



Case Reference: EA/2022/0071

Neutral Citation Number: [2023] UKFTT 966 (GRC)

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard on the papers

Heard on: 23 September 2023

Decision given on: 14 November 2023

Before

TRIBUNAL JUDGE CARTER
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER EMMA YATES

Between

MO

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

BRISTOL CITY COUNCIL

Second Respondent

Decision:

The First Respondent had been correct in upholding the decision of the Second Respondent to rely upon section 41 of the Freedom of Information Act 2000 to withhold the disputed information. The appeal is accordingly, and for the reasons below, dismissed.

1. This is an appeal under section 57 of the Freedom of Information Act 2000 (“FOIA”), against the Commissioner’s Decision Notice IC-111493-D7M8 (the "Decision"), which held that Bristol City Council, the Second Respondent was entitled to rely on section 41 of FOIA, to refuse disclosure of information requested by the Appellant.
2. By earlier order of the Registrar in this jurisdiction, the Appellant remains anonymous in this appeal.
3. The request for information by the Appellant concerned the licensing of Sex Event Venues (“SEV”). This was in the context of a long running debate about the appropriateness of the Second Respondent licensing SEVs.

Request, Decision Notice and appeal

4. On 8 April 2021 the Appellant wrote to the Second Respondent and requested the following information:

"Would you please send me all the evidence and reports that have been submitted to the council by the Fawcett Society, that show the negative impact that SEV's have and justify a nil cap policy."

5. The Tribunal understands that a so-called 'nil cap' policy would prevent the renewal of licenses for SEVs in the area. The Second Respondent, initially withheld all of the disputed information on the basis it was personal data, under the exemption in section 40(2) of FOIA. The Appellant sought an internal review and at the same time sought to refine the request, on 14 May 2021:

"I made a FoI request (ref 15336629) which was denied due to personal information being present in the documents.

I would like to appeal this decision. I understand the reasons why it got turned down, but would like to request any personal details to be taken out of the documents or simply redacted. The documents from the Fawcett Society have influenced the Licensing Committee into changing the policy regarding SEVs. This policy is soon going out to public consultation, so I believe that these documents should be made available to the public."

6. On internal review, the Council changed its position and informed the Appellant that it did not hold the information requested saying it had not received any evidence or reports submitted to it by the Fawcett Society. This was on the basis that the Bristol Fawcett Society was a different legal entity to the Fawcett Society.
7. The Appellant complained to the First Respondent. During the course of the investigation, the Council changed its position again and put forward that it did hold information but this was not disclosable either on the basis of either personal data exemption (section 40(2) of FOIA) or on

the basis that it was confidential under section 41 (information provided in confidence). The First Respondent agreed with the Second Respondent that it had been entitled to rely upon section 41 not to disclose the information and on that basis it did not go on to consider the applicability of the personal data exemption under section 40(2).

8. The Decision noted that the information sought was a report provided to the Council by Bristol Fawcett in response to a consultation exercise on the Second Respondent's policy concerning the licensing of SEVs. The First Respondent concluded that the report had the necessary quality of confidence and had been provided to the Second Respondent in circumstances where it was placed under a duty of confidence. He also agreed with the Second Respondent in finding that disclosure of the report risked further harassment of Bristol Fawcett members due to "*the emotive and divided opinions over the issue*". The First Respondent considered that the public interest in the information being disclosed was outweighed by the public interest in the confidence in the report being maintained.
9. The Appellant then filed a Notice of Appeal to the Tribunal on 5 April 2022. The Grounds of Appeal set out the Appellant's objections to the Decision. In summary:
 - a) the Decision failed to explain why they could not see a redacted version of the report. The Appellant argued that if the report is released in a redacted form, no personal data would be provided.
 - b) there is no evidence that the Appellant has ever harassed members of Bristol Fawcett, and the Tribunal should place little weight on this point. Further, as the updated request did not seek the disclosure of the identities of any individuals, any alleged risk of harassment of those individuals was irrelevant. On this basis the Appellant argued disclosure would not amount to a breach of confidence.
 - c) the public interest in maintaining confidentiality in the report outweighed the public interest in its disclosure and the First Respondent had been wrong to conclude otherwise. Factors raised are addressed below, including the right to freedom of expression under Article 10 European Convention of Human Rights ("ECHR").

Evidence

10. The Tribunal had before it an open bundle, shared with all the parties containing documents and correspondence but no witness statements. There was in addition a closed bundle containing the disputed report and other materials which was subject to a ruling under rule 14(6) of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 such that it has not been shared with the Appellant.

Legal Framework

11. The Tribunal's remit is governed by section 58 of FOIA. This requires the Tribunal to consider whether the Decision Notice made by the First Respondent is in accordance with the law or where the First Respondent's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal is entitled to receive evidence that was not before the First Respondent and may make different findings of fact from the First Respondent.

12. Section 41 of FOIA provides 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."*

13. The Tribunal agreed with the way in which the First Respondent set out, in its response to this appeal, what it considered to be the correct approach to section 41. Thus there were four criteria to be met:

"These are the criteria set out in the Commissioner's 2017 Guidance Information provided in confidence (section 41) (the "Section 41 Guidance"), para 8.

