Tribunals Service
Information Tribunal

**Information Tribunal Appeal Number: EA/2009/0036**
**Information Commissioner's Ref: FS50188864**

**Heard at Audit House, London, EC4**
**On 16 November 2009**

**Decision Promulgated**
**13 January 2010**

**BEFORE**

**CHAIRMAN**

**CHRIS RYAN**

**and**

**LAY MEMBERS**

**GARETH JONES**
**STEVE SHAW**

**BETWEEN:-**

**THE HIGHER EDUCATION FUNDING COUNCIL FOR ENGLAND**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**GUARDIAN NEWS AND MEDIA LTD**

**Additional Party**

**Subject matter:** Confidential information s.41

**Cases:** Derry City Council v Information Commissioner (EA/2006/0014)
Bluck v Information Commissioner (EA/2006/0090)
Pepper v Hart [1993] AC 593
Howard v Sec of State for Health [2002] EWHC 396 (Admin)
*Coco v A N Clark (Engineers) Limited* [1968] FSR 415
Thomas Marshall Ltd v Guinle [1979] 1Ch 227
Lancashire Fires Ltd v S A Lyons Co Ltd [1996] FSR 629
Ocular Sciences v Aspect Vision Care Ltd [1997] RPC 289
Fraser v Thames Television Ltd [1984] QB 44
De Maudsley v Palumbo [1996] FSR 447
Sales v Stromberg [2006] FSR 7
Deloitte & Touche LLP v Dickson [2005] EWHC 721 (Ch)
AG v Observer [1990] 1 AC 109
Crowson Fabrics Ltd v Rider [2007] EWHC 2942 (Ch)
Vestergaard Frandsen v Bestnet Europe Ltd [2009] EWHC 657 (Ch)
McKennitt v Ash [2006] EWCA (Civ) 1714
Douglas v Hello [2007] UKHL 21
BUAV v Home Office and Information Commissioner [2008] EWCA Civ 870
Moseley v News Group Newspapers Ltd [2008] EMLR 20
Campbell v Mirror Group Newspapers [2004] UKHL 22
Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776

**Representation:**

For the Appellant: Timothy Pitt-Payne
For the Respondent: James Cornwell
For the Additional Party: Aidan Eardley

## Decision

The Tribunal upholds the decision notice dated 31 March 2009 (although on different grounds) and dismisses the appeal.

## Reasons for Decision

Introduction

1. The underlying issue on this appeal is whether the Higher Education Funding Council for England ("HEFCE") should have disclosed information relating to the state of the buildings at those Higher Education Institutions (each an "HEI") which contributed data to a database of information about the management of land and buildings under their control. We have decided that the Information Commissioner was right to conclude that it should have done so. The basis of both the Information Commissioner's decision and our own is that the exemption provided by section 41 of the Freedom of Information Act 2000 ("FOIA") does not apply, although we reach that conclusion by a different route.

2. The HEFCE is a statutory corporation established under the Further and Higher Education Act 1992 to administer public funds in relation to higher education in this country and to monitor, and report to Government on, the financial health of the sector. Since 1999 HEIs have provided the HEFCE with certain information about their estates management including the suitability of the buildings for their intended function, the cost of reconditioning the buildings and the overall size of each University's "estate" of buildings. The information is retained on a database, which is maintained by the HEFCE, and may be accessed by HEIs and UK funding councils via a controlled-access website. The information on the database enables HEIs to compare their performance in the management of their estates with that of other HEIs. It is also said to be of value to the HEFCE and funding councils in assessing the condition of estates managed by institutions to which funding may be allocated and to have value in enabling the HEFCE to report to Government on the condition of the infrastructure utilised in the higher education sector. The database is known as the Estate Management Statistics database (EMS) and although contributing data to it is voluntary, substantially all higher education institutions do so.

The request for information

3. On 21st September 2007 Ms Jessica Shepherd, a journalist employed by Guardian News and Media Ltd ("Guardian News"), submitted a freedom of information request to the HEFCE ("the Request") in the following terms:

*"Please could you tell me the proportion of each university's gross internal area (which I understand includes halls of residence, lecture theatres and libraries in 1) condition A, 2) condition B, 3) condition C, 4) condition D.*

*Please could you also tell me how much it would cost each university to upgrade their buildings so that every building was in category B.*

*Please could you also tell me, for each university, what proportion of their gross internal area is in functional suitability 1) grade 1, 2) grade 2, 3) grade 3, and 4) grade 4.*

*Please could you also tell me the size of each university's estate and their institutional income. "*

For the reason explained in paragraph 8 below, the income element of the last of those requests is not in issue on this appeal.

4. It is evident from the terms of the request that Ms Shepherd was familiar with the categorisation codes used when submitting information to the EMS database. But they require some explanation for the purposes of this decision. So condition A means that the building is as new, condition B that it is sound, operationally safe and exhibiting only minor deterioration, condition C that it is operational but major repair or replacement is needed and condition D means that the building is inoperable, or there is a serious risk of major failure or breakdown. Similarly, references to numbered grades, indicate the suitability of buildings for their intended purposes with grade 1 meaning excellent, grade 2 meaning good, grade 3 meaning fair and grade 4 meaning poor.

5. On 27 September 2007 the HEFCE confirmed that it held the information requested on the EMS database but refused disclosure on the basis that most of the information had been received from third parties who had an expectation that it

would be treated in confidence. Disclosure would therefore be a breach of confidence actionable at common law, with the result that the information fell within the exemption provided by FOIA section 41.

6. FOIA s.41 provides (in material part) that:

> *" (1) Information is exempt information if—*
>
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

The exemption is an absolute one. It follows that, if engaged, it is not necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information, as one must with a qualified exemption (FOIA section 2(2)(b)). However, a balance of public interest test still arises because it is a defence to a claim for breach of confidence to show that disclosure was justified in order to serve the public interest.

7. In support of its reliance on s41 the HEFCE relied, in particular, on:

   a. A confidentiality statement published on a website dedicated to the EMS project, part of which read:

      *'The Funding Councils treat all information they receive from individual institutions as confidential unless it is collected specifically for publication; and*

   b. A code of conduct, which those institutions accessing the EMS database are required to sign up to. As will become apparent this imposed restrictions on the circulation of information obtained from the database.

8. The HEFCE also stated that, to the extent that the requested information related to institutional income, it was already published by the Higher Education Statistics Agency ("HESA"). Accordingly, it was said, this information was reasonably accessible to Ms Shepherd by other means and therefore fell within the exemption

provided by FOIA section 21. This part of the original request was not pursued further by Ms Shepherd.

9. On 16 October 2007 Ms Shepherd requested an internal review of the refusal (referred to in correspondence at the time as an appeal), limiting her application to the section 41 issue only. A review was then carried out by an internal panel within the HEFCE and Ms Shepherd was informed, by letter dated 30 November 2007, that the application of the section 41 exemption was correct and that the information would not therefore be disclosed.

The complaint to the Information Commissioner

10. On 7th January 2008 Ms Shepherd wrote to the Information Commissioner to complain about the refusal of the Request.

11. In a Decision Notice dated 31st March 2009 the Information Commissioner decided that section 41 was not engaged. He considered that the information in question:

    a. Had been obtained from a third party (a fact that is not disputed in this appeal);

    b. was information to which an obligation of confidence was capable of attaching (in that it was not easily accessible elsewhere and was not trivial in nature); and

    c. had been passed to the HEFCE in circumstances that gave rise to an obligation of confidence.

