



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

Case No. EA/2013/0045

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS5462275 dated 4 February 2013

Appellants: JAMES AND LYNN CASE

First Respondent: INFORMATION COMMISSIONER

Second Respondent: COLEHILL PARISH COUNCIL

Heard at Field House, London

Date of hearing: 24 October 2013

Date of decision: 12 November 2013

Before

Andrew Bartlett QC (Judge)
Anne Chafer
Andrew Whetnall

Representation:

For the Appellants: in person
For the Commissioner: Michael Lee (counsel)
For the 2nd Respondent: Councillor David Mitchell

Subject matter:

Freedom of information – whether information held – whether s 41 exemption applicable

Cases:

Coco v AN Clark (Engineers) Ltd [1968] FSR 415

Attorney General v Guardian Newspapers (No 2) [1990] 1 AC 109

University of Newcastle upon Tyne v Information Commissioner; BUAV [2011] 2 Info LR 54

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 4 February 2013.

SUBSTITUTED DECISION NOTICE

Public authority: Colehill Parish Council

Address of Public authority: 1 Hornbeam Way, Colehill, Wimborne
Dorset BH21 2QE

Name of Complainant: Mr and Mrs Case

Minster Stone Memorials Ltd

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the public authority did not deal with the complainants' request in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that it ought to have communicated to the complainants the information in the letter received regarding the installation of memorials which was referred to in the minutes of the Wimborne Cemetery Joint Management Committee meeting of 27 November 2011 (Item 11/148).

Action Required

The public authority shall disclose a complete copy of the above-mentioned letter to the complainants no later than 28 days from the date of this decision.

REASONS FOR DECISION

The request and the complaint to the Information Commissioner

1. Mr and Mrs Case (“the appellants”) run a business called Minster Stone Memorials Ltd. In the first half of 2012 they made a number of requests for information under the Freedom of Information Act, relating to matters dealt with by the Wimborne Cemetery Joint Management Committee (“JMC”).
2. The Management Committee is a joint committee of three councils, Colehill Parish Council, Wimborne Minster Town Council, and Pamphill and Shapwick Parish Council. The requests were directed to each of the three councils.
3. The appellants were dissatisfied with the responses received, and complained to the Information Commissioner. After investigation, the Commissioner issued a Decision Notice dated 4 February 2013. With one exception, the parties accepted his decision. The exception relates to a letter referred to in the JMC minutes of their meeting of 27 November 2011, held at Wimborne Minster Town Hall. We will refer to this as “the disputed letter”. The Commissioner decided that the disputed letter was properly withheld pursuant to FOIA s 41 (exemption for information received in confidence). The appellants appeal against this aspect of his decision.
4. Colehill Parish Council took the lead in dealing with the requests and with the Commissioner, and was joined as Second Respondent to this appeal (“the Council”).

The questions for the Tribunal

5. The appellants challenge on a variety of grounds the Commissioner’s finding that the s 41 exemption applied to the disputed letter.
6. The Council seeks to support the Commissioner’s decision on s 41, but in addition contends that in any event it did not hold the disputed letter at the time when the information request was dealt with.
7. The Commissioner maintains his position on s 41, and does not agree with the Council’s contention that it did not hold the information at the material time.

Procedural matters

8. We dealt with the following procedural matters at the oral hearing:
- a. There were six pages of the hearing bundle where, having regard to developments prior to the date of the hearing, it had become appropriate for redacted items to be made available to the appellants. We held a closed session at the beginning of the day (c 10.00am) to consider these with the Commissioner and the Council, both of whom agreed that the particular items should be unredacted. They were accordingly made available to the appellants.
 - b. Documents and parts of documents had been removed from the bundles, on the direction of the Registrar, in an effort to exclude irrelevant and unnecessary materials. Because there was an issue as to the credibility of the public authority's version of the facts, the full documents were required. The Commissioner therefore made arrangements for the full documents to be brought to the hearing. After their arrival, the Commissioner and the Council went through them to agree what redactions were required. We held a further closed session to go through the proposed redactions (c 12.30-1.00pm). We refused a number of them on the ground that the FOIA exemption relied upon did not appear to us to be applicable. We permitted redactions where the FOIA exemption appeared to us to be properly relied on. We permitted one redaction on proportionality and case management grounds. The redacted documents were then made available to the appellants for them to consider before the afternoon session.
 - c. After dealing with item 'a' above, we explained to the parties in open session our concerns that the issue under FOIA s 41 depended (among other things) upon the credibility of the account given by the clerk to the JMC of the circumstances in which the disputed letter was received by him and discussed by the JMC. No procedural provision had been made for any witness statements or oral evidence. The appellants were making serious allegations concerning the truthfulness of the clerk's account, which appeared to have some justification in the documentary material. We adjourned for a short period so that the parties could consider what they wished to do. Upon resuming (c 11am), the Council applied for an adjournment to a future date so that the clerk could prepare a witness statement (which, it was said, would contain straightforward innocent explanations of the matters which appeared possibly improper) and take any necessary legal advice. The application was made by their representative Mr Mitchell, who is a parish councillor, the current chairman of the parish council, and a former chief inspector in the police. The application was strongly opposed by the appellants, who had closed their business for the day in order to be present, and who did not require an adjournment for the purpose of preparing cross-examination of the clerk, who was present with Mr Mitchell at the hearing. The Commissioner

