

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 10 June 2010

**Public Authority:** Companies House  
**Address:** Crown Way  
Maindy  
Cardiff  
CF14 3UZ

### Summary

---

The complainant made a freedom of information request to Companies House for information it had received in relation to a complaint it had previously investigated against a named company. Companies House refused the request under the exemptions in section 41 (Information provided in confidence) and section 43 (Commercial interests) of the Act. The Commissioner has investigated the complaint and has found that section 41 applies to all of the requested information and that Companies House dealt with the request in accordance with the Act. The Commissioner requires no steps to be taken.

### The Commissioner's Role

---

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

---

2. The Commissioner notes that under the Act Companies House is not a public authority itself, but is actually an executive agency of the Department for Business, Innovation and Skills which is responsible for Companies House. Therefore, the public authority in this case is in fact

the Department for Business Innovation and Skills and not Companies House. However, for the sake of clarity, this decision notice refers to Companies House as if it were the public authority.

3. The complainant had previously complained to the public authority that information supplied to it by a named company was misleading. As a result the public authority investigated the complaint and informed the complainant, via his MP, that it was satisfied that the information it had received was not misleading. On 10 July 2009 the complainant made a freedom of information request to the public authority for the 'evidence' submitted by this named company ["the company"] in response to that complaint.
4. Companies House responded to the request on 4 August 2009 when it confirmed that the requested information was being withheld under the exemptions in section 41 (Information provided in confidence) and section 43 (Commercial interests) of the Act because the information had been provided in confidence and disclosure would prejudice the commercial interest of the company concerned. It added that it had considered the public interest test and has concluded that there was no general public interest in disclosure.
5. On 6 August 2009 the complainant asked the public authority to carry out an internal review of its handling of his request. In particular the complainant suggested that because the company was in 'financial disarray' disclosure would have no commercial impact on its operations.
6. The public authority presented the findings of its internal review on 13 August 2009 at which point it explained that it was upholding its earlier decision to refuse the request under section 41 and section 43. As regards section 41 the public authority said that in deciding whether the exemption applied it had asked itself the following questions:
  - Was the information obtained by the public authority from another person?
  - Is the information held subject to a duty of confidence?
  - Would the disclosure of this information to the public, otherwise than under the FOIA, constitute an actionable breach of confidence? This will include consideration of whether there would be a defence to an action for breach of confidence.

7. The public authority concluded that the answer to these questions was 'yes' and that it did not believe that a public interest defence could be established.
8. As regards the section 43 exemption the public authority confirmed that it was specifically section 43(2) that was being applied. It explained that the requested information gives details of the company's past funding and sponsorship as well as potential future sponsorship and partnerships and that disclosure could prejudice the commercial interests of the company and the other organisations concerned. It said that it did not agree with the complainant's conclusion that because the company had no real funds there could be no claims of commercial confidentiality. Having considered the public interest test, it said that because the information concerned a third party (as opposed to the public authority) it could not see any greater public interest in disclosure that would outweigh the public interest in maintaining the exemptions.

## **The Investigation**

---

### **Scope of the case**

9. On 10 August 2009, prior to the completion of the internal review, the complainant contacted the Commissioner to complain about the public authority's refusal of his request. The complainant was then advised by the Commissioner to seek an internal review before submitting his complaint. The complainant re-submitted his complaint on 15 October 2009 at which point he questioned the public authority's application of the two exemptions on which it was seeking to rely.

### **Chronology**

10. On 20 October 2009 the Commissioner contacted the public authority with details of the complaint. In particular the Commissioner asked the public authority to provide him with copies of the requested information, clearly marked to show where any exemption was being applied.
11. On 11 November 2009 the public authority provided the Commissioner with copies of the requested information together with some background details on some of the issues surrounding the complaint.
12. On 31 March 2010 the Commissioner wrote back to the public authority with some supplementary questions on its application of the

exemptions. For section 41, the Commissioner explained that the most commonly cited test for a breach of confidence was that set out *Coco V Clark* and that in most cases he would apply this test when considering if the exemption was engaged.<sup>1</sup> The Commissioner acknowledged that the internal review had set out in detail why the exemption was believed to apply but believed that the public authority may want to be aware of his approach in case it wished to make any additional representations on this point.