    However, the Information Commissioner did not believe that the HEIs who had confided the information to the HEFCE would suffer any detriment if it were to be disclosed. They would not therefore have a cause of action for breach of confidence, with the result that the section 41 exemption was not engaged. He therefore directed that the information should be released.

12. In reaching this conclusion the Information Commissioner applied a three point test which he derived from the well known case of *Coco v A N Clark (Engineers) Limited*

[1968] FSR 415 in which Megarry J (as he then was) said that disclosure would constitute an actionable breach of confidence if:

- the information had the necessary quality of confidence;
- it was imparted in circumstances importing an obligation of confidence; and
- disclosure would be an unauthorised use of the information and to the detriment of the confider.

The Information Commissioner suggested that, had he concluded that the application of these tests led to the conclusion that disclosure (other than under the terms of the FOIA) would have constituted a breach of confidence, it would have been necessary for him to consider whether the HEFCE would have had a public interest defence to such a claim. But, having decided that it did not, he did not pursue the issue further.

The appeal to the Tribunal

13. On 27th April 2009 the HEFCE lodged with the Tribunal a Notice of Appeal against the Decision Notice. The Grounds of Appeal were that:

    a. The Information Commissioner had misdirected himself in law in two respects. First he had concluded that the test for establishing a breach of confidence included a requirement for detriment to the confider. Secondly, in assessing the potential claim, he had proceeded on the basis that he had to satisfy himself that it would be successful (as opposed to properly arguable, as the HEFCE contended).

    b. If detriment were an essential component, there was no requirement for it to be suffered by the confider of the information, detriment to others might be sufficient.

    c. In any event the Information Commissioner should have decided, on the facts of the case, that detriment was at least arguable in respect of either the confider, other HEIs or the HEFCE itself and that this was sufficient to engage the section 41 exemption.

14. The Information Commissioner filed a Reply on 27th May 2009 which joined issue on each of the Grounds of Appeal. Subsequently Guardian News, which is Ms Shepherd's employer, was joined as an Additional Party to the Appeal. It largely supported the Information Commissioner but introduced two additional grounds. It argued, first, that the requested information did not satisfy the first of the *Coco v Clark* requirements in that it lacked the necessary quality of confidence. Secondly, it contended that reputational damage, (to the extent that it was relied on by HEFCE as a detriment likely to be suffered by the HEIs), was an irrelevant consideration.

15. The Appeal was heard on 16th November. HEFCE had earlier made the requested information available to us, on the basis that it would not be disclosed during the course of the Appeal to any third party, other than the Information Commissioner. The HEFCE and Guardian News had also filed evidence in the form of witness statements by Stephan Egan and Professor John Raftery (HEFCE) and Ms Shepherd (Guardian News). In the following paragraphs we summarise the evidence emerging from those statements and from the cross examination to which each witness was subjected.

16. Stephen Egan Mr Egan is the Deputy Chief Executive of HEFCE and its Director of Finance and Corporate Resources. His evidence covered the following issues:

    a. HEFCE is responsible to the Department for Business, Innovation & Skills, and therefore to parliament, for the economic, effective and efficient use of public funds by all organisations in the higher education sector which it supports.

    b. HEIs compete vigorously with one another for the highest quality applicants in an era of tuition fees and the use of substantial borrowing by many students to fund this part of their education. The competition applies also to the recruitment of staff, for teaching and research activities, and the process of attracting funding from both public and private sources. In these circumstances the institution's reputation is very important to it.

    c. The role of the EMS was to be a reliable basis on which individual HEIs could benchmark their performance in the management of their estates. It is a voluntary system for sharing data, which developed from a consultation

process in the late 1990s. Its introduction gave rise to some concerns by HEIs about the potential for misinterpretation of data, the possibility of vexatious approaches from contractors and consultants (either offering services or submitting unsolicited proposals to undertake work currently carried out in-house) and the possible use of data by those wishing to oppose development plans and other initiatives. In order to address those concerns it had been agreed that the database of information accumulated from the HEIs would be kept confidential and would only be used by participating HEIs for limited purposes. Mr Egan stressed that confidentiality is a fundamental principle of benchmarking, because it supports the principle of continuous improvement while protecting participants from the risk of reputational damage resulting from data being used by outsiders who may not appreciate the full context of the shared data, particularly for individual participants with special circumstances. In the course of cross examination Mr Egan was able to provide an example of how misinterpretation could occur, explaining that an institution might have been about to start a significant redevelopment at the time data was submitted to EMS (with the result that it might record a relatively low "score" for the quality and suitability of its buildings) but might have completed the redevelopment (justifying a high "score") by the time the comparative results become available.

d. With 99% of HEIs now contributing data to EMS (and willingly providing data for 90% of the categories of information on which their input is sought) the annual report which the HEFCE publishes on the progress and findings of the EMS service provides the public with a considerable amount of aggregated and anonymised data, while preserving the confidentiality of the data submitted by each individual HEI.

e. Feedback from HEIs confirmed that they regarded the database and the reports based on it as extremely valuable and that they were used to good effect in improving management. The EMS database was also a valuable resource for the HEFCE itself in providing a reliable evidence base for influencing decisions on government spending and resource allocation. In particular it enabled the HEFCE to demonstrate to the Treasury the steps

being taken by HEIs to improve the value for money the taxpayer receives from public investment in the higher education sector.

f. From the outset every participating HEI has been provided with a confidentiality undertaking, which is also presented to them, for confirmatory agreement, each time they seek to access the EMS database. There was some uncertainty as to the exact form of this at the time when Ms Shepherd made her original request, because the version published on the EMS website had not been brought up to date with changes made to one that any HEI seeking access to the database was required to acknowledge. Unfortunately, only one of those versions was made available to the Information Commissioner during his investigation. That is significant for two reasons. First, because of the importance of public authorities ensuring full and accurate disclosure to the Information Commissioner. It was an error in this case which the HEFCE acknowledged, and for which it apologised unreservedly. Secondly, the form of the undertaking in this case had undergone a significant change. The earlier version, as made available to the Information Commissioner, included a relatively short "Code of Conduct" for the effective and responsible use of data submitted by HEIs. It included a requirement that no HEI would reveal another HEI's data, accessed via the EMS database, without the express permission of the HEI in question. In the later version the obligation of confidence was set out in a more elaborate form but with the same general effect. However, it was followed by an entirely new section which listed a number of circumstances in which the obligation would not apply. The exclusions included one that provided that the obligation of confidence did not apply "*to the extent that [*the accessed information*] is required to be disclosed by any court or government or administrative authority competent to require the same"* and another that excluded disclosure required *"by any applicable law or regulation".* A later section of the Code focused on the FOIA. It recorded that "…*HEIs participating in [EMS] hereby acknowledge the application [of FOIA] to all information held by a public authority that is not covered by a valid exemption under [FOIA]"* before setting out certain procedural requirements for handling FOIA information requests.

g. On the basis of his experience with benchmarking processes generally, Mr Egan said that rigorous confidentiality provisions were invariably imposed, that this was the norm throughout the public sector, and was regarded as crucial to ensure “buy in” by participants.