took a neutral position on the application. In response to the appellants' opposition, Mr Mitchell indicated that the clerk was happy to give his explanations without an adjournment. Taking into account the respective and somewhat conflicting interests of the parties and of the clerk, and the criteria in rule 2(2) of the applicable procedural rules¹, we decided not to adjourn the hearing. The clerk confirmed to us that he was willing to give his account and affirm its truthfulness.

- d. After refusing the adjournment, at the Commissioner's suggestion we heard the parties first on the issue whether the Council held the disputed letter at the material times. This allowed time for the additional documents, which bore on the s 41 issue, to be brought to the hearing venue.
- e. By 2.10pm the appellants had been able to consider all the additional documents and were content to proceed. The clerk then gave oral evidence and was cross-examined.
- f. After the clerk's evidence we held a short closed session to consider the disputed letter. In this session the clerk gave further evidence about it, and related matters.
- g. The open hearing then resumed. An additional question was answered by the clerk and all parties made their submissions on the s 41 issue. The hearing concluded just before 5pm.

General facts

9. We set out first our findings of fact on the matters which were agreed or which did not appear to us to be realistically capable of serious dispute.
10. We have been shown extracts from the constitution of the JMC, and we have considered Local Government Act 1972 s 214 and Schedule 26. The three councils which send representatives to the JMC are burial authorities. The purpose of the JMC is to exercise the functions of the three constituent councils on a joint basis in relation to the Wimborne cemetery. It is funded by the three councils.
11. The appellants, whose business is conducted in Wimborne and elsewhere, raised concerns about the contents of new regulations introduced by the JMC in late 2011, and about the manner in which they were introduced. Among other steps in furtherance of their concerns, they asked the Clerk to the JMC, Mr Anthony C Sherman, for copies of minutes of meetings of the JMC.

¹ Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended

12. Minute 11/148 of 27 November 2011 dealt with correspondence received. After referring to several letters, the minute, as supplied by Mr Sherman to the appellants on 26 March 2012, stated:

A letter had been received regarding the installation of Memorials. After discussion it was proposed by Cllr J Burden and seconded by Cllr (Mrs) D March that an independent inspection be made of a representative sample of recent Memorials and report obtained. It was also agreed that The Clerk would check with local Cemeteries on their satisfaction (or not) on all Masons. Stone Cleaning would come under the same need for paperwork as any other work, and the receipt book amended to allow for it. Cleaning instructions and permitted methods would be circulated, and it would be re-iterated that any stone removed for any reason would need to be reinstated to BRAMM/NAMM standards. It was also agreed that no calling cards were allowed to be left on new (or old) graves. **Action: The Clerk to contact a Mason re inspection and write to all Masons.**

13. We will refer to this version of the minutes as "version S". We should also explain that BRAMM is the British Register of Accredited Memorial Masons. This is a network of nationally accredited businesses and registered fixers, which promotes a recognised uniform standard of workmanship to meet the requirements of BS 8415 in all burial grounds throughout the UK. NAMM is the National Association of Memorial Masons, which exists to further the memorial masonry industry and promote codes of good practice, including for ethics, business practice, and working practice. We were told (and it was not disputed) that Wimborne cemetery is a BRAMM registered cemetery, where all work must be done by registered masons, and to NAMM standards.

