FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS) **Appeal Reference: EA/2017/0218**

Heard via CVP on 21 September 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL
(SITTING AS A JUDGE OF THE FIRST-TIER TRIBUNAL)
TRIBUNAL MEMBER J RANDALL CBE
TRIBUNAL MEMBER RAZ EDWARDS

Between

IAN DRIVER

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THANET DISTRICT COUNCIL

Second Respondent

For the Appellant	in person
For the Commissioner	Ms A Littlewood
For the Thanet District Council:	Ms J Lambert

DECISION AND REASONS

Decision

The appeal is dismissed for the reasons set out below

Preliminary matters

Abbreviations

Barco De Vapor	Barco De Vapor v Thanet District Council [2014] EWHC 490
DN	Decision notice number FS50640981 dated 7 August 2017
FOIA	Freedom of Information Act 2000
ICO	Information Commissioner
Request	Request made by the appellant to Thanet on 8 April 2016
Upper Tribunal's decision	Information Commissioner v Driver and Thanet District Council [2020] UKUT 333 (AAC)

Mode of hearing

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way, and no objections were made to that.

2. The Tribunal considered the bundle prepared for the First hearing, a bundle prepared for this hearing, an authorities bundle, additional material supplied by the appellant and a skeleton argument from Ms Lambert. We also took into account a closed bundle, but it was not necessary for the panel to hear any closed evidence or closed submissions, nor have we produced a closed decision.

Background

3. This appellant wishes to know the identities and the sums of money paid to five entities by way of an out of court settlement reached between the five and Thanet some years ago.

4. In September 2012, following an incident involving a particular exporter in which 45 sheep died, Thanet imposed a ban on live animal shipments from the port of Ramsgate. That ban lasted just over a month but in Barco De Vapor, the High Court found the ban was to have been in breach of EU law and, as a result, that Thanet was liable in damages and had to compensate the claimants.

5. The appellant requested details of how much Thanet had spent in paying damages to the live animal exporters, legal fees and for a breakdown of the

damages by recipient name, and how much Thanet had spent to cover the legal costs of the exporters. The request was made in respect of the financial years 2013/14, 2014/15, 2015/16 and 2016/17.

6. Thanet replied on 10 May 2016, providing a table showing the value of compensation payments and the legal costs in each financial year, and confirmed that there had no further court cases since the High Court hearing in December 2013. Thanet maintained, however, that the remainder of the information was exempt from disclosure under section 41(1) of FOIA as the information requested had been provided in confidence.

7. The appellant sought a review, arguing that as two names (Barco De Vapor B.V.[1] and Trevor Head) had already been disclosed as they were named parties to the proceedings, therefore consistency required disclosure of the other names, and that there was an overwhelming public interest case for the disclosure of the withheld information. The council responded on 10 June 2016, although later accepted that the review had been inadequate.

8. On 8 August 2016, the appellant contacted the ICO. In its submissions to the ICO, Thanet explained that they had not withheld the names Barco De Vapor B.V and Trevor Head as the former was a named party in the High Court action, and Trevor Head had been paid compensation through a Consent Order made in that action.

9. The ICO concluded that section 41(1) was engaged as the withheld information was information obtained by a third party and that its disclosure would constitute an actionable breach of confidence, given that it would be detrimental to the five unnamed claimants. The ICO rejected the public interest arguments raised.

10. The appellant appealed against that decision. His appeal was heard on 3 December 2018. The appellant attended, and Thanet were represented by counsel; the ICO did not attend.

11. The First-tier Tribunal allowed the appeal on the basis that the withheld information had not been "obtained" from another person within the meaning of section 40 (1) of the FOIA. It also held that Thanet was not allowed to rely on two additional exemptions set out in section 42 and 43 of FOIA

12. The ICO appealed on the grounds that the FtT had erred: (i) in concluding that the names had not been "obtained" by Thanet; (ii) in concluding that the exporters names were terms agreed in the settlement agreements; and, (iii) in refusing Thanet's application to rely on additional grounds.