h. HEIs saw that it was in their interests to provide accurate data in as many of the data categories as they could in order to ensure that the database provides them with authoritative and comprehensive benchmarking data. They were willing to participate because they had the assurance that their data would only be made available to other HEIs, the UK funding councils and certain other organisations approved by the EMS steering group, without risk of any unflattering data being released to the public. Mr Egan expressed the view that if data submitted by HEIs was not kept confidential then levels of participation would be reduced (in that HEIs would either withdraw altogether or would volunteer less extensive information than previously). In addition, he thought, they might be tempted to disclose only flattering information and/or to err on the side of providing more optimistic data where the form of request for data provided a degree of flexibility or judgment. The result, he feared, would be that the database would become less reliable, particularly as data is not submitted to any form of audit before being included in the system, and that, over time, HEIs would lose confidence in its value as a benchmarking tool.

i. If HEIs did withdraw from EMS then the HEFCE could fall back on a statutory power to compel them to submit data. However, he felt that this would undermine the working relationship between HEIs and the HEFCE and would increase expense, possibly leading to a compensating decision by HEFCE to reduce the scope of the information sought. The loss of voluntary co-operation would also lead to a need for extensive auditing or data validation, (which is minimal under the current scheme) leading to an estimated increase in annual costs of approximately £100,000.

j. Mr Egan feared that disclosure could cause the relationship between HEIs and the HEFCE to be undermined on a broader scale than just in respect of the management of EMS. If the confidentiality that HEIs expected in this

area were compromised by an order to disclose the requested data, then they might lose trust in the HEFCE on a more general level, to the detriment of its ability to counsel and assist their management. It would also undermine the HEFCE's desire, on occasions, to seek the co-operation of HEIs in providing information, on a confidential basis, to assist in policy development for the sector as a whole.

17. Professor John Raftery Professor Raftery is Pro Vice-Chancellor for Student Experience at Oxford Brookes University. In that capacity he chairs the EMS Steering Group. He has held that office since 2006. Excluding matter on which his witness statement duplicated that of Mr Egan, it covered the following issues:

    a. The role and constitution of the Steering Group, whose members are drawn from various HEIs, the HEFCE, funding councils and the Higher Education Statistics Agency. It promotes the understanding and use of EMS within the higher education sector, advises on its development, considers requests for access to its data (usually for research purposes, and invariably complied with by the disclosure of anonymised data) and advises on how it may help to secure value for money within the sector.

    b. The EMS database itself holds other information beyond that falling within the categories covered by the Request, including data on estate occupancy, carbon emissions and maintenance costs. The requested information, if released, would be capable of being used to compile a league table ranking of HEIs based on the quality of their estates. This could influence student choice to the competitive disadvantage of any HEI listed in the lower end of the table, although he feared that it might in fact mislead them (being no more than a retrospective snapshot ) and that it would, in any event, be of less value to them than many of the other available sources of information including, in particular, the information likely to be obtained in the course of a visit to the institution in question.

    c. Over the last two years the Steering Group has agreed, on advice, that environmental information on the EMS database had to be released to the public in order to comply with the Environmental Information Regulations

2004. However, this caused some consternation within the Steering Group and its minutes confirmed Professor Raftery's recollection that some of the HEI representatives expressed concern about continuing to provide data if it was to be disclosed in this way. A considerable amount of work had been undertaken in order to ease concerns, devise new procedures for handling the data and achieve agreement to the voluntary publication of environmental information instead of only doing so in response to a request under the regulations. The result has been that the supply of information on environmental issues has not reduced.

d. Professor Raftery thought that the environmental information was less sensitive than the information at issue in this Appeal (in that it had a less direct impact on student choice of institution) and that the co-operation of the HEIs in the new procedures for handling the former could not be assumed in the event that we order disclosure of the latter. He thought that it was conceivable that information in the EMS database may be published as a matter of course in the future but stressed the difference between the Steering Group reaching that position itself, with the support of the HEIs, and disclosure being imposed on them with the Steering Group being seen to lose control over the management of information. He agreed with Mr Egan that there would then be a significant risk of the volume and quality of data from HEIs being reduced.

18. Ms Jessica Shepherd Ms Shepherd is, of course, the journalist who submitted the Request. She writes on education matters for Guardian News and most of her witness statement constituted submission on the public interest in favour of disclosure, rather than evidence. However, she did provide the statistic that most students starting university in 2009 will pay tuition fees of £3,225 per year and that they could rise in the future to £7,000 per year (leading to the argument that students and their parents have a resulting entitlement to know what they are paying for, in terms of the quality of buildings). Ms Shepherd also explained that HEIs contribute potentially adverse information about themselves to other publicly available studies (a point that she suggested undermined the suggestion that disclosure would deter them from continuing to contribute to the EMS). Under

cross examination she conceded that the requested information, on its own and without a degree of explanation or clarification, would have limited value for potential students. She also conceded that disclosure could damage individual institutions. However, she maintained the view that potential students should still have access to it and that, for those institutions at the bottom of any league table, the harm that may result from disclosure, would be deserved and might encourage them to improve their performance.

Questions for the Tribunal

19. The parties' submissions summarised above contain a number of questions. One more seemed to arise when the parties filed their skeleton arguments. It stemmed from the disclosure by Mr Egan (see paragraph 16 f. above) that HEIs' access to the EMS database had for some time been made the subject of a confidentiality undertaking, which was qualified by reference to the disclosure requirements imposed by the FOIA. Up to that stage there had been general agreement that the second element of the *Coco v Clark* test was satisfied i.e. that the submission of data to the HEFCE by individual HEIs was made in circumstances that gave rise to an obligation of confidence. It seemed at one stage to be suggested that the qualified terms of the undertaking had the effect of altering that obligation in the circumstances of this case. However, we are sure that the suggestion could not be entertained. We would certainly not accept that the HEFCE, by adopting the fair and responsible approach of making the extent of its legal obligations clear to those contributing to EMS, had undermined the protection to which HEIs were entitled. All it had done was to record the fact that, since 1 January 2005, the right to confidentiality is qualified by the FOIA in cases where information is made available to a public authority. To suggest otherwise is to create an entirely circular argument, which we would have no hesitation in rejecting. Although we will return to the point when we come to consider the public interest defence, we do not intend to say more about it as a separate question going to the issue of whether or not an obligation of confidence arose between HEIs and the HEFCE.

20. We will deal, first, with the question of whether the phrase in section 41 "would constitute a breach of confidence actionable by [a third party]" means that the exemption is engaged if it can be established that such a claim is merely arguable,

or if it is necessary to establish that the claim would be successful. The answer to this question determines the level at which the other questions must be assessed. We therefore deal with it first, before turning to the remaining questions at paragraph 31 below.

The meaning of "actionable"

21. The Information Commissioner contended that he had been correct in proceeding on the basis that "actionable" meant that the public authority must establish that the claim would succeed on the balance of probabilities. He was supported in that contention by Guardian News but challenged by the HEFCE, which argued that it was sufficient to engage section 41 if a breach of confidence claim was "properly arguable". It said that we should proceed on the basis of an hypothetical scenario in which:

    a. the HEFCE disclosed the requested information voluntarily (and not under any obligation to do so under FOIA section 1);

    b. one or more HEIs brought a claim against it for breach of confidence; and

    c. Particulars of Claim were served setting out the facts and matters in support of the claim (and supported by a statement of truth, as required by the Civil Procedure Rules).

    If the Particulars would not be struck out, applying the normal strike out test of considering if the claim would fail, even if the truth of every fact alleged in the Particulars were to be established at trial, then we should treat the claim as "actionable". It followed from that interpretation, it said, that it would not be necessary or appropriate to give any consideration to whether or not the defence of public interest would be available to the HEFCE.