14. In his covering email, Mr Sherman wrote:

Why you need these I do not know as we have concluded the correspondence with you regarding regulations. However, as they are in the public domain, I attach the minutes for November, January and March hereto. There were no meetings in December or February.

15. The next day (27 March 2012) the appellants made their FOI request to the three councils for

a copy of the 'letter received regarding the installation of memorials', which is referred to within the Minutes of the Cemetery Meeting of 27 November 2011, Item 11/148 correspondence.

16. A copy of the disputed letter was not supplied to the appellants. Mr Sherman sought FOI guidance from East Dorset District Council. The Head of Legal & Democratic Services, Keith Mallett, advised him by letter of 11 April 2012:

It is a basic principle of Local Government administration that if you refer to correspondence when dealing with matters in a formally constituted meeting of the Joint Management Committee then background information is also available to anyone who has the right to view the

details of the agenda item. You can only exclude such background information by specifically addressing the criteria in the Local Government Act 1972 Schedule 12 that permits information to be withheld on certain prescribed grounds. The general principle, however, is that information should be available if it is referred to in the report to the meeting as if it were available and annexed to the agenda item under consideration.

Regarding ... [the disputed letter] if you received that correspondence in confidence you can cite that as a reason for not putting it in the public domain although your agenda item considered at the meeting on 27 November 2011 should have expressly cited that the letter was exempt/confidential information, not for disclosure to the public.

17. Irrespective of the detailed provisions of Schedule 12 or Schedule 12A of the Act of 1972, we accept Mr Mallett's letter as setting out the normal procedural practice of local authorities in the respects which we have quoted.

18. Since the JMC is a committee of the three councils, after each meeting it reports to each of the councils by way of a copy of the minutes. The minutes of the 27 November 2011 meeting had been circulated in the usual way to the three councils. Mr Mitchell told us that the usual procedure at Colehill Parish Council was that the minutes were placed on the table at the meeting of the Parish Council "for anyone to read and look at if they wish", but that they were not afterwards kept by the Parish Council. He also stated that such minutes were in fact usually drafts, albeit in this case the minutes were not marked as being in draft. The Council's response to the appeal stated: "At the conclusion of the Council meeting the minutes are then shredded in the knowledge that should any further reference be needed a request can be made of the Clerk to the WCJMC". The practice at the other two councils was not the subject of evidence, except that it is clear that Wimborne Town Council retained the minutes and made them available to the public. Mr Case informed us that the minutes of the November meeting were made available or distributed to councillors and relevant council employees of the three councils, being at least 43 people. This was not contradicted, except that it was not clear to what extent the minutes were actually distributed to those persons as opposed to merely being made available to them. The minutes of the November meeting which were made available contained no indication of confidentiality of any of the information contained in them.

19. The JMC minutes for 23 April 2012 recorded at item 12/107:

With regard to the FOI requests, we have been advised that Local Government Act 1972 Schedule 12 permits information to be withheld on certain grounds. The advice was therefore, as the Committee has now agreed that the original letter advising us of the problems was exempt/confidential and is not for disclosure to the public, that this information should be withheld. This also applies to the name of the person who advised us about the business cards as it is normal practice not to disclose identity of complainants.

20. Mr Sherman stated in his evidence that the word “now” in the phrase “the Committee has now agreed” was intended to refer to the April meeting itself. Thus it was only some five months after the event, and only after the information request, that the JMC agreed that the disputed letter should be treated as confidential.
21. During his investigation, the Commissioner received information from the Council, which derived from Mr Sherman, from which the Commissioner understood that the disputed letter had been preceded by a telephone call from the writer, in which confidentiality for the letter had been agreed in advance between the writer and Mr Sherman, and that at the November 2011 JMC meeting no disclosure was made of the confidential details.
22. The Commissioner accepted this account, and decided on 4 February 2013 that the disputed letter was protected from disclosure by FOIA s 41 (information received in confidence).
23. The appellants commenced their appeal to the Tribunal on 10 March 2013. In June 2013 they saw what appeared to be an official copy of the minutes of the JMC meeting of 27 November 2011, being the copy held by the Wimborne Town Council for public inspection. We will call this “version W”. This version differed from the copy supplied to them by Mr Sherman. The relevant minute stated (with differences underlined and struck through):