[1] A company incorporated in the Netherlands

13. In his decision[2] issued on 26 November 2020, UTJ Wikeley found that the FtT had erred on grounds (i) and (ii) but not on ground (iii). He then ordered that the case be remitted to a differently constituted First-tier Tribunal.

Terms of the Remittal

14. The Upper Tribunal directed as follows

> 1. This case is remitted to a differently constituted First-tier Tribunal for reconsideration at an oral hearing (this may be a 'virtual' hearing e.g. by video platform).
>
> 2. The new Tribunal is to proceed on the basis that the threshold condition in section 41(1)(a) of FOIA is satisfied, i.e. that the exporters' names are information "obtained by the public authority from any other person".
>
> 3. The new Tribunal must therefore consider Mr Driver's further grounds of appeal relating to whether the confidential information exemption is engaged by virtue of section 41(1)(b).
>
> 4. The new Tribunal should also consider any further exemptions which are
> raised in accordance with the First-tier Tribunal's case management directions.
>
> These Directions may be supplemented by later directions by a Tribunal Judge, Registrar or Caseworker in the General Regulatory Chamber of the First-tier Tribunal.

Directions & Interlocutory Proceedings

15. On 30 December 2020 further directions were issued giving Thanet an opportunity to raise additional exemptions, setting out a timetable.

16. In her skeleton argument, the ICO seeks to rely on the exemption set out in section 40 of FOIA if the appeal is allowed in relation to section 41; Thanet no longer seeks to rely on the section 43 exemption.

The appeal hearing

17. The appellant did not give evidence, nor did he call any oral evidence. The panel heard evidence from Mr Brown and Ms Culligan who were called by Thanet.

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[2] Reported as Information Commissioner v Driver and Thanet District Council [2020] UKUT 333 (AAC)

18. The panel then heard submissions from Ms Lambert, Ms Littlewood and Mr Driver. Ms Lambert's submissions related primarily to whether section 41(1)(b) is met; Ms Littlewood adopted those, making a few additional points, and focused on whether the section 40 exemption was made out.

19. It was agreed that the closed evidence contains the names of five entities to which compensation was paid. It was therefore our view that there was no need for a closed session or for any further gist of the information to be supplied.

20. We reserved our decision at the close of submissions.

The law

21. Section 2 of FOIA provides, so far as is relevant:

> 2.— Effect of the exemptions in Part II.
> …
> (2) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
>
> ….
> (f) in section 40 –
> (i) subsection (1), and
> (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section.
> (g) section 41, and

22. Section 40 of FOIA provides (so far as is relevant to this appeal):

> 40.
> …
>
> (2) Any information to which a request for information relates is also exempt information if—
> (a) it constitutes personal data which do not fall within subsection (1), and
> (b) either the first or the second condition below is satisfied.
> (3) The first condition is—
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
>
> (i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

23. Section 41 of FOIA provides

41.— Information provided in confidence.

(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.

Discussion

24. Our task is to consider this matter afresh and in doing so, we have to consider information which was available at the time the Appellant's request was made, and at the time the decision notice was prepared, but was not available to the Commissioner.

25. We must consider first what is meant by *actionable breach of confidence*. We have in submissions and in the skeleton arguments been taken to HEFCE v ICO [EA/2009/036] at [30]:

> 30. Our conclusion on this part of the case, therefore, is that the HEFCE must establish that disclosure would expose it to the risk of a breach of confidence claim which, on a balance of probabilities, would succeed. This includes considering whether the public authority would have a defence to the claim. Establishing that such a claim would be arguable is not sufficient to bring the exemption into play.

26. We are persuaded that we should adopt that approach; no authority has been cited to us indicating that we should not.

27. We turn next to what has to be shown in order to show that disclosing the withheld material would constitute a breach of confidence.

28. The starting point for that is the test identified in Coco v A N Clark (Engineers) Ltd [1968] FSR 415 where Megarry J said this:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. I must briefly examine each of these requirements in turn.