22. Guardian News supported the Information Commissioner's argument by reference to certain dictionary definitions but the HEFCE argued that it was not competing dictionary definitions that counted, but reading the words in context to extract the correct meaning. The same objection was made to the reference by the Guardian News to case law and statute which, it said, supported its interpretation. However,

it did not seem to us that the quotations provided established a clear and obvious meaning, capable of being applied in every circumstance.

23. The Information Commissioner put forward 6 reasons in his Reply for preferring his interpretation of the statutory language. These appeared to have been reduced to 5 in his skeleton, with the boundaries between some being a little difficult to discern. We deal with each one, as we understand it, in the following paragraphs.

24. Consistency with Tribunal Jurisprudence

    a. The Information Commissioner relied on the fact that in the cases of *Derry City Council v Information Commissioner* (EA/2006/0014) and *Bluck v Information Commissioner* (EA/2006/0090) the Tribunal had proceeded on the basis that the hypothetical breach of confidence claim was made out, and was not merely arguable. He made the point that, if the relevant test was the one for which the HEFCE contended, then the Tribunal in those cases would have had no cause to consider whether the claim would have been defeated by a defence of public interest. Yet that is what it did on both occasions. However, his counsel, Mr Cornwell, conceded that the HEFCE was correct to say that in neither of those cases had the Tribunal been specifically asked to rule on the point of construction that is now raised in this Appeal.

    b. We believe that in these circumstances we should consider the point as a new one and should not be influenced by the interpretation which appears to have been assumed to be correct, without significant argument, in previous cases.

25. Consistency with Parliamentary intention

    a. Counsel for the Information Commissioner argued that it was appropriate for us to take account of certain statements made in the course of the FOIA's passage through Parliament by its sponsoring Minister, Lord Falconer of Thoroton. Counsel for the HEFCE argued that the language of section 41 was not ambiguous or obscure, nor did it lead to an apparent absurdity, and

that the circumstances established in *Pepper v Hart* [1993] AC 593 for referring to Parliamentary materials did not therefore exist in this case.

b. We confess to finding section 41 quite ambiguous on this point. Any sense of intellectual inadequacy we might have in failing to find a single clear meaning for the word "actionable" is assuaged by our discovery that the second edition of Information Rights by Philip Coppel mentions three possible meanings. At paragraph 25-007 it reads:

> *"One possible meaning of the word "actionable" is that it will be satisfied whenever the circumstances afford "grounds for an action at law"* [citing the Oxford English Dictionary and the case of Stephens v Avery [1988] Ch 449]. *If that meaning applied here, the exemption would appear to be available wherever there is in existence a claim for breach of confidence which satisfied the test of "real prospect of success" or arguability* [citing CPR r.3.4]. *Another possible interpretation is that "actionable" means a breach of confidence that satisfies the essential elements for a successful breach of confidence claim, but without consideration of whether any of the public interest defences to the claim would defeat it. A third interpretation is that the claim is only actionable if the claim would be successful, taking into account any public interest defences"*

Interestingly, the author makes no attempt at that stage to identify a preferred meaning but proceeds immediately to consider part of the extract from Hansard on which the Information Commissioner relied.

c. We can ourselves envisage a fourth meaning, which arises when the word "actionable" is used, not to indicate the test to be applied in assessing whether a possible cause of action should be taken into consideration, but for the purpose of indicating who has the necessary status to assert it. Guardian News referred us to section 1 of the Regulation of Investigatory Powers Act 2000 which provided, in subsection (3), that *"Any interception …shall be actionable at the suit…of the sender, or recipient, or intended recipient of the communication…".* It is certainly arguable that this is the meaning which should be given to the word in FOIA section 41. Used in that

way it would serve only to provide that the hypothetical claim for breach of confidence could be one brought by either the confider of the information or any other person. The words “would constitute a breach of confidence” then stand alone and are not qualified by “actionable” (as they would have been if that word had been inserted before “breach of confidence” instead of after it). This interpretation supports the meaning urged on us by the Information Commissioner, but we do not have such confidence in it to decide that it removes ambiguity altogether.

d. We accordingly turn to Hansard to see if it provides guidance in the form of an authoritative, clarifying statement from a promoter of the legislation. We find that it unquestionably does, the following quotations from statements made in the course of debate by Lord Falconer putting the issue beyond doubt, in our view:

> *"Simply to put at the top of a document "Confidential"' does not make the disclosure of that document by anyone actionable in breach of confidence. "Actionable', means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win."* (Hansard HL (Series 5), Vol.618, col.416)

> *"... the word "actionable" does not mean arguable … It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, "I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure". That is not the position. The word used in the Bill is "actionable" which means that one can take action and win."* (Vol.619, col. 175-176)

Dealing specifically with the question of whether a public interest defence should be taken into account he said:

> *"In relation to the common law test and confidentiality, the courts say that on the face of it someone has a right to keep that information confidential but ask, despite that confidentiality, whether there is a public interest in disclosing the information at large. I am sure that lawyers could fine tune the differences between the two tests but they are in substance sufficiently close. In order to establish whether the exemption applies, consideration must be given as to whether common law public interest applies."* (Vol.617, col.928)

26. Although we consider that those statements determine the issue, we will briefly consider the other arguments that were debated before us.

27. Consistency with Departmental Guidance

a. Counsel for the Information Commissioner referred us to guidance on section 41 issued by the Ministry of Justice. He pointed out that this was the Government Department with responsibility for the operation of the FOIA and that, on the authority of Bennion on Statutory Interpretation, Fifth Edition, at page 702, the views expressed may be taken into account as persuasive authority on the legal meaning of the relevant provision, although he also conceded that it was not binding on us. The guidance states:

*"the exemption only applies if a breach of confidence would be 'actionable'. A breach of confidence will only be actionable if a person could bring a legal action and be successful"*

b. Counsel for the HEFCE sought to persuade us that any influence the Guidance might have on our decision should be balanced against the Information Commissioner's own guidance which read:

*"Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider or a third party could take the authority to court"*

We do not know whether the Information Commissioner used the final six words of that quotation in an attempt to avoid making his guidance over-technical or legalistic, or whether he meant to provide a different interpretation to that in the Ministry's Guidance – perhaps making the distinction between taking someone to court, on the one hand, and emerging from court with a victory over him or her, on the other.

c. We do not consider that either document completely clarifies the position and we believe, in any event, that the passages from Hansard quoted in paragraph 25 d. above, provide more authoritative guidance on interpretation.

28. Consistency with public policy

a. The Information Commissioner argued that, if the test for engaging the section 41 exemption was the relatively low one of establishing an arguable breach of confidence claim, that would "cut across the grain" of the overall purpose of the FOIA, which was to facilitate access to information held by public authorities. He said that it would also be inconsistent with the right to give and receive information under Article 10 of the European Convention on Human Rights. The HEFCE challenged the relevance of Article 10 to a case involving a claim for access to information, as opposed to one seeking to prevent a government authority from blocking the receipt of information from someone willing to impart it. We prefer the HEFCE's argument on this issue, which we believe is consistent with binding authority in the form of a statement of Scott Baker J in *Howard v Sec of State for Health* ([2002] EWHC 396 (ADMIN) at paragraph 103) in which he said:

> *"What Article 10(1) is really about is the basic freedom of individuals to express themselves by giving and receiving opinions, information and ideas without restriction on the part of the State… Article 10(1) does not confer a right on individuals to receive information that others are not willing to impart"*

b. The HEFCE also disputed that the threshold for engaging the exemption would be set at too low a level if its interpretation were preferred and stressed the countermanding public policy of not imposing on a public authority an unreasonable burden when faced with a conflict between competing obligations to disclose under FOIA and to preserve a confidence imparted to it by a third party. Counsel for HEFCE said that, before the public authority could safely rely on the exemption, its personnel would have to put themselves in the position of a judge in order to establish that a claim, if brought, would succeed. He suggested that the public authority could be at risk of a claim for damages from a third party if its conclusion that the claim would not succeed proved to be wrong. It was a risk that was much greater than if the test were simply whether the claim was arguable.

c. We have some sympathy for public authorities who are faced with a conflict between an apparently valid request for disclosure and a potential obligation of confidence to a third party. But, having resolved our initial doubt as to possible meanings for the word "actionable", we are required to apply that meaning. We must assume that Parliament considered the difficulties that public authorities might face and balanced them against opposing considerations, such as the possibility of third parties simply asserting confidentiality and arguing that this had the effect of creating at least an arguable cause of action so as to trigger the exemption. Evidently, the conclusion reached at the end of that process was to impose on public authorities the heavier of the two possible burdens and we should not undermine that intention by diverting from the interpretation we settled on in paragraph 25 above.