13. The Commissioner also asked the public authority to clarify which parts of the information section 43(2) was being applied to. He also asked the public authority to further explain why disclosure would prejudice the commercial interests of the company and to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.
14. The public authority responded to the Commissioner on 29 April 2010 and provided answers to his questions on the application of the exemptions.

### **Findings of fact**

15. The public authority is the UK Registrar of companies and its main functions are to:
  - incorporate and dissolve limited companies;
  - examine and store company information delivered under the Companies Act and related legislation; and
  - make this information available to the public.<sup>2</sup>

### **Analysis**

---

16. A full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

---

<sup>1</sup> *Coco v A N Clark (Engineers) Limited* [1968] FSR 415

<sup>2</sup> <http://www.companieshouse.gov.uk/about/functionsHistory.shtml>

## Exemptions

### Section 41 – Information provided in confidence

17. The public authority has confirmed that the section 41 exemption is being applied to all of the requested information. Section 41(1) provides that information is exempt if it was obtained from any other person and disclosure of the information to the public by the public authority holding it would amount to a breach of confidence actionable by that or any other person.
18. In this case it is clear that the information was received by the public authority from the company in response to an earlier complaint from the complainant. The Commissioner would stress that for the purposes of section 41 'person' includes both natural persons and legal persons such as companies.
19. As noted above, the most commonly cited test of an actionable breach of confidence, for commercial information, is that set out in the case of *Coco v Clark*. The Commissioner recognises that there are other approaches to analysing the common law of confidentiality but considers that this is the appropriate test to apply in the circumstances of this case. Under this test a breach of confidence will be actionable if:
  - the information has the necessary quality of confidence,
  - the information has been imparted in circumstances importing an obligation of confidence, and
  - there was an unauthorised use of the information to the detriment of the confider.

#### The necessary quality of confidence

20. Information can be said to have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. In this case the public authority explained that the requested information was not in the public domain and having reviewed the information the Commissioner is satisfied that this is indeed the case.
21. It is generally accepted that, since the law does not concern itself with trivialities, information which is trivial will not have the necessary quality of confidence. In this case the information relates to the financial history of the named company as well as future plans for its business. It is clear that this information is not trivial and the Commissioner is mindful of the findings of the Information Tribunal in a

case in which it considered the quality of confidence and concluded that:

"Information cannot be said to be trivial if it is of importance to the person whose privacy has been infringed."<sup>3</sup>

22. The named company clearly considers the information to be important to the success of its business and has argued, to the public authority, that its confidence should be maintained. In light of this, and given the commercially sensitive nature of the information, the Commissioner is satisfied that the requested information has the necessary quality of confidence.

#### An obligation of confidence

23. Even if information might otherwise be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances giving rise to an obligation of confidence. Information shared in public will therefore not be confidential.
24. An obligation of confidence can either be expressed implicitly or explicitly. In this case the named company specifically asked the public authority to treat the information as 'commercial in confidence'. As far as it was concerned the information was being supplied to the public authority for the sole purposes of allowing it to investigate a complaint that information it had previously supplied in support of its registration was misleading. It had no expectation that the information would be shared more widely and indeed took steps to ensure that the public authority treated the information as confidential. Therefore the Commissioner is satisfied that this element of the test has also been met.

#### Detriment to the confider

25. The Commissioner has to be careful not to reveal the reveal the content of the requested information or details about the company concerned. However, he does wish to highlight the fact that the company appears to have been the focus of a long running dispute over a very controversial issue in its particular field. Having reviewed the withheld information it is also clear that the named company, the confider of the information, is convinced that disclosure of the information would be used by certain individuals to attempt to discredit it and to frustrate its financial plans for the future including its plans for obtaining new sponsorship deals, which appears to be an integral part

---

<sup>3</sup> S v Information Commissioner and General Register Office [EA/2006/003], para. 36.

of its business model. The named company also believes that the information would be used to cause, or else would result in, distress to individuals within the company. The Commissioner is aware of a particular website that would appear to show that the named company's concerns are not without some foundation.