A letter had been ~~received~~ sent by Anthony O'Hara regarding the installation of Memorials by one local Mason. After discussion it was proposed by Cllr J Burden and seconded by Cllr (Mrs) D March that an independent inspection be made (by Mike Holloway) of a representative sample of recent Memorials and report obtained. It was also agreed that The Clerk would check with local Cemeteries (including Southampton) on their satisfaction (or not) on ~~all~~ Masons. Stone Cleaning would come under the same need for paperwork as any other work, and the receipt book amended to allow for it. Cleaning instructions and permitted methods would be circulated, and it would be re-iterated that any stone removed for any reason would need to be reinstated to BRAMM/NAMM standards. It was also agreed that no calling cards were allowed to be left on new (or old) graves. **Action: The Clerk to contact ~~a Mason M Holloway~~ re-inspection and write to all Masons.**

24. The fact that two versions of the minutes existed had not been appreciated by the Commissioner before he made his decision. In the course of his investigation he had sought information from the three councils. The wording of version S of the minutes was apparent from quotations in materials originating from the appellants, copies of which were contained within materials submitted by the Council to the Commissioner on 16 October 2012. A later letter dated 6 November 2012, in which the parish clerk responded to queries from the Commissioner, set out information obtained from Mr Sherman, which quoted from version W. However the Commissioner's decision notice stated at paragraph 35:

... there is no clear evidence to suggest that the full contents of the letter were discussed at the meeting of 27 November 2011. The WCJMC has explained that although the letter was referred to, it was not disclosed at the meeting whom [sic] had written the letter nor whom the letter was written about. Instead, it has advised the Commissioner that all that was stated at the meeting was that a letter had been received and that as a result an independent inspection of the cemetery would take place. The Commissioner does not consider that there is any evidence before him to doubt this account of events.

25. This summary by the Commissioner was not consistent with version W which, among other things, disclosed the identity of the writer of the disputed letter. We discuss the differences between version S and version W further below.

26. Prior to the oral hearing Mr Sherman had given the following accounts of matters relevant to the November 2011 meeting and the circumstances in which the disputed letter was received:

- a. On a date which the evidence has not identified, he provided version W of the minutes to Wimborne Town Council.
- b. On 26 March 2012 he sent version S of the minutes to the appellants.
- c. On 29 March 2012 he wrote to East Dorset District Council:

This letter was sent to me in confidence, and it came from a trusted source (Nicholas O'Hara), and we do not feel that it would be ethical to release details of it, as it would/might be used to stir up more trouble.

- d. Between 26 October and 6 November 2012 he provided to the parish clerk, Mrs Paine, for onward transmission to the Commissioner, the statement "Withheld the letter as it was provided in confidence by a competitor", followed by an extract of version W of the minutes. The extract was the main text of the minute dealing with the disputed letter, without the action points.
- e. Between 16 and 28 November 2012 Mr Sherman provided further details to Mrs Paine, for onward transmission to the Commissioner, in response to a letter from the Commissioner which explained the legal criteria applicable under FOIA s 41. In these further details he stated:

It was sent and received on the understanding that it remained totally confidential. It gave rise to a specific proposal being made in committee for an independent examination of headstones to be carried out. ...

- f. On 20 December 2012 there was a telephone conversation between Mr Sherman and the Commissioner's investigator, which was recorded as follows:

Q: Why does the WCJMC consider the letter from Mr O'Hara was communicated in circumstances importing an obligation of confidence?

A: Mr O'Hara called before the letter was sent stating that he did not wish for a fuss to be made and therefore wanted to ensure that the letter would not be widely circulated.

Q: Why would Mr O'Hara call to state this rather than just put it in the letter?

A: Mr O'Hara didn't want to make a fuss. He therefore called before sending the letter to discuss its contents with Mr Sherman. Mr O'Hara will often telephone Mr S to discuss things and it was therefore perfectly normal that he would do this before committing something to writing. In light of this phone call, there was no need for Mr O'Hara to expressly state in the letter that it should not be disclosed as this was already understood by Mr S. That he is making a complaint about masons who operate in the same cemetery is in itself indicative that he wouldn't want the letter to be disclosed.

...

Q: How widely has the letter been disseminated?

A: Less than half the councillors involved with the WCJMC have seen the letter.

Q: To what extent were the contents of the letter disclosed at the meeting on 27 November 2011?

A: That a letter expressing concerns had been received and that as a result an independent inspection would be taking place. Mr S stated that he did not wish to disclose publically whom the complaint had been made by nor whom the complaint had been made about.

