



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

EA/2013/0035

**ON APPEAL FROM
The Information Commissioner's Decision
No FS504599954 dated 29 January 2013**

Appellant: TELFORD & WREKIN COUNCIL

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: MR A. HONARMOND (on behalf of CCS Media Ltd)

Date and place of hearing: on the papers

Date of decision: 3 December 2013

Before

**Anisa Dhanji
Judge**

and

**Alison Lowton and Dave Sivers
Panel Members**

Subject matter

FOIA section 41 – whether disclosure would constitute an actionable breach of confidence.

Case Law

Coco v A.N. Clark (Engineers) Ltd [1968] FSR 415

Department for Business, Enterprise & Regulatory Reform v Information
Commissioner and Friends of the Earth (EA/2007/0072)

HRH Prince of Wales v Associated Newspapers [2008] Ch 57

Information Commissioner v. Home Office [2011] UKUT 17 (AAC)

DECISION

The Appellant's appeal is allowed.

The Second Respondent's cross appeal (to the extent admitted as being in time) is dismissed.

Signed

Date: 3 December 2013

Anisa Dhanji

Judge

REASONS FOR DECISION

Introduction

1. This is an appeal against a decision notice issued by the Information Commissioner (the "Commissioner"), on 29 January 2013.
2. It arises from a request for information made under the Freedom of Information Act 2000 ("FOIA") by the Second Respondent, Mr A. Honarmond (on behalf of CCS Media Ltd), to the Appellant, Telford and Wrekin Council (the "Council"). The request was for a copy of the successful supplier's submission for the tender for the Council's data storage center. The supplier was Dell Corporation Limited ("Dell").
3. The Council disclosed Dell's tender submissions, but redacted certain information which it said was exempt from disclosure under FOIA sections 40(2) (personal data of a third party), 41 (information provided in confidence), and 43 (prejudice to commercial interests).

The Complaint to the Commissioner

4. The Appellant complained to the Commissioner under section 50 of FOIA. The Commissioner found that the information withheld under sections 40(2) and 41 of FOIA was exempt.
5. However, the Commissioner did not consider that the information withheld under section 43 was exempt. He accepted that the information did not amount to a trade secret, and therefore, that section 43(1) of FOIA was not engaged. However, he found that disclosure would be likely to prejudice the commercial interests of Dell and accordingly, section 43(2) was engaged. Since section 43 is a qualified exemption, he then went on to consider the public interest balance. For the reasons set out in his decision notice at paragraphs 72 - 88, he considered that the public interest favoured disclosure, and ordered disclosure of the information which the Council had claimed was exempt under section 43.
6. The Commissioner also recorded a procedural breach by the Council in that its refusal notice had failed to comply with the requirements of sections 17 of FOIA. However, the Commissioner did not require any remedial steps to be taken in this regard.

The Appeal to the Tribunal

7. The Council appealed to the Tribunal against the decision notice. However, it did not seek to dispute the Commissioner's findings in relation to section 43. Rather, it claimed that the information it had previously said was exempt under section 43, was in fact exempt under section 41. It relied, in this regard,

on the reasons the Commissioner had given, in his decision notice, for finding that the information which had been withheld under section 41 was exempt under that section.

8. In response, the Commissioner accepted, first, on the basis of the Upper Tribunal's decision in **Information Commissioner v. Home Office**, that the Council was entitled to change its position even at such a late stage. Second, he accepted that the information previously withheld by the Council under section 43 was exempt under section 41 for the same reasons as he had set out in his decision notice in relation to the information which he had found was exempt under section 41. On that basis, the Commissioner no longer opposed the appeal, and he invited the Tribunal to dispose of the appeal by way of a consent order, subject to the views of the requester.
9. The requester objected, however, and at his request, he was joined as the Second Respondent to this appeal. He argued that (1) the Tribunal should not allow the Council to rely on section 41 at this late stage; (2) in any event, section 41 did not apply; and (3) the Tribunal should review the Commissioner's decision in relation to the information which the Council had originally claimed was exempt under section 41.
10. The Commissioner says that the Second Respondent is out of time in seeking to challenge the Commissioner's decision in relation to the information which the Council had originally claimed was exempt under section 41.
11. All parties have requested that this appeal be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.
12. We have considered all the documents received even if not specifically referred to in this determination. The documents contained in the agreed bundle of documents includes a redacted copy of Dell's tender submissions as provided by the Council to the Second Respondent. The un-redacted document has been provided to the Tribunal on a closed basis. Submissions were received only from the Commissioner.

Legislative Framework and the Tribunal's Jurisdiction

13. Under section 1 of FOIA, any person who has made a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
14. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.

