



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

**Case No. EA/2011/0043**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50277373  
Dated: 10 February 2011**

**Appellant: Mr William Thackeray**

**Respondent: The Information Commissioner**

**On the papers**

**Date of decision: 18 May 2012**

**Before  
CHRIS RYAN  
(Judge)  
and  
MICHAEL JONES  
RICHARD FOX**

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

**DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is dismissed.

**REASONS FOR DECISION**

Background Information

1. We start by putting this Appeal into context. In the Tribunal's decision in case EA/2011/0082 and 0083, promulgated on the same date as this decision, we identified a number of requests and chains of request sent by the Appellant, Mr Thackeray, to the Common Council of the City of London ("the Authority"). This appeal arises from the chain of requests identified there as the "Internal Communications Chain". It led to a request for information about the Authority's dealings with various organisations connected to the Church of Scientology. The request was made under section 1 of the Freedom of Information Act 2000 ("FOIA"), under which any person making a request for information to a public authority is entitled to be informed if the public authority holds the information and, if so, to have the information communicated to him or her.
2. The scope of the request was narrowed during the course of correspondence between Mr Thackeray and the Authority and some of the requested information was then released by the Authority. Mr Thackeray complained to the Information Commissioner about some of the information, which continued to be withheld, and the Information Commissioner, in a Decision Notice dated 10 February 2011, decided that the exemptions claimed by the Authority had been correctly applied to some documents, but not to others.

This Appeal

3. Mr Thackeray has appealed to this Tribunal on only one point. He has said that the Information Commissioner was in error in deciding that FOIA section 41 (third party confidentiality) had the effect of exempting two of the withheld documents. One of those documents has subsequently been disclosed. As the Appeal comes to us, therefore, it concerns just one document, an internal email sent by one member of staff of the Authority to another reporting the substance of a telephone conversation with a third party. The Information Commissioner did not provide information on document content in his Decision Notice because, he said, this would have undermined the integrity of the withheld information. However, the document had been made available to the Information Commissioner during his investigation and

he had therefore been able to take the contents into account in reaching his decision. He identified it simply as “document 35”. We propose to do the same.

4. By agreement between the parties the appeal was determined on the papers, without a hearing, which we considered was an appropriate procedure to adopt. The appeal was stayed for a considerable period, pending resolution of a procedural issue affecting this appeal and others instigated by Mr Thackeray. The reply submissions filed by Mr Thackeray included issues that the Information Commissioner considered were new and should not have been raised at that stage. However, he submitted submissions in response to them and we agreed that, in those circumstances, it was not appropriate or proportionate to allow yet further submissions from Mr Thackeray. We were satisfied that the issue had by that stage been fully and fairly aired and did not believe that further submissions would assist us in our determination.

#### Relevant law

5. FOIA section 41 provides that information is exempt from the disclosure obligation in section 1 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.”*
6. The test for breach of confidence is obtained from the well known case of *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. It requires three elements:
  - a. the information in question must have the necessary quality of confidence;
  - b. it must have been passed by the confider in circumstances that gave rise to an obligation of confidence; and
  - c. detriment would be suffered by the confider by unauthorised use or disclosure by the recipient
7. Section 41 is an absolute exemption (FOIA section 2(3)(g)), which means that, once a decision has been made that it applies to information, it is not necessary to go on to balance the public interest in disclosure against the public interest in maintaining the exemption (as in the case of other exemptions). However, it is well established that, in deciding whether a potential breach of confidence would be “actionable” for the purpose of section 41, consideration must be given to any defence that might be available to the public authority. One such defence is that the public interest in disclosing the information in question outweighs the public interest in maintaining confidentiality.

#### Analysis of the issues

8. The Information Commissioner decided that the information recorded in document 35 had been obtained by the third party who had participated in the recorded conversation and that it included information having the necessary quality of confidence to satisfy the first part of the *Coco v Clark* Test. He also concluded that the information had been confided to the Authority in circumstances that gave rise to an obligation of confidence and that its disclosure would lead detriment for the confider.
9. Mr Thackeray, (who for obvious reasons had not had the benefit, which we have had, of inspecting document 35) suggested that, although it might record some information passed by a third party to the Authority, it might also contain other information that did not fall into that category. He provided, as examples, the names of the sender and recipient and, possibly, any opinion recorded in it. We can say, from our own inspection of the document, that it contains no names that are not already covered by the Information Commissioner's decision under FOIA section 40 (personal data of a third party), which has not been appealed. Nor does it contain any opinion that might take it outside the meaning of confidential information.
10. We have considered the contents of the document and the circumstances in which, it says on its face, the information was obtained. We are satisfied, on that basis, that the Information Commissioner's analysis was correct and that a breach of confidence claim could be sustained against the Authority if it had disclosed it other than under the FOIA. We reject the argument by Mr Thackeray that the exemption was not engaged because document 35 was created by the Authority. The document may have been created by an employee of the Authority but the information contained in it had certainly been obtained from a third party, being the person to whom the writer of the document had spoken.
11. The Information Commissioner went on to consider whether the notional confidentiality claim would have been defeated by a defence based on the public interest in disclosure outweighing the public interest in respecting confidences. Although the Information Commissioner acknowledged the public interest in being informed about the Authority's relationship with the Church of Scientology (particularly on the subject of business rates) he concluded that it was outweighed by the public interest in preserving the confidentiality of the particular information provided to it by the third party in this case.
12. Mr Thackeray challenged the balancing exercise because of the importance, in his view, of uncovering information about the Church of Scientology. He also attempted to develop an argument based on what he considered was the inconsistent treatment of other material. However, we consider that the Information Commissioner's decision may not fairly be criticised for the approach he adopted to other material containing other information. Overall, we were satisfied that

the Information Commissioner had not fallen into error when assessing the weight to be given to the factors for and against disclosure and that, notwithstanding the concern felt by many about the activities of the Church of Scientology, it cannot be said that this would establish a public interest justification for disclosing the information provided by the confider of the information recorded in document 35.

### Conclusion

13. For the reasons set out above we conclude that the Authority was justified in relying upon section 41 when refusing to disclose the information recorded in document 35. The appeal should therefore be dismissed.

14. Our decision is unanimous.

Chris Ryan  
Tribunal Judge  
18 May 2012