27. As regards the differences between the two versions of the minutes, we note that, among other differences, version W, if or in so far as it constituted the minutes available to the public-

- a. placed in the public domain the identity of the writer of the letter, Mr Anthony O'Hara, a local competitor of the appellants,
- b. placed in the public domain the fact that the letter made allegations concerning the work of one particular mason,
- c. placed in the public domain the identity of the person chosen to make the inspection,
- d. did not say that the check with other local cemeteries was to relate to "all" masons.

28. The appellants made many criticisms of the behaviour of the JMC. One of them, made at the hearing before us, was that the person commissioned to make the inspection, though qualified, was not licensed at the material time and therefore should not have been working in a cemetery where all memorial work was required to be undertaken by BRAMM registered companies using licensed fixers, and he was apparently a relative of one of the appellants' competitors. We note this as a fact which contributes to the total picture, but do not consider it is necessary to go further into or make findings about the appellants' various criticisms of the methods adopted by the inspector, of the manner in which the new regulations were adopted, or of the JMC's claims about its consultations with NAMM, BRAMM, or other cemeteries.
29. Shortly before the information requests were dealt with, the appellants had applied for the acceptance of their company as a full retail member of NAMM. Mr Sherman was a nominated referee. He provided a reference dated 25 March 2012. (This was the day before he sent version S of the minutes to the appellants.) On 1 May 2012 the application was declined on the basis of a confidential reference. The appellants took the matter up with Mr Sherman.
30. By email of 4 May 2012 he "refute[d] completely" that he had given a damaging reference, and stated that he had "declined" to give a reference "due to the then on-going correspondence between us". This was not true; he had in fact given a damaging reference.
31. The appellants pressed him for the exact wording of his statement to NAMM. He replied by email: "I said that we have an on-going disagreement with regard to our regulations and it would not be appropriate to comment." This was accurate as far as it went, but omitted the damaging part of the reference.
32. The appellants sought a written copy of his response to NAMM. His reply was: "Not got a copy, sorry." This reply was not correct. He later produced a copy to Mrs Paine.
33. The appellants suggested he obtain a copy from NAMM. He replied on 5 May 2012:

As the reference form was not saying anything, it would be pointless for us to ask for a copy, and we do not feel it necessary to spend the time so doing. You did not ask us before giving our name as a referee and, had you done so, in the circumstances, we would have advised you that we would not give any opinion, which is what we said to NAMM. We have given you the information requested and the matter ends there.

34. To say that the reference form was “not saying anything” and declined to give an opinion was misleading; in fact the reference form made an untrue allegation (to which we refer below), which caused NAMM to decline the application.
35. The same day the appellants made an information request to the three councils, asking for an exact copy of the reference, without result.
36. Ultimately, as a result of the Commissioner’s intervention, Mrs Paine obtained a copy of the reference from Mr Sherman and sent it to the appellants under cover of a letter of 13 December 2012. This copy did indeed state that there was “an on-going dispute” with Minster Stone “with regard to our regulations, so it would not be appropriate to comment.” The next two sentences read as follows:
- This Company ~~*does/ *does not~~ fix memorials or carry out memorial work without obtaining the proper permission and paying the proper fees.
- Do you wish the above information to be confidential ~~*yes/*no~~.
37. Having been provided with the reference under FOIA, the appellants were subsequently able to obtain a copy from NAMM. The copy received from NAMM was identical, including the precise shape and positioning of Mr Sherman’s signature and other freehand parts of the form, except in two respects.
38. The first difference was that the two sentences cited above read as follows:
- This Company ~~*does/ *does not~~ fix memorials or carry out memorial work without obtaining the proper permission and paying the proper fees.
- Do you wish the above information to be confidential ~~*yes/*no~~.
39. Mr Sherman’s statement, which he had asked be kept confidential, that the company fixed memorials or carried out memorial work without obtaining the proper permission and paying the proper fees, was untrue, as we understood to be accepted by Mr Sherman and all parties at the hearing before us. For brevity, we will refer to this as “the untrue reference”.
40. The second difference was that someone at NAMM had written Mr Sherman’s telephone number onto the form. This was for the purpose of telephone discussions that took place between NAMM and Mr Sherman concerning the reference.