29. Consistency with the scheme of the FOIA

a. The Information Commissioner argued that, if "actionable" means only that the hypothetical breach of confidence claim would have been arguable and that the question of whether or not a public interest defence is accordingly irrelevant, the effect would be that section 41 would be one of a very few exemptions in respect of which no consideration of public interest in disclosure may be taken into consideration. The others, he said, would be section 23 (state security), section 32 (court records), section 34 (Parliamentary privilege) and parts of section 36 (relating to information held by the House of Commons or the House of Lords). The HEFCE argued that, if Parliament had intended section 41 to include a consideration of competing public interests, it could have made the exemption a qualified one, which it clearly did not.

b. It is conceivable that Parliament did not make section 41 a qualified exemption because it anticipated that the public interest defence would be preserved (and perhaps wanted to avoid two slightly different public interest tests applying to the same set of information). But it is also conceivable that section 41 was deliberately made a separate type of exemption in recognition that it involved third party rights (although in that case one might

have expected section 43 also to be an absolute exemption). But we do not think that we can adopt any part of the Information Commissioner's argument on this point without becoming involved in uninformed speculation about Parliament's intentions. It is a process that has been rendered unnecessary in view of the guidance on interpretation provided by Hansard and we are not prepared to allow it to undermine the meaning of "actionable" found there.

30. Our conclusion on this part of the case, therefore, is that the HEFCE must establish that disclosure would expose it to the risk of a breach of confidence claim which, on a balance of probabilities, would succeed. This includes considering whether the public authority would have a defence to the claim. Establishing that such a claim would be arguable is not sufficient to bring the exemption into play.

The remaining questions for the Tribunal

31. Having answered that question, which determines the basis on which the others must be approached, we now list the remaining questions arising from the parties' submissions, before considering each one in turn in subsequent paragraphs.

    a. Would a claim for breach of confidence fail because the requested information did not possess the necessary quality of confidence (i.e. the first limb of Coco)?

    b. Does the test for determining whether disclosure would constitute a breach of confidence include a requirement that disclosure must be shown to be detrimental (i.e. does the third limb of Coco v Clark actually apply) and, if so, is detriment established on the facts of this issue?

    c. If the conclusion is reached, in answering the above questions, that all the elements for a breach of confidence claim would exist, would that claim be defeated by a public interest defence?

Necessary quality of confidence

32. The HEFCE and Information Commissioner accepted that the disputed information is not widely accessible and is not trivial, but Guardian News contended that there

were two further requirements in determining whether the information should be treated as confidential. The first was whether there is some value to the party claiming confidentiality in the information being treated as confidential. The second was whether the information is such that a reasonable person in the position of the parties would regard it as confidential, taking account of usages and practices in the relevant sector. The Information Commissioner was neutral on whether the additional requirements were required. The HEFCE argued that they were not, but that, if they were, they were satisfied on the facts of the case.

33. Guardian News based its argument on an extract from Toulson and Phipps on Confidentiality (2nd Edition, 2006) which, having considered the cases of *Thomas Marshall Ltd v Guinle* ([1979] 1Ch 227) and *Lancashire Fires Ltd v S A Lyons & Co Ltd* ([1996] FSR 629), and having noted that both were trade secret cases, stated:

> *"Adapted for more general application, the following elements may be suggested:*
>
> *(1) There must be some value to the party claiming confidentiality (not necessarily commercial) in the information being treated as confidential;*
>
> *(2) The information must be such that a reasonable person in the position of the parties would regard it as confidential; and in considering reasonableness, usage and practices in the relevant sector (for example, industrial or professional) are to be taken into account."*

34. We would find it a surprising conclusion if detailed financial and other data regarding the management by the institutions in question of a significant part of their undertaking was not the type of information that the law would protect from unauthorised disclosure. But we do not think that the authorities relied on by Guardian News require us to reach that conclusion. We conclude, in paragraphs 46 and 47 below, that disclosure would cause some detriment to the HEIs. If there is detriment in disclosure, then clearly there is some value in non-disclosure. It follows that, if there is an additional requirement of value, it is satisfied on the facts of this case. It is, moreover, a value that a reasonable person would perceive to exist and to justify a claim to confidence.

35. We are not, in any event, convinced that Guardian News is correct to suggest that additional criteria require to be applied. We were not referred to any authority, involving commercial information, which criticised the *Coco v Clark* formulation or suggested that it was incomplete. The information in *Coco v Clark* concerned detailed engineering design. There was no real challenge to the plaintiff's claim that the information was capable of being protected by the law of confidence. The only issue addressed by the judge, on that part of the case, was whether any part of it had fallen into the public domain. Not surprisingly, therefore, he did not elaborate on the tests that might have to be applied in order to determine whether, in other circumstances, the first element of his three part test was satisfied. Eleven years later, the facts in issue in *Thomas Marshall v Guinle* required the same judge to consider whether supplier and customer contact details, pricing information, product information and other business information was capable of being protected. The defendant did not accept that all of them were. Not surprisingly, therefore, the judge set out to clarify his earlier formulation of this element of the cause of action. He did so in these words:

> *"If one turns from the authorities and looks at the matter as a question of principle, I think (and I say this very tentatively, because the principle has not been argued out) that four elements may be discerned which may be of some assistance in identifying confidential information or trade secrets which the court will protect. I speak of such information or secrets only in an industrial or trade setting. First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e., that it is not already in the public domain. It may be that some or all of his rivals already have the information but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned.*

We see that passage as clarifying the first element of the three part test summarised in *Coco v Clark.* We do not think it alters its essence or adds any new

elements. This is confirmed by the words which follow immediately after the extract quoted above. They were:

> *"It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets, but I think that any information which does satisfy them must be of a type which is entitled to protection "*

This seems to us to make it clear that the judge was simply clarifying how to determine, in the circumstances of a particular case, whether the first element of the *Coco v Clark* test had been satisfied. He was defining the threshold below which information would be treated as too trivial to justify equity coming to the aid of the plaintiff. In other cases, involving different types of information, the threshold has been defined by reference to different criteria. In *Coco v Clark* itself, Megarry J had referred to the requirement for *"some product of the human brain which suffices to confer a confidential nature upon the information",* a concept that was also relied on in *Ocular Sciences v Aspect Vision Care Ltd* ([1997] RPC 289). In *Fraser and Ors v Thames Television Ltd* ([1984] QB 44) it was held that, to be capable of protection, the information must have a significant element of originality and must have been developed to the stage where it had a least some commercial attractiveness. In *De Maudsley v Palumbo* [1996] FSR 447 the threshold was defined by reference to the vagueness and generality of a business concept under consideration and in *Sales v Stromberg* ([2006] FSR 7) product design information was also held not to be protected because it was just a general idea. However, the application of a threshold test, however it is expressed, assumes less significance in cases where the information in question clearly possesses significant substance and value. We believe that it clearly does in this case (even though the HEIs are not profit-making organisations) with the result that, if an additional test must be applied, the data supplied by HEIs to the HEFCE would clearly satisfy it.