29. We recall that in that case, as has here been determined by the Upper Tribunal, the information was not passed as part of a contract. We recall also that equity intervenes to prevent unfairness.

30. We are satisfied that in assessing whether the information has the necessary quality of confidence about it and the circumstances in which it was transmitted import an obligation of confidence are to be assessed objectively from the standpoint of a reasonable person.

31. We are satisfied also that there must be some value (not necessarily commercial) to the party claiming confidentiality in the information being treated as confidential; and, that the information is such that a reasonable person in the position of the parties would regard it as confidential.

32. We are satisfied from the evidence of Mr Howes (as adopted by Ms Culligan) (and it does not appear to be in dispute) that the information was passed to Thanet during the course of negotiations for compensation. Although Ms Culligan did not have direct knowledge of those, we accept that she has examined the relevant files and that we can rely on her evidence on this. We accept from that evidence that there was an expectation from all parties that the information would be kept confidential.

33. We bear in mind also that the context is negotiations to achieve an out of court settlement. There are good reasons of public policy why such negotiations are conducted with an expectation of confidentiality, not least of which is to encourage parties to settle disputes without the need to go to court. These negotiations were, we accept, carried out on a without prejudice basis. That, in turn, prevents the parties from revealing later what was discussed. The corollary of that is to impose a duty of confidentiality as, otherwise, the basis of without prejudice communications would be undermined. We find that is so irrespective of the fact that there was no express agreement to keep matters confidential; that was not necessary given the nature of the negotiations.

34. The appellant sets out in detail in his grounds and submissions that the information is not confidential as the identities of the parties are well known, may have been witnesses in the High Court case and have been circulated on the internet on the KAALE site and elsewhere. This, we were told, extends to video evidence of those concerned in the trade and photographic evidence showing

the business names and identities of those involved in the trade. We are satisfied that this evidence exists, but what it does not do is identify with any certainty any entity, real or corporate, as having been in receipt of compensation or, importantly, the amount paid to each. As the ICO submitted, more than five entities have been identified, and thus, it can only be speculated that the five entities in question are included within the group of entities identified on KAALE or elsewhere. This is not a situation in which, for example, the withheld information - that X was given compensation - has been disclosed to the public, thus the confidential nature of the information has been retained nor has, on the basis of the evidence before us, confidentiality been waived.

35. For these reasons, we are satisfied on the basis of the evidence, that the information has the quality of confidence and was transmitted in circumstances which import a duty of confidentiality.

36. We turn next to the question of detriment, an issue which formed the greater part of the appellant's closing submissions. In that context, we consider first what is meant by "detriment" and whether it is necessary to prove it. In Coco Megarry J observed:

> Some of the statements of principle in the cases omit any mention of detriment; others include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect. The point does not arise for decision in this case, for detriment to the plaintiff plainly exists."

37. Similarly, in the A-G v Guardian & Ors [1990] 1 AC (the Spycatcher case), Lord Keith observed:

> "… 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 even where the confider can point to no specific detriment to himself … So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure to him would not be harmful to him in any positive way.

38. We deduce from this that, insofar as detriment needs to be shown, it must be detriment to the person who confided the information. Much of the relevant case law relates to trade secrets where financial loss is relatively easily identified. But those cases are not analogous to the situation in this case.

39. The greater part of the submissions made to us focused on what might be the consequences to the entities of disclosure primarily in terms of physical or financial harm to the entities none of whom have provided direct evidence to the

Tribunal. There is little or no direct evidence of likely financial harm, beyond statements to that effect made by those possibly affected.

40. We accept the account given by Mr Brown of the intimidation of harbour staff, assaults, obstruction and so on, and the interference with the exporters lawful business. We bear in mind that by the date of Thanet's decision, some years had elapsed since compensation payments had been made, and the nature of the protests had changed. It is difficult to ascertain how real any risk to the five entities in question is, bearing in mind also that the issue of detriment is primarily to the parties. Nonetheless, having considered the evidence of Mr Brown, and the emails disclosed by Thanet, we consider that the concerns of the five entities are or were real.