The contested evidence and its significance

41. As we have indicated above, Mr Sherman gave evidence before us on affirmation. He was cross-examined by Mr Case and Mr Lee, and the Tribunal also asked him questions. We have reminded ourselves that, while the relevant standard of proof in this appeal is the balance of probabilities and not the criminal standard, the allegations concerning Mr Sherman's conduct are serious and should not be accepted, even on the civil standard, without cogent evidence. After anxious consideration of all the evidence and the parties' submissions we have concluded that his evidence was unsatisfactory and that the reliance we should place on it is limited.
42. Regarding the untrue reference, Mr Sherman expressly accepted that the copy as received by the appellants from NAMM reflected the version that he had originally sent to NAMM. His explanations for giving the untrue reference were that he had not been asked beforehand, he was quite annoyed, he made copies and wrote various versions, he realised that by crossing out "does not" his statement could be construed contrary to the true facts, and he thought it did not really matter.
43. We find ourselves unable to accept in full his evidence that he thought it did not really matter. We accept that it did not matter to him, but in our judgment he must have known full well, as anyone in his position would, that it mattered to the appellants. That was part of the reason why he requested in the reference that what he had said be kept confidential.
44. He was asked for his explanation for saying that he had not provided a damaging reference, when in fact he had done so. In the course of an evasive and argumentative answer, he stated that what he had provided was not a reference but a "non-reference".
45. Mr Sherman's willingness to shade the truth in and concerning his dealings with the appellants is consistent with other, documented, parts of the events concerning the reference. When he "refute[d] completely" that he had given a damaging reference, in our view he was being knowingly misleading. When he wrote to the appellants that the reference form was "not saying anything", this must also have been untrue to his knowledge. We infer that he was exasperated with the appellants, and was more concerned with saying what he thought would cause them to stop troubling him than with being careful to convey the whole truth.
46. His explanation for telling the appellants in May 2012 that he had not kept a copy of the reference was that he had looked in his file and could not find a copy, and thought he had not bothered to keep one. His explanation for the copy which he provided to Mrs Paine for transmission to the appellants being different from the original which he supplied to NAMM was that, when

responding to the Commissioner's request in December 2012 he found a copy which he had misfiled, this being one of the copies in which he had played around with various wordings. He said the misfiled copy was what he had been going to send originally.

47. The altered reference was investigated by the Commissioner's criminal investigation unit. The papers from that investigation were not placed before us, but Mr Case put to Mr Sherman that the explanation which he gave to the unit was that he filed a copy of the reference on the day that he wrote it, and that he accidentally altered it in two places. Mr Sherman did not deny this, but said he had "no idea" what he had told the unit. That was a surprising answer. We consider it is reasonable to infer that Mr Sherman's explanations to the unit were probably different from the explanations that he gave to us.
48. We do not find credible the explanations which he gave to us for the differences between the two copies. We are unable to accept his improbable assertion that his original intention had been to send a copy which had both alternatives crossed out in the sentence concerning whether the company obtained permissions and paid fees and both alternatives crossed out in the sentence concerning whether he wished the information to be kept confidential. In May 2012, when responding to the appellants' inquiries, he had the wording available to him, as shown by his email which accurately reproduced the statement about the on-going disagreement with regard to the regulations and the inappropriateness of comment. The version he produced in December 2012 was simply an exact copy of what he had sent to NAMM, with two subsequent alterations made to it, to obscure the facts that he had submitted an untrue reference and that he had asked for the untruth to be kept confidential.
49. Mr Case put to Mr Sherman that the NAMM office manager telephoned him and asked him about the adverse reference, and that in the conversation he said that he stood by what he had written. Mr Sherman agreed that he had used those words in the telephone conversation. This was an admission to misleading NAMM concerning the conduct of Minster Stone. He also agreed that in a later conversation with Mr Roger Wilcock of NAMM he had confirmed that in fact there was no failure to pay fees or non-compliance with regulations on the part of Minster Stone, as set out in Mr Wilcock's letter to him dated 14 November 2012.
50. The issue concerning the circumstances of the disputed letter and the two versions of the November 2011 meeting minutes falls to be considered in the light of the facts concerning the two versions of the reference, which cause us to be cautious in regard to Mr Sherman's accounts of events.
51. Mr Sherman's explanation for providing one version to Wimborne Town Council (version W) and a different version to the appellants (version S) was

that version W was only the draft minutes, which were confidential and not for dissemination to the public, whereas version S constituted the official minutes as approved and signed at the next meeting. A councillor (he said he could not remember which one) had said he should change the wording of the draft minutes because he had included Mr O'Hara's name. The committee also wanted to avoid any embarrassment.