***First**, the authority must have obtained the information from another person (see section 41(1)(a).*

***Second**, its disclosure must constitute a breach of confidence (see section 41(1)(b)). It is common ground between the parties that the question of whether there has been a breach of confidence first involves a three-stage test, as held in *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415, 419 per Megarry J:*

- 1) the information must have "the necessary quality of confidence",*
- 2) it must be "imparted in circumstances importing an obligation of confidence", and*
- 3) there must be "an unauthorised use of the information to the detriment of the party communicating it".*

*If that three-stage test is met, such that disclosure of the information would otherwise constitute a breach of confidence, the court must then turn to consider whether the public interest in disclosure overrides the competing public interest in maintaining the duty of confidence: *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57, para 67.*

This is commonly called the 'public interest defence' and forms a complete defence to a claim for breach of confidence.

In the context of section 41, this means that the Tribunal is required to consider whether, had the public authority chosen to disclose the information, it could have successfully raised a public interest defence to any claim for breach of confidence. If the public authority could have successfully raised such a defence, then disclosure should be granted (as any claim for breach of confidence would not then be actionable). In its consideration of the public interest defence, the Tribunal is required to weigh the competing public interests - the interest in disclosure, and the interest in maintaining confidence in the information sought - against each other.

Third, *a legal person must be able to bring an action for the breach of confidence (see section 41(1)(b)).*

Fourth, *that action must be likely to succeed (see section 41(1)(b)). In the words of the Minister promoting FOIA in its passage through Parliament (endorsed by the FTT in *Higher Education Funding Council for England v Information Commissioner EA/2009/0036*, para 25(d), implicitly approved by the UT in *Rob Evans v Information Commissioner [2012] UKUT 313 (AAC)*, and relied on the Section 41 Guidance, para 70):*

"... 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."

*In practice, the fourth criterion will typically be met in cases where the other three criteria are satisfied. It is difficult to conceive of a case where a court would find that disclosure of the information by the public authority would satisfy the three stages of the test in *Coco v A N Clark* (and so constitute a breach of confidence), where the public interest in maintaining confidence in the information outweighs the public interest in disclosure (so the public authority would not be able to rely on the public interest defence), but where any action for breach of confidence would still not be likely to succeed".*

14. The Appellant sought to raise, as one of the factors that was to be considered for the purposes of the fourth criteria, Article 10 ECHR. Article 10 provides:

"1. Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interferences by public authority...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Tribunal analysis

15. The Tribunal noted that the first criteria was not disputed. It was not however clear to the Tribunal, as asserted by the First Respondent, that in relation to the second criteria, it was agreed by the Appellant that the report has the *"necessary quality of confidence"*, as required at stage 1 of the test in *Coco v A N Clark* or that the report was *"imparted in circumstances importing an obligation of confidence"*, as required by stage 2 of the *Coco v A N Clark* test.
16. On both counts the Tribunal is satisfied that the tests are met given that the Bristol Fawcett and its members made clear when it submitted the report, and on subsequent occasions, that the report was provided to the First Respondent in confidence and that they would not consent to its publication.
17. With regard to the question of detriment to the members of Bristol Fawcett, the Appellant argues that because there is no suggestion that they have ever harassed anyone from the Bristol Fawcett, disclosure to the Appellant could not cause a detriment to those individuals. The Tribunal notes that no one has suggested that this was the case, and takes the view that, as disclosure under FOIA is to the world at large, not just the Appellant, there would be no control over further dissemination of the information if disclosed. The Tribunal agrees therefore with the First Respondent that the question is whether Bristol Fawcett or its members are likely to suffer detriment at the hands of anyone, not just the Appellant, through the publication of the report.
18. Taking into account the evidence provided confidentially further to the rule 14 ruling, the Tribunal accepts that the Bristol Fawcett members have been subject to harassment on account of their involvement in the debate around the licensing of SEVs in the area. The Tribunal considered the Appellant's argument that a version of the report with names redacted would remove any risk of harassment. However, it takes the view that that it is not necessarily the disclosure of individual names that would lead to any detriment. It seems likely that given the long-running nature of the debate over SEVs in the area, the identities of the members of the former Bristol Fawcett are likely to already be well-known. The Tribunal agrees with the First Respondent that it is the fact of the disclosure that would risk *"inciting a renewed round of harassment against members of Bristol Fawcett, rather than the disclosure of any individual members' names or any other data within the report"*.