15. If the public authority refuses a request, in whole or in part, the requester may apply to the Commissioner for a decision as to whether the request was dealt with in accordance with FOIA.
16. Either party can appeal to the Tribunal against the Commissioner's decision. The scope of the Tribunal's jurisdiction in dealing with such an appeal is set out in section 58(1) of FOIA. If the Tribunal considers that the Commissioner's decision notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
17. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the decision notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

Issues

18. There are three issues before us:

Issue 1:

Is the Council entitled to rely on section 41 in relation to the information it had originally claimed was exempt under section 43?

Issue 2:

Should the Tribunal review the Commissioner's decision in relation to the information which the Council had originally claimed was exempt under section 41?

Issue 3:

Whatever the scope of the Disputed Information (depending on the answer to Issue 2), is that information exempt under section 41?

Findings

Issue 1: Is the Council entitled to rely on section 41 in relation to the information it had originally claimed was exempt under section 43?

19. In the **Information Commissioner v Home Office**, the Upper Tribunal held that a public authority which had initially relied on a particular exemption under FOIA, could later rely on additional or different exemptions without the permission of the Commissioner or the Tribunal. In other words, public authorities have the right to change the exemptions on which they rely. It follows that the Council in the present case is entitled to rely on section 41 of FOIA in relation to the information which it had originally claimed was exempt

under section 43. As the Upper Tribunal pointed out, any such change in the exemptions relied upon is subject to the Tribunal's case management powers. While we consider it regrettable that the Council did not properly consider its position at an earlier stage, we accept that it changed its position in good time for the other parties to deal with the appeal properly. There has been no prejudice to them and no good reason for the Tribunal to exercise its case management powers to restrict the Council from its late reliance on section 41.

Issue 2: Should the Tribunal review the Commissioner's decision in relation to the information which the Council had originally claimed was exempt under section 41?

20. Rule 22(1)(b) of The Tribunal Procedure (First-tier Tribunal) General Regulatory Chamber) Rules 2009 sets out the time limit for appealing against the Commissioner's decisions. It requires that a notice of appeal should be received within 28 days of the date on which the Commissioner's decision notice was sent to the party seeking to appeal. The decision notice in the present case is dated 29 January 2013. Although there is no evidence before us as to exactly when it was sent to the Second Respondent, there is no suggestion that it was not sent promptly. The Second Respondent did not lodge a notice of appeal. The first indication he gave that he wished to challenge the Commissioner's findings was set out in his letter to the Tribunal dated 24 June 2013. Even accepting that that letter properly constitutes a notice of appeal, it was considerably out of time. Under Rule 26(5), if a notice of appeal is provided later than the required time, it must include a request for an extension of time and must set out the reasons why it was not provided within the required time. Unless the Tribunal extends the time, it must not admit the notice of appeal.
21. The Second Respondent has not requested an extension of time. He has also not provided any reason for why he did not seek to challenge the Commissioner's decision in time. We bear in mind that the Second Respondent is not represented. However, we also bear in mind that he has been on notice since at least the Commissioner's submissions dated 30 August 2013, that his challenge to the Commissioner's decision was out of time. There has been ample opportunity, therefore, for him to make a proper request for an extension of time, and to put forward reasons for why he did not appeal against the Commissioner's decision in time. He has not done so. In these circumstances, we do not consider that there are grounds for the Tribunal to extend the time, and we do not do so.

Issue 3: Is the Disputed Information exempt under section 41?

22. The final issue before us is whether the information which the Council had originally claimed was exempt under section 43 of FOIA (the "Disputed Information"), is exempt under section 41. To the extent that it is necessary, in order to consider this issue, for the Tribunal to extend the time for the Second Respondent's appeal, we do so. Clearly, until the Council changed its position and until the Commissioner accepted that new position, there was no basis for the Second Respondent to appeal on this issue. If a public authority is able to rely on additional or different exemptions late in the day, it must follow, in

the interests of fairness, that the requester should have the opportunity to dispute that as he would have done had the public authority taken that position sooner.

23. Section 41(1) provides as follows:

(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.

24. It is not in dispute that an “actionable” breach of confidence is one in respect of which a claim would, on the balance of probabilities, succeed (rather than being simply arguable).

25. The exemption in section 41 is absolute so it does not depend upon a balancing of the public interest in maintaining the exemption against the public interest in disclosure. However, public interest is a defence to a claim for breach of confidence and therefore, it is necessary to consider the public interest when determining whether disclosure would constitute an actionable breach of confidence. We will return to this issue below.

26. The Disputed Information comprises a relatively small amount of information. It is not necessary, for the purposes of this appeal, to refer to it in detail. We consider it sufficient to say that it comprises details of unit costs, price schedules and discount terms forming part of Dell’s tender submissions.

27. The Disputed Information was provided to the Council by Dell, and therefore section 41(1)(a) is clearly met. For the reasons set out below, we are also satisfied that disclosure would constitute an actionable breach of confidence.