41. That said, we consider that there is merit in the appellant's submission that much of the claims that there would be financial loss to the entities is not grounded in evidence, and that some of the submissions made – for example that competitors might glean evidence to their advantage are at best speculative.

42. We consider that there is a detriment in the disclosure of withheld material in that the material was supplied on the basis that it was to be kept confidential. The parties clearly proceeded on that basis. The fact that they had done so, and had suffered loss, is something that they wished not to be known.

43. We remind ourselves, looking at the evidence, that our role is to consider only if it is more likely than not that a court would find a breach of confidence. We find that, given the particular circumstances in which the information was passed, and the relationship of trust that was thus created between the five entities and Thanet, that this would be so, the detriments identified above being sufficient, if it were necessary to prove such a detriment.

Public interest

44. We remind ourselves that, in addressing this issue, we do so within the framework of considering whether or not a court would find a breach of confidence. We are not considering the public interest test applicable under FOIA to exemptions other than section 41 – for example section 43.

45. The approach that we should take is set out in Associated Newspapers v HRH Prince of Wales [2006] EWCA Civ 1776 at [67] to [69]:

> 67. There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances

> justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.
>
> 68. For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all 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.
>
> 69. In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In *Campbell v Frisbee [2002] EWCA Civ 1374; [2003] ICR 141* at paragraph 22 this court drew attention to this conflict of view, and commented:
> "We consider that it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the right of freedom of expression, than a duty of confidence that is not buttressed by express agreement"
>
> We adhere to this view. But the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case.

46. We consider that in this case there is a significant weight to be attached to the public interest in keeping confidential negotiations undertaken on a without prejudice basis. All the parties who entered into those negotiations did so on the assumption that they would be kept confidential, an assumption they were rightly entitled to hold. We consider also that, although there was not a contract in this case, as determined by the Upper Tribunal, the particular nature of the without prejudice negotiations do, we find, add to the weight to be attached to maintaining confidence.

47. We accept, also, that significant weight is to be attached to the public knowing how public funds are spent, and to whom. There is also a public interest in such sums being properly accounted for and tax paid, and in persons not benefiting

from wrongdoing. We are not, however, persuaded that in this case there is any evidence of taxes not being paid or of fraud being committed.

48. We consider that in this case, the public is aware of how much has been paid in compensation. To that extent and, given that the claims for compensation were, as it appears from the email from Calum Liddle of 11 May 2017, reached on a properly costed basis, we see no basis for any argument that the identity of those compensated is necessary to uncover any potential impropriety. There is, in reality, no proper evidence of that, nor can it be argued that disclosure is necessary in order for HMRC to be sure that tax was properly paid, if indeed tax was payable in respect of an out of court settlement.

49. We find further that there is insufficient evidence to show that any of the five entities in question are being paid for having mistreated animals, or were compensated for unlawful activity.

50. Taking all of these factors into account, and having paid close attention to the appellant's submissions, we find that, on the particular facts of this case, bearing in mind the nature of the circumstances in which the duty of confidentiality arose, we find that there is no public interest in disclosure.

51. Accordingly, for these reasons, we are satisfied by the respondents, that disclosure of the withheld material would give rise to an actionable breach of confidence. On that basis, we find that the section 41 exemption is met.

52. Having found that the section 41 exemption is met, we turn next to consider whether the exemption set out in section 40 is made out. We were addressed on that matter in detail by Ms Littlewood but we consider that it is not necessary for us to make any finding on that issue given our finding that the section 41 exemption is met.

Conclusion

53. For the reasons set out above, we find that the withheld material is exempted information by operation of section 41 of FOIA.

Signed Date: 5 October 2021

Jeremy K H Rintoul Promulgation Date: 12 October 2021

Upper Tribunal Judge Rintoul
(Sitting as a judge of the First-tier Tribunal)