36. We do not think, either, that the second part of the quotation from Toulson and Phipps in paragraph 33 above creates an additional test. It simply means that the first element of the *Coco v Clark* test requires an objective assessment of the status of the information in question. Clearly, in assessing the threshold for information to qualify for protection, something more is required than the plaintiff's subjective view

of the significance of the information in dispute. And, not surprisingly, the technique to be adopted in order to create fairness and balance is the view of the hypothetical reasonable person. We find clear support for our conclusion in *Deloitte & Touche LLP v Dickson* ([2005] EWHC 721 (Ch)) in which Laddie J expressed the objective nature of the assessment by reference to the reasonable man's view of the concept of confidentiality in broad terms, not just in the identification of the protected information. He said:

> *"In cases where the obligation [of confidentiality] has to be discovered from the surrounding circumstances rather than where it is the subject of an express agreement or understanding between the communicator and the recipient, it is for the notional reasonable recipient to determine what is covered. Where information is trivial or does not appear sensitive it might be that the reasonable man would not have realised it was being given in confidence. In such a case no obligation would be created. The circumstances of transmission would point away from restriction on use."*

Detriment

37. The HEFCE argued that detriment was either not an independent requirement for a claim for breach of confidence at all, or that any such requirement is satisfied by the detriment that is necessarily involved in the unauthorised disclosure of information that has been communicated in confidence. It relied upon the following section of the judgment of Megarry J in *Coco v Clark,* which, it said, demonstrated that the question of whether detriment was an essential ingredient was expressly left open:

> *"Thirdly, there must be an unauthorised use of the information to the detriment of the person communicating it. Some of the statements of principle in the cases omit any mention of detriment; others include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a*

*favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists. I need therefore say no more than that although for the purposes of this case I have stated the proposition in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form."*

38. The Information Commissioner argued that the only cases where detriment may not be required were those concerning private, personal information. Both sides found parts of the House of Lords judgments in *Attorney General v Observer Ltd* [1990] 1 AC 109 which, they said, supported their submissions on this point. That was a case that concerned Government secrets and the conclusion reached was that the plaintiff did have to show that disclosure would cause harm to the public.

39. In the course of the hearing we suggested to the advocates that the three part test set out in *Coco v Clark* derived much of its authority from the fact that it had been referred to as the basis for the cause of action, without qualification, in many later cases involving commercial information. We mentioned, in particular, the recent case of *Vestergaard Frandsen v Bestnet Europe Limited,* ([2009] EWHC 657 (Ch)). In that case Arnold J said, at paragraph 623:

*"The clearest statement of the elements necessary to found an action for breach of confidence remains that of Megarry J in Coco v A.N. Clark (Engineers) Ltd [1969] RPC 41 at 47:*

> *"First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been communicated in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorised use of the information to the detriment of the party communicating it."*

*This statement of the law has repeatedly been cited with approved at the highest level: see Lord Griffiths in Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 at 268, Lord Nicholls of Birkenhead in Campbell v MGN Ltd [2004] UKHL 22, [2004] AC 457 at [13] and Lord Hoffmann in Douglas v Hello! Ltd (No 3) [2007] UKHL 21, [2008] 1 AC 1 at [111]".*

40. .None of the parties pursued the point further at the time, but after the hearing we received a further written submission from the HEFCE pointing out that there had been no discussion in Vestergaard of whether detriment was an independent

element of a claim for breach of confidence and that it did not appear that the point had been argued by either side. The HEFCE suggested that there was therefore nothing in either that case or the other recent case of *Crowson Fabrics Ltd v Rider & Ors* ([2007] EWHC 2942 (Ch)) (in which the three part test was also recited) that assists in determining whether, in a case of the present kind, detriment is an essential element of a claim for breach of confidence. It is true that the presence or absence of detriment was not a central issue in either of those cases. However, we think that we should take note of the courts' apparently consistent acceptance of the three part test. We contrast this with the fact that none of the parties has been able to point us to any case involving commercial information in which the court has stated that it should depart from that test.

41. In contrast to the case law on commercial information, there have been several cases in recent years, involving the private information of an individual, where the court has not required any requirement to prove detriment. The test to be applied in those cases, was expressed by Buxton LJ in the leading case on the subject, *McKennitt v Ash* ([2006] EWCA Civ 1714 at paragraph 11), as follows:

> *"…in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8* [of the European Convention on Human Rights]? *If 'no', that is the end of the case. If 'yes', the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10"*

42. The divergence between cases involving private information and those involving commercial information was confirmed by Lord Nichol in *Douglas v Hello* ([2007] UKHL 21) who referred to "*two distinct causes of action, protecting two different interests: privacy and secret (confidential) information".* Closer to home, the Court of Appeal in *British Union for the Abolition of Vivisection v The Home Office and the Information Commissioner* ([2008] EWCA Civ 870 at paragraph 23) adopted the criticism of this Tribunal by Eady J., at the first level of appeal, for having applied the *Coco v* Clark test to the information in question without regard to the fact that *"Nowadays … it is recognised that there is a distinction to be drawn between 'old-*

*fashioned breach of confidence' and the tort now characterised as 'misuse of private information'".*

43. The establishment of this distinction seems to have led some to doubt whether the test applied in cases of commercial information is still appropriate and, in particular, whether the requirement to show detriment should be retained – see, for example *An analysis of the modern action for breach of commercial confidence: when is protection merited?* by Hazel Carty, (Intellectual Property Quarterly 2008 p416). The existence of any such doubt does not, however, tempt us to follow the HEFCE's invitation to conclude that, regardless of whether the relevant information affects individual privacy, detriment is either not required or any requirement is satisfied by the fact of unauthorised disclosure. We feel sure that, for the time being, this Tribunal, when dealing with the type of information in question in this Appeal, should not depart from the line of authority from the higher courts leading from *Coco v Clark* up to and including *Vestergaard*.

44. We conclude, therefore, that the HEFCE must prove detriment flowing from disclosure before the hypothetical cause of action may be said to have been established (and the exemption thereby triggered).

45. We therefore now proceed to examine the evidence as to what detriment, if any, would result from disclosure to the public of the requested information in this case.

46. During the investigation of Ms Shepherd's complaint by the Information Commissioner the HEFCE relied on four types of detriment. These were:

    a. Disclosure would potentially damage the reputation of the HEIs which had confided the information, with a consequent detrimental affect on their ability to recruit staff and students;

    b. HEIs would suffer from vexatious approaches from suppliers offering services to assist in resolving problems which the disclosed information suggested might exist;

    c. Those wishing to object to developments proposed by HEIs might find data to support their case; and

d. The overall effect of a. to c. above would be that HEIs would not submit data to EMS, or would submit less extensive data, with the consequence that all HEIs would suffer from a reduction in the value of an important benchmarking tool.

