



First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0228

Decided without a hearing
On 22 August 2017

Before

JUDGE ANDREW BARTLETT QC

MICHAEL HAKE
PAUL TAYLOR

Between

KISHORE KANSAL

and

INFORMATION COMMISSIONER

Appellant

Respondent

Freedom of Information Act 2000 – information provided in confidence – s 41

Case cited:

Higher Education Funding Council for England v IC 13 January 2010, EA/2009/0036

DECISION AND REASONS

The Tribunal dismisses the appeal.

1. The appellant, Mr Kansal, appeals against the Information Commissioner's decision notice FS50617015, dated 22 September 2016. The parties agreed that the appeal should be determined on the papers, without an oral hearing.
2. Mr Kansal submitted a number of information requests to South Tyneside Council, the administrator of the Tyne and Wear Pension Fund. Some were fully and extensively answered. The present appeal is concerned with a request that was refused. This was a request for the names of the underlying funds into which the Council invested via private equity funds of funds. The Council withheld the information, relying, among other things, on s 41 of the Freedom of Information Act 2000 (information obtained in confidence).
3. Mr Kansal was dissatisfied and referred the matter to the Information Commissioner.
4. After investigation, the Commissioner upheld the Council's refusal on the basis of the application of s 41. The decision notice contains considerable detail of the Commissioner's reasoning, which runs to 40 paragraphs. The essence of the reasoning is that the Commissioner was satisfied that (1) the requested information was obtained by the Council from third parties, (2) the requested information had the necessary quality of confidence, (3) it was communicated to the Council in circumstances importing an obligation of confidence, (4) disclosure would be detrimental to the providers of the information, (5) an action against the Council for breach of confidence would not be defeated by a public interest defence, (6) as a result of (2)-(5), disclosure of the information otherwise than under FOIA would constitute an actionable breach of confidence, and accordingly (7) the information requested was protected by the absolute exemption contained in FIOA s 41.
5. Before proceeding to the issues we indicate briefly our view of the requirements of s 41. We take the word 'actionable' to mean that an action for breach of confidence would succeed, in the same manner as was explained in *Higher Education Funding Council for England v IC* 13 January 2010, EA/2009/0036, [21]-[30]. We also consider that elements (2)-(6) as stated in the foregoing paragraph are necessary in the present case, essentially for the reasons stated by the Tribunal in the *Higher Education Funding Council* case at [31]-[44].
6. In the course of the procedural stages of the appeal Mr Kansal refined his arguments. The points finally pursued by him on appeal can be summarised as follows:

- a. There is insufficient evidence to establish detriment. The detriment relied on by the Council and the Commissioner is speculative and unconvincing. It is not proved that the investment strategies of the funds of funds are truly confidential or would wrongly be revealed. Since there are over 40 different funds of funds involved, revealing the names of the underlying investments would not show the make-up of individual funds of funds.
 - b. The Council's solicitor muddied the water by referring to Mr Kansal as a competitor of the investment funds, which he is not.
 - c. It is in the public interest for the disclosure to be made; accordingly no public interest defence would apply to an action for breach of confidence.
7. In our judgment there is abundant evidence that all the ingredients of s 41 are applicable here. We agree with the Commissioner's decision, substantially for the same reasons as given in the decision notice. In order to reach our decision we have not found it necessary to consider the details of the information that was withheld from Mr Kansal.
8. Sample representative extracts have been provided from the legal documentation applicable to the requested information. It is clear that the requested information is protected by legally enforceable express obligations of confidentiality both in the hands of those responsible for the funds of funds and in the hands of the Council. In addition two of the entities with whom the Council deals in order to make its investments in funds of funds have provided their own explanations of this confidentiality, in terms of its commercial value, and the competitive harm that would ensue if it were revealed. We consider that these two entities are appropriately representative. We are not impressed by Mr Kansal's criticisms of that evidence, and we accept it.
9. We were also provided with an explanation and examples of how, by use of the names of the underlying investments, identification could be made of the investment choices made by the various funds of funds. We accept that explanation, and can see no sufficient reason to accept Mr Kansal's assertions to the contrary.
10. Mr Kansal provided information about what was published to the public by an organisation related to one of the funds of funds. He argued that this demonstrated the lack of detriment and a public interest in disclosure. We disagree. He is not comparing apples with apples. The entity in question

operates under a different regime and is subject to public disclosure requirements.

11. As regards Mr Kansal's own status, we agree with what he says. He is not a competitor. But in our view the apparent misunderstanding of his status has no impact on the issues which we have to decide.
12. Mr Kansal's point about the public interest fails on applying the law to the facts. As regards the law, the public interest defence to an action for breach of confidence is not the same as the public interest test applicable under FOIA in the case of qualified exemptions. The law recognises that good reasons are required to override a legal obligation of confidentiality. The classic example is a case where enforcing the confidence would prevent wrongdoing being revealed. Another example is where a public figure is misleading the public. Another example is where journalists wish to publish information on a matter of pressing public concern. As regards the facts, it is relevant to observe that, while there are some factors favouring disclosure, in order to foster public accountability, there are also in this case factors favouring non-disclosure; in particular, if Councils were obliged by FOIA to disregard their confidentiality obligations in this context, this would be likely to narrow the range of investment choices open to them for the purpose of maximising pension fund returns. In our view, on the facts the present case is nowhere near the kind of case where a public interest justifies a breach of confidence. In our judgment there is nothing in the present case which would justify the breach of confidence which the requester seeks.
13. Mr Kansal's arguments made reference to other decisions made by the Information Commissioner. We have not found it necessary to examine them in detail. Such decisions may be of interest but they are not binding on the Tribunal. Our duty is to apply the law as we understand it to the particular facts of the present case.
14. For the above reasons we dismiss the appeal.

Signed by Andrew Bartlett QC

Judge of the First-tier Tribunal

Date: 23 August 2017

Promulgated: 24 August 2017