19. The Tribunal is satisfied that disclosure of the report whether redacted of names or not would be likely to cause detriment to Bristol Fawcett members, such that the third stage of the *Coco v A N Clark* test is met.
20. The Tribunal turned next to whether the public interest in maintaining confidence in the report outweighs the public interest in disclosing the report. As explained above, whilst section 41 is an absolute exemption, on account of the four criteria which underpin the engagement of section 41, this balancing exercise comes into play.
21. The Tribunal accepts as argued by the Appellant and acknowledged in the Decision that there is a public interest in disclosing the information. The First Respondent's position is however that, despite these factors (which are addressed in detail below), the public interest in disclosing the report is outweighed by the public interest in maintaining its confidence. It follows, the First Respondent submits, that the Council would not be able to successfully rely on the public interest defence, and so a claim for breach of confidence by Bristol Fawcett members would be actionable and likely to succeed.
22. Dealing first with the Appellant's arguments. The Tribunal gave weight to the argument of the Appellant that the fact that the report was an academic style report, such that there was a greater public interest in disclosure of the information. As a general proposition it was in the public interest for the input to public sector decision making to be made public and open to scrutiny. The Tribunal accepted the valid concern that reliance upon confidential information could impede the ability of members of the public to interrogate evidence underpinning any decision taken into account by the First Respondent. There were weighty issues at stake with regard to licensing of SEVs including, as persuasively argued by the Appellant, the employment of individuals working in the sex industry.
23. The Tribunal was aware there had been a 2021 Consultation which concerned the SEV industry and which post-dated the Second Respondent receiving the report from Bristol Fawcett. The Appellant argued that the report "*influenced the initiation*" of that consultation. The Tribunal however made no finding on this point instead noting that the fact of the Consultation did then go on to give an opportunity to others to put forward their views such that the decisions in relation to SEV licensing would have been based on a wider range of stakeholders. Thus, the public interest in disclosure of the report was reduced.
24. In relation to other points made by the Appellant, the Tribunal noted that it was considering a factual matrix that applied when the request was made, or at the latest when finally refused. The letter from United Sex Workers dates from January 2022, seven months after the updated request was made in May 2021. The Tribunal agreed with the First Respondent moreover, that the fact that a union has threatened a judicial review does not mean that the policy is potentially unlawful. It was not the role of this Tribunal to assess the legality of any licensing of SEVs nor to assess whether the existence of SEVs causes or correlates to violence against women and girls.

25. The Appellant has provided no evidence to support the serious allegation made that Bristol Fawcett is potentially guilty of wrongdoing and the Tribunal gave no weight to this in considering the public interest defence. Having considered the disputed information, the Tribunal satisfied itself that there was nothing in the report which indicated any misconduct.
26. Finally, in terms of the Appellant's submissions, they submitted that their right to freedom of expression under Article 10 ECHR was engaged as they seek to be able to express their views on the report. The Tribunal accepted the First Respondent's submission that article 10 did not create the right to receive information under the FOIA regime: *Kennedy v The Charity Commission* [2014] UKSC 20. Either way, this is a qualified right which can be outweighed by the legitimate interests listed in Article 10(2), one of which is "*preventing the disclosure of information received in confidence*".
27. Thus, the public interest in freedom of expression is to be weighed against the public interest in maintaining confidentiality. This mirrors the balancing exercise which the Tribunal considers under section 41 FOIA. The Tribunal is of the view that, contrary to the Appellant's argument, the Decision does not ignore the relevance of article 10 to the public interest defence. As the First Respondent has argued:
- "the reason why the public interest defence has to be considered, and was considered in the Decision, is because of article 10. That was the point made by the Court in Appeal in HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776, [2008] Ch 57, para 67, which is the source of the dicta relied on by the Appellant at Grounds §18(g) (see also the discussion in the 2017 Guidance, paras 72-81)."*
28. The Tribunal agreed with the First Respondent's submissions in this relation to the balancing exercise.
29. Thus, on a general basis it was accepted that there is an inherent public interest in confidences being maintained by public bodies. If not respected, individuals would be less likely to supply confidential in the future. This would be to the detriment of the quality of decision-making. In this case, the First Respondent pointed out and the Tribunal agreed that it was vital, given its licensing role and the long running controversy over this, that the Second Respondent maintain the trust of all stakeholders in making that decision. Disclosing the report was likely to risk undermining that trust from members of Bristol Fawcett and other stakeholders, who would be concerned that any information that they had supplied to the Second Respondent in confidence might also be disclosed.
30. The Tribunal also accepted that there was persuasive evidence that the individuals who supplied the report to the public authority have previously been subject to harassment due to their involvement in the debate. Thus, the Tribunal agreed with the First and Second Respondent that not only would disclosure of the report risk leading to further harassment of these individuals, but could have a negative impact on others being open in their opinions in future.

31. Finally, the Tribunal noted that the Appellant had themselves made an application for anonymity, on the basis that third parties could otherwise identify them and their involvement in the debate. It was decided that the Appellant should remain anonymous. Without detracting from the appropriateness of this, the Tribunal took the view that many of the arguments deployed by the Appellant in applying for anonymity applied equally in terms of the risk of harassment to the members of the Bristol Fawcett Society.
32. The Tribunal concluded, in light of its reasoning above, that the public interest in maintaining the confidentiality of the report outweighs the public interest in its disclosure. It followed that the First Respondent would be unlikely to be able to successfully rely on the public interest defence to a breach of confidence claim. Thus, section 41 is engaged, and the report is exempt from disclosure.

The appeal is dismissed.

Signed :

Tribunal Judge Melanie Carter

Date:

10 November 2023