52. The appellants submitted that this explanation was not true, and the true position was that version W constituted the genuine minutes, Mr Sherman having deliberately falsified them so as to produce version S in order to hide from the appellants information which they were entitled to receive but which Mr Sherman did not want to give to them.
53. Mr Sherman's account suffers from the following weaknesses or matters of concern:
 - a. Version W contains no indication that it constitutes only draft minutes or should for that reason not be made available to the public.
 - b. So far as the evidence goes, Version W was provided by Mr Sherman to Wimborne Town Council (and presumably the other two councils) as constituting the minutes, there being no suggestion that they were awaiting approval; at no time was anything said to Wimborne Town Council to tell them that the approved version was materially different and should be substituted. This is why version W was available to the public and was obtained by the appellants in June 2013.
 - c. We would have expected at least a photocopy of the official minutes, bearing the signature of the chairman as a correct record, to be produced to us. This would have provided some corroboration of Mr Sherman's account. It was not.
 - d. We would have expected to be shown a minute of the subsequent meeting in which the draft was amended and approved subject to the amendments. This would have provided some corroboration of his account. We were not.
 - e. We would have expected to see other examples of draft minutes being amended in a similar manner. This would have provided some corroboration of his account. We were shown none.
 - f. On 26 March 2012 the copies of minutes which Mr Sherman sent out to the appellants, as being in the public domain, included the minutes for the March meeting. This evidenced a practice of publishing the minutes prior to their official approval at the next meeting. We find unconvincing, and unsupported by any corroboration, Mr Sherman's statement that this was because there was a flurry of meetings around March because of the financial year-end. With the exception of this

assertion by Mr Sherman, the evidence shows that meetings were infrequent.

- g. When Mr Sherman provided the text of the minutes to Mrs Paine for her letter to the Commissioner dated 6 November 2012, he provided the text from version W. In evidence he initially said he was unable to explain how it had come about that he had provided to her the text of what he claimed was the draft version. In a further answer he said that both versions were on his computer. The fact that he provided version W to her suggests that he regarded that version either as the official record or as the most accurate available record.
54. Mr Case put to Mr Sherman that an account he had recently given to Mr Mallett was materially different, namely, that Wimborne Town Council had made additions to version S so as to produce version W. Mr Sherman's answer was that this was an assumption he had made about what the Town Council had done; it was only after he had given this explanation to Mr Mallett that he became aware that the Town Council had given Mr Case a copy of the draft minutes.
55. It is not in dispute that Mr Sherman altered version W so as to produce version S, which he provided to the appellants. The precise circumstances in which the alterations were made are not clear to us from the evidence. It may be that points c, d and e in paragraph 53 above could have been satisfactorily addressed. We do not consider that we have sufficient evidence to enable us to decide at what date version S became the official minutes, if it did. If it were necessary to make a finding on those points, we would issue a direction requiring the parties to provide further evidence. However, we have concluded that we do not need to decide these particular questions. This is because what really matters is not which was the official version, but what were the circumstances of the disputed letter, relevant to FOIA s 41. Mr Sherman accepted in evidence that version W was an account of what was discussed at the meeting. It is plain to us that version W is the more detailed of the two versions. The alterations made by Mr Sherman for version S were not for the purpose of correcting the accuracy of the minutes as a true record of the meeting but for the purpose of making them less explicit concerning the disputed letter and concerning what had been said at the public meeting of the JMC. Version W said that the disputed letter made allegations concerning the work of one particular mason; version S omitted this. Version W did not say that the check with other local cemeteries was to relate to "all" masons; the addition of "all" to version S made the treatment of the matter sound more even-handed than in reality it was.
56. There was nothing in either version W or version S which indicated that the disputed letter was confidential. Similarly, there has been no suggestion that the other letters referred to in the same minute were confidential. The normal practice in local government for confidential agenda items was not followed.