28. There have been numerous judicial pronouncements about the elements necessary to found an action for breach of confidence. The most often cited is that of Megarry J in **Coco v Clark** where he set out three elements to such a claim:

(a) the information itself must have the necessary quality of confidence about it;

(b) the information must have been imparted in circumstances importing an obligation of confidence; and

(c) there must be an unauthorised use of that information, to the detriment of the party communicating it.

29. In considering these questions, we have taken into account the correspondence between the Council and Dell, and in particular Dell’s letter dated 4 April 2013. We agree with the Commissioner that the information has the necessary quality of confidence about it in that it contains sensitive

commercial pricing which is not public knowledge. We also agree that it was imparted in circumstances importing an obligation of confidence and that Dell expected that it would be kept confidential. Third, if the information is disclosed, it would clearly be without Dell's permission and we accept, on the evidence from Dell, that it would be to its detriment in that disclosure could damage Dell's competitive position in relation to other tender submissions.

30. The Second Respondent does not appear to dispute these points. Although he says that he does not accept that the Disputed Information is confidential, the only reason he gives is that due to the passage of time, the information has lost its confidential quality. He says that there would not now be any detriment to Dell if the information is disclosed. We agree with the Commissioner that this argument is misconceived. The question is whether the Council's decision was in accordance with FOIA at the time it was made. The date at which the Tribunal is required to assess whether an exemption applies is the date of the request, or at the latest, by the time that request should have been complied with (see: **Department for Business, Enterprise and Regulatory Reform**). Dell's tender was submitted on 7 February 2012 and the Second Respondent made his request for information shortly afterwards, on 20 February 2012. At the date of the request, therefore, the Disputed Information was still very current. It may be that a fresh request made now would have to be dealt with differently if the passage of time has weakened the case for why the exemption is engaged, or indeed if it raises new issues not present at the time of the request, but that is, of course, a separate matter. The question before us is whether the Council dealt with the request in accordance with the requirements of FOIA at the time of the request, and we are satisfied that it did.
31. The Second Respondent also says that disclosure of the information would not constitute a breach of confidence actionable by Dell because the Council would have a defence to any such claim based on the public interest in the disclosure of the Disputed Information. He says that there is a public interest in making people aware of how the decisions on public funding are made, particularly to ensure that the Council strives to obtain value for money when carrying out a tender process.
32. As already noted, although the exemption in section 41(1) is absolute, an action for breach of confidence can be met with a public interest defence and therefore public interest considerations are still relevant. In the terms articulated by Lord Phillips in **HRH Prince of Wales v Associated Newspapers** at paragraph 68:
- “ The court will need to consider whether, having regard to the nature of the information, and all of 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.”*
33. There is, of course, always a public interest in ensuring that public authorities discharge their functions properly, particularly functions involving the expenditure of public funds. That is not, however, a trump card. It is still

necessary to look carefully at the public interest in the particular information in issue. We agree with the Commissioner that an obligation of confidence should not be lightly overridden on public interest grounds, and that there must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence.

34. In the present case, there is no evidence before us to indicate any particular public interest in disclosure. There is no evidence, for example, of any criticism of the Council by the public as regards how it carried out the tender process. There is also no suggestion that the Council did not carry out its functions properly as regards the tender process, nor that the public have been misled in any way. There is, on the other hand, a valid public interest in a public authority being able to carry out a tender process effectively. The evidence from the Council, which we have no reason to doubt, is that disclosure would compromise its ability to attract tenders if those participating in the process consider that the information they provide in what we accept is a very competitive market, would be made available to its competitors.
35. For all these reasons, we consider that a public interest defence would not be made out. It follows that we find that the exemption in section 41(1) is engaged in relation to the Disputed Information, and that the Council is not required to disclose it.
36. For completeness, we would note that the Second Respondent has explained that it has a contract with Dell which requires that where both are submitting a tender, Dell must provide the relevant products to CCS at the same price as it quotes in its own tender in order to allow CCS to offer the same price. The Second Respondent alleges that in the case of its tender to the Council, Dell may not have acted in accordance with its contractual obligations to CCS. However legitimate such concerns might be, those interests are of course of a private contractual nature and do not come within the scope of the public interest relevant in relation to section 41.

Decision

37. The Appellant's appeal is allowed. The Second Respondent's cross-appeal (to the extent admitted as being in time) is dismissed.
38. Our decision is unanimous.

Signed

Date: 3 December 2013

**Anisa Dhanji
Judge**

Pages 3 and 10 have been corrected under Rule 40 of The Tribunal Procedure (First-tier Tribunal) General Regulatory Chamber) Rules 2009 (relating to clerical mistakes, accidental slips and omissions)