Before us, points b. and c. were effectively dropped and the HEFCE relied on alleged detriment to the reputation of HEIs and on their ability to attract students, with the consequential effect on the comprehensiveness and value of the EMS database. However, the case on this issue still remained vulnerable to the criticism, expressed in the Decision Notice in these terms:

> *"[*the Information Commissioner*] finds the argument that the disclosure of this information might discourage some HEIs from providing such information in the future, in turn potentially compromising the viability and value of the EMS database, in turn potentially preventing the confider (i.e. the HEI that provided that information) from being able to improve its estate management, thereby causing detriment to its interest, tenuous"*

During argument before us counsel for the Information Commissioner, faced with the challenge that even a tenuous detriment may be sufficient to support the cause of action, suggested that the degree of harm necessary was such that equity would be justified in intervening. He said that it had not been established in this case.

47. Guardian News argued that in considering detriment we should ignore any damage to reputation since this ought not to be taken into consideration in a claim for breach of confidence. It suggested that the proposition was supported by the case of *Mosley v News Group Newspapers Ltd* ([2008] EMLR 20). It is true that Eady J., the trial judge in that case, commented that the dispute before him was not directly concerned with compensating for injury to reputation. But that was said in the context of an assessment of remedy and we find no authority there for the proposition that damage to reputation may not be considered at the earlier stage of determining liability. Nor did the other authority relied on by Guardian News assist it. We were referred to a passage from the judgment of Buxton LJ in *McKennitt v Ash* in which he considered a defence argument to the effect that a breach of confidence claim was not sustainable where the disclosure complained of was in

fact not true. His Lordship concluded that "*provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the defendant cannot deprive the claimant of his* [right to privacy under Article 8 of the European Convention on Human Rights] *simply by demonstrating that the matter is untrue".* Immediately before that passage he had mentioned, by way of contrast, a hypothetical case in which a claimant might deliberately set out to avoid the rules governing a claim for defamation by asserting breach of confidence when he or she knew that the real complaint was that the statement in question was false. His subsequent passing comment that an abuse of process objection might be raised in such a case is not a convincing authority for Guardian News' proposition that harm to reputation could not be relied on by the HEFCE.

48. There can be no doubt that a public interest defence might well be available in order to thwart a claim brought in order to prevent the publication of information that revealed unlawful behaviour or even, as in the case of *Campbell v Mirror Group Newspapers Ltd* ([2004] UKHL 22), hypocrisy. But we do not see any reason why a claimant should not be entitled to rely on the fact that an unauthorised disclosure of confidential information would harm his or her reputation at the earlier stage of establishing liability. One may consider a case where, before the time when accounts are required to be put on the public record by being filed at Companies Registration Office, an individual threatens to publicise private information about a drop in profits at a privately owned company. Could it be argued, in the absence of an overriding public interest in publication, that the company would not have a right to prevent the breach of confidence? Similarly, closer to the present case, one may envisage the hypothetical case of an HEI which requires students to occupy accommodation that is not fit for human habitation. Clearly, in those circumstances, there would be a significant public interest in publishing any data submitted to EMS, which disclosed that state of affairs. But that is not the type of reputation which is relied on in this case. It was made clear during evidence and legal submissions that the HEFCE case was that it was not just those HEIs who scored poorly on the criteria recorded in EMS which would suffer detriment. Those whose record appeared relatively good might also be harmed if others in a narrow group being considered by a potential student proved to be more attractive in terms of the quality of their estate. Where the element of "reputation" does not go to the legality

or morality of the institution's behaviour, but only to its relative stature as compared with others in its peer group, we would not be prepared to ignore that aspect of its case simply because it was capable of being characterised as "reputational damage".

49. Even if the authorities relied on by Guardian News did preclude us from considering any "reputational damage", it may be argued, as the HEFCE suggested, that the objection may be circumvented by avoiding the use of the word "reputation" and expressing the anticipated detriment simply as harm to the confiding institution's relative competitive position against other HEIs and its ability, as a consequence, to compete for staff and students or attract funding.

50. Whatever terminology is used to describe this aspect of the claimed detriment, we do not think that it creates a very attractive reason for seeking confidentiality. If publication of the requested information about one HEI would cause potential students to prefer to be educated at another, which appeared to have buildings that were of a higher quality or more suited to purpose, then the complaint of detriment could be said to form part of an attempt to keep its "customer base" in the dark on a subject in which it has a legitimate interest. That is a consideration that certainly requires close examination when we come to consider whether a public interest defence would be available to the HEFCE. But we do not see the unattractiveness of the argument as justification for saying that no detriment is suffered at all, or that the detriment is so tenuous that the cause of action may not be made out. We therefore conclude that any HEI which would be at risk of damage to its competitive position in this way would satisfy the requirement of establishing detriment.

51. We also believe that the HEIs as a group would face some detriment by reason of the EMS possibly becoming less accurate or comprehensive, with a detrimental knock on effect on their ability to carry out effective benchmarking. This was again described by the Information Commissioner as "tenuous" and it is true that it would require a series of contingencies to occur (as summarised in the extract from the Decision Notice quoted in paragraph 41 above) before it could arise. In our view it does not follow that it may be discounted entirely and we conclude that it would be sufficient to support a claim for breach of confidence by all HEIs which had provided confidential data to EMS, or by one or more HEIs representing that group.

52. The HEFCE argued before the Information Commissioner that if disclosure led to fewer HEIs participating in EMS, (or if those who did participate provided less information), then the HEFCE itself would suffer harm in that its own functions would be adversely affected, including its ability to secure government support for the development of higher education nationally. The Information Commissioner considered that it was only detriment to the confider that could be taken into account and he therefore dismissed the argument. His counsel maintained that position on this Appeal (in which he was supported by Guardian News) and even counsel for the HEFCE conceded that it might at first sight appear surprising to suggest that damage to his client could be a relevant detriment, when the hypothetical breach of confidence claim would be one in which it would be the defendant. He argued, however, that, as the HEFCE ran EMS in the interests of HEIs generally, there was nothing wrong in principle about the idea of detriment to that aspect of its functions being a relevant consideration to take into account. In his closing submission he referred to this potential outcome as "damage to the sector", by which we took him to mean that all HEIs would suffer harm if the HEFCE's ability to influence government decisions was reduced as a result of the EMS database providing it with less authoritative evidence to use in support of arguments on policy issues. At that level we find it difficult to see a distinction between the HEFCE and the whole body of HEIs. The HEFCE seems simply to be the servant of the HEIs in this respect and, having decided that they are vulnerable to suffer detriment as a group, we find it difficult to conclude that the HEFCE is capable of suffering detriment on its own account. Accordingly we reject the HEFCE's argument on this point, although we will need to revisit the impact of disclosure on its operations when we come to consider the possibility of a public interest defence.

Public Interest Defence

53. Guardian News asserted that there was strong public interest in disclosing the information covered by the Request. The Information Commissioner, who had decided in his Decision Notice that he did not need to consider this issue, adopted the position that if, contrary to his primary submission, there was sufficient detriment to found an action for breach of confidence, such detriment was tenuous and

minimal. It did not outweigh the arguments put forward by Guardian News (which he supported) on the public interest in disclosure.

54. The test for establishing a public interest defence has been authoritatively defined by the Court of Appeal in *HRH Prince of Wales v Associated Newspapers Ltd* ([2006] EWCA Civ 1776) in the following terms:

> *"Those who…enter into…relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality."*

A little later the Court of Appeal said:

> *"…the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.*

We therefore now turn to apply that test to the facts of this case.