26. The Commissioner has taken into account the commercial nature of the information and the wider context in which it is held and has concluded that the information would result in a detriment to the company if it were disclosed.

Is there a public interest defence to a breach of confidence?

27. The Commissioner is satisfied that the information was obtained from a person other than the public authority holding it and that disclosure would amount to an actionable breach of confidence. However, before the Commissioner can decide if the exemption is engaged he must consider whether a public interest defence to a breach of confidence could be established.
28. Section 41 is an absolute exemption and therefore is not subject to the ordinary public interest test that would be applied for a qualified exemption. Under section 2(2)(b) of the Act information shall only be withheld where a qualified exemption applies if the public interest in maintaining that exemption outweighs the public interest in disclosure. For section 41 the test is reversed: a public interest defence will only succeed if the public interest in disclosure outweighs the public interest in maintaining the confidence.
29. The Commissioner's view is that where there is an express obligation of confidence then that confidence should not be overridden on public interest grounds lightly and that any reasons why the public interest favours disclosure should be clearly stated. In its internal review the public authority referred to guidance originally produced by the then Department for Constitutional Affairs which sets out the principles which ought to be looked at when considering a public interest defence to a breach of confidence under section 41 of the Act.<sup>4</sup>
30. Referring to this guidance, the public authority noted that there is a public interest in ensuring public scrutiny of the activities of public authorities. Similarly, the complainant contends that disclosure is necessary to shed light on the work of the public authority and that it would demonstrate that it had failed to properly exercise its duties with regard to registering companies. The Commissioner is not persuaded

---

<sup>4</sup> <http://www.foi.gov.uk/guidance/exguide/sec41/chap03.htm>



by this argument on the basis of the information he has seen. Whilst there would be, at best, a general public interest in disclosure, it must be remembered that the information relates exclusively to the affairs of the company concerned. Disclosure would not in any real sense aid public understanding of the work of the public authority nor would it allow for greater scrutiny of its activities and the Commissioner would find it difficult to conceive of any other reasons that would weigh the public interest in favour of disclosure.

31. In any event, the Commissioner finds the public interest arguments in favour of maintaining the confidence are compelling. As he has already noted, there will always be a general public interest in maintaining a confidence, and in this case this extends to protecting the ability of the public authority to receive information from registered companies so as to allow it to perform its functions. The Tribunal has itself recognised this fact in the case of *Bluck v Information Commissioner* when it quoted from an earlier case heard in the House of Lords:

“...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence...”<sup>5</sup>

32. There is also a public interest in protecting the interest of the confider of the information, which in this case is the company. This public interest is twofold. Firstly, there is a public interest in protecting the commercial confidentiality of the information. The company considers the information to be commercially sensitive and believes that disclosure would jeopardise ongoing commercial negotiations and adversely affect the viability of the company. Given the concerns that disclosure would cause distress to individuals within the company, there is also a public interest in protecting the privacy of individuals as recognised in Article 8 of the Human Rights Act 1998 which provides that ‘Everyone has a right to respect for his private and family life, his home and his correspondence’.
33. For the reasons given above the Commissioner has decided that there would be no public interest defence to a breach of confidence in this case and that therefore any breach of confidence would be actionable. Consequently the section 41 exemption is engaged.

---

<sup>5</sup> *Bluck v Information Commissioner and Epsom & St Helier University NHS Trust* [EA/2006/0090] para. 8.



34. The Commissioner is satisfied that all of the information is exempt under section 41 and therefore has not gone on to consider the public authority's application of section 43.

### **The Decision**

---

35. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

### **Steps Required**

---

36. The Commissioner requires no steps to be taken.

## Right of Appeal

---

37. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 10<sup>th</sup> day of June 2010**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

---

**Section 41(1)** provides that –

“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.”

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”