57. On examination of the disputed letter, it does not refer to any prior telephone conversation. It says nothing about confidentiality. There is nothing specific in it which in our view constitutes an implied request for confidentiality. It indicates that a copy of the letter is also being sent to another addressee, in addition to Mr Sherman. It also indicates that Mr O'Hara is going to be contacting another person in relation to a matter mentioned in the letter, in terms which suggest to us that that person may in due course be expected to raise the matter with Minster Stone. These features seem to indicate that the contents of the letter were not intended to be kept confidential or, at least, provide no support for the assertion of confidentiality. On the face of it, it would seem reasonable to infer that Mr O'Hara expected the letter to be discussed by the JMC at one of its meetings, which are held in public.
58. Given our findings over Mr Sherman's unsatisfactory behaviour over the reference to NAMM, we approach his evidence concerning his telephone conversation with Mr O'Hara with a degree of caution and we look for corroboration of the assertion that there was an agreement of confidentiality. We do not find it.
59. The first visible sign in the evidence of Mr Sherman's contention that the letter was sent to him in confidence is the bare assertion in his letter of 29 March 2012 to East Dorset District Council. This was four months after the November 2011 meeting, and was also after he had received the FOI request from the appellants, asking for the disputed letter. We observe that it was a convenient assertion to make, given that he did not wish to reveal the disputed letter to the appellants. The JMC's agreement that the letter should be regarded as confidential was not obtained until 23 April 2012, as the minutes record.
60. Going back to version W of the minutes, the relevant text begins: "A letter had been sent by Anthony O'Hara regarding the installation of memorials by one local Mason". We find it very difficult to accept that Mr Sherman could have written this in the minutes if the true circumstances were that he had agreed with Mr O'Hara that the letter would be "totally confidential", as Mr Sherman put it in November 2012. In his evidence, Mr Sherman said that when he wrote version W of the minutes he had not forgotten about the letter being confidential, rather, he "just didn't think", he was human and had made a mistake. However, Mr Sherman also told us in evidence that in his five year tenure confidentiality had only come up about three times. Accepting this to be true, an issue of confidentiality was a highly unusual matter for Mr Sherman to be dealing with. In the circumstances we find it inconceivable, if there had been an agreement that the letter was to be confidential, that Mr Sherman commenced the relevant minute by stating the identity of the writer of the letter.
61. Moreover, there are further indications that when writing the minutes Mr Sherman did not regard the contents of the letter as confidential. The minute

makes clear that the letter related to work by one particular mason, and says that the checks with other cemeteries are to include Southampton. Minster Stone were easily identifiable from these details, since they did a large proportion of the work at Wimborne, and they came from Southampton. In closed session (and we see no reason not to reveal this) Mr Sherman expressly admitted that Minster Stone had been mentioned at the meeting as the subject of the complaint. We also note that the appellants were able from the information given in version W of the minutes to make reasonable and largely accurate deductions about the contents of the disputed letter.

62. It seems that Mr Sherman had no concerns about providing the details in version W of the minutes to the three councils, to be noted at their public meetings.
63. Mr Sherman said in his letter to East Dorset District Council on 29 March 2012: "we do not feel that it would be ethical to release details of it, as it would/might be used to stir up more trouble". That the avoidance of trouble was a motivating factor for Mr Sherman is consistent with his approach to wanting to keep the untrue reference confidential.
64. Mr Sherman's November 2012 version of events for the Commissioner was that the letter was sent and received "on the understanding that it remained totally confidential". This falls short of an assertion that there was an express agreement. It would be easy, with wishful thinking after the event, for Mr Sherman to attribute such an understanding to Mr O'Hara and himself.
65. The account of the telephone conversation which Mr Sherman gave on 20 December 2012 to the Commissioner's investigator was: "Mr O'Hara called before the letter was sent stating that he did not wish for a fuss to be made and therefore wanted to ensure that the letter would not be widely circulated." Assuming that this reflects the actual content of the conversation, it falls short of an agreement, or even a request, for confidentiality. Purely by way of example, it would be equally consistent with a conversation in which Mr Sherman said he would place the letter before the JMC for consideration, Mr O'Hara said he did not want the letter widely circulated, and Mr Sherman assured him that, while the meetings of the JMC were public meetings, and the minutes were available to the public, it was rare for any member of the public to attend a JMC meeting, or for any member of the public to inspect the minutes.
66. We note that Mr Sherman gave the investigator an explanatory addition: "That he is making a complaint about masons who operate in the same cemetery is in itself indicative that he wouldn't want the letter to be disclosed". This also seems to us to be consistent with there being no express agreement as to confidentiality; rather, it is a rationale which Mr Sherman relies on after