55. In addressing the issue of public interest we recognise that we should revisit the elements of alleged detriment considered above and that, in this context, we may take it all into account regardless of whether it will be suffered by a particular HEI which has disclosed information to EMS, the whole body of HEIs or the HEFCE

itself. However, we do not consider that, even on that basis, the case for maintaining confidentiality is convincing. We are sceptical whether HEIs will withdraw from EMS or significantly reduce the data submitted under it if the information covered by the Request were disclosed. They have not done so as a result of either the FOIA coming into force, the Code of Conduct being altered to emphasise its potential impact, or the environmental information being disclosed. We accept that environmental information may have less impact on students' choice of institution, but believe that, if EMS is as valuable to HEIs as we have been told, those responsible for managing them will continue to support it, even if this creates some risk to an individual institution's relative competitive position. We certainly believe that, as the guardians of a significant element of public funds, they should not adopt a short sighted approach which would deny them access to a valuable benchmarking tool. In practice we believe that they would, in any event, realise that it would become very clear to those investigating the issue of estates management which HEIs were not prepared to expose their record in that area to public scrutiny. That would be a damaging outcome for any HEI which would have appeared towards the bottom of any league table ranking, but it would be even more damaging to one with a better "score". The negative comments arising from an apparent fear of putting the true position into the public domain might have a relatively neutral effect on the former but, being unjustified, would have a more serious and damaging effect on the latter. Even if that were not the case we do not believe that a well-advised, rational management team would allow the competitive pressures it faces to cause it to adopt a policy of non-cooperation, which undermined the broader interests of itself and the sector as a whole. In this respect we observed that Professor Raftery fell short of saying that this is what his university would do. He told us that it would consider carefully the consequences of any order for disclosure the Tribunal made. We believe that, having done so, it would continue to support EMS, for the reasons we have given.

56. If, contrary to our expectations, HEIs did withdraw cooperation then we believe that their failure to manage public resources in what we would regard as a responsible manner would fully justify the HEFCE resorting to its powers of compulsion. We suspect that the mere existence of compulsory powers will ensure that HEIs do not in fact adopt an attitude of non-cooperation. But we cannot be certain of that and

we were told that, if HEIs were forced to participate in EMS, this would result in additional costs and damage to the relationship between the HEFCE and HEIs. We would regard both elements of anticipated harm as wholly self-imposed wounds for the higher education sector and ones which, again, those with senior management responsibilities for public assets ought not to create. We would be reluctant to give any significant weight to a category of detriment which arose, not from the operation of the FOIA, but from the threat by some of those affected by it to behave in an obstructive manner, which would fall short of the standard of stewardship which the public is entitled to expect.

57. We were told that disclosure, whether under the current voluntary scheme or any future compulsory version of it, would have a further detrimental effect on the relationship between HEIs and the HEFCE because, once an assurance of confidentiality had been found to be unsustainable in one respect, HEIs would lose trust in the HEFCE at a more general level and would not be prepared to discuss with it issues on which it required support or guidance. If that were to be the case then it would, again, represent a short sighted approach to the role of an HEI's management team. Whether there was a risk of disclosure would depend on the possible application of one or more of the exemptions available under the FOIA and, very probably, the operation of a public interest balancing test. Those involved would, or should, have been aware of the risk since the FOIA came into force. The perceived harm is therefore speculative and does not, in our view, carry any significant weight in the balancing exercise we are required to undertake.

58. If our conclusions on the approach likely to be taken by mature and responsible management teams within the higher education sector, were wrong we would still agree with the Information Commissioner that there is only a tenuous connection between, on the one hand, individual decisions to withdraw from, or reduce contributions of data to, the EMS database and, on the other, detriment to the sector as a whole or the ability of the HEFCE to carry out its functions.

59. In addition to the public interest factors identified and assessed above, we must also take account of the general public interest in maintaining the right to confidentiality under either or both of the equitable right under English law and Article 8 of the European Convention on Human Rights.

60. Against those factors we set the public interest in having the information requested disclosed. Guardian News, supported by the Information Commissioner, relied on the following five elements of public interest in support of disclosure:

    i. The need to give relevant information to those faced with a choice of university.

    ii. The disclosure to the public of the proportion of an HEI's gross internal area which are in relatively poor repair.

    iii. The disclosure to the public of the proportion that is not suitable for its intended function.

    iv. The need to inform public debate on the adequacy of funding in the higher education sector.

    v. The concerns that have been expressed within the sector about the challenge of maintaining adequate investment in HEI's estates.

61. The HEFCE argued that a certain amount of information from the EMS was already published, albeit in aggregated form that did not enable individual HEIs to be identified. It suggested that this substantially met any public interest in scrutinising the economy, efficiency and effectiveness with which HEIs in general manage their estates. That may be so, but it self-evidently provides no information about individual HEIs, each of which is itself a public body for the purposes of the FOIA. It provides no information to those having an interest in how public funds invested in a particular institution have been managed (a group that is not limited to potential students, potential members of staff or funders). We believe that there is very considerable public interest in public institutions of this type, which frequently have a strong connection with a particular town or community, making this type of information available. Certainly no compelling evidence or argument was put to us on why, in general terms, those responsible for such an institution should not have data on this aspect of their stewardship made available to the public as a whole. Guardian News and the Information Commissioner made the additional point, which we find compelling, that if the reason for an HEI having buildings that are unsuitable

or in a poor state is that it has suffered from inadequate public funding, then that is an issue on which a properly informed public debate is required.

62. On a narrower perspective, limited to the likely approach of those faced with a choice of institution to attend as a student, join as a member of staff or assist as a funder, the HEFCE argued that the public interest in disclosure was slight because the information in question would not be of significant value. This, it said, was because a considerable amount of information was available from other sources and the information from EMS would be out of date and therefore potentially misleading. We think that this argument under-estimates the ability of those reviewing the information, including potential students, to assess the accuracy, currency and value of data, to weigh it in the balance alongside other available information (such as hard copy or web-based brochures) and to ask questions (typically at open days or the like) in order to fill gaps, correct inaccuracies or provide a balanced overview. It is certainly true that many other factors will be taken into account by potential students and that some (maybe most) of those factors will be of greater significance for them than the state of an institution's estate. But that does not mean that the information covered by the Request should not be available to them, to make of it what they will, and we think that there are strong public interest reasons why it should.

63. We place less weight on the argument, again put forward by both Guardian News and the Information Commissioner, that the data may disclose that buildings are in use that might constitute a risk to health and safety. We form that view because, although it would be a serious issue if such buildings were being used by students and staff, the lapse in time between the date when information is supplied to the HEFCE and the date when it is incorporated in the EMS database, is such that the disclosure, which we are asked to sanction, would have significantly less relevance than more contemporaneous information, such as health and safety reports or even the observations of those required to occupy and use the buildings in question.

64. We conclude, applying the test of proportionality set out in the *Prince of Wales* case, that the factors in favour of disclosure substantially outweigh those in favour of maintaining confidentiality and that the HEFCE would therefore have a valid

public interest defence to any breach of confidentiality claim brought by one or more HEIs.

Conclusion and remedy

65. In view of our findings set out above we conclude that the exemption provided by FOIA section 41 does not apply to the information covered by the Request and that the Information Commissioner was correct in deciding that the HEFCE should have disclosed it. We accordingly direct that the information set out in the Request, other than the information on income identified in paragraph 8 above, should be disclosed within 28 days of the date when our decision is promulgated.

66. Our decision is unanimous.

Signed:

Chris Ryan

Deputy Chairman

Date: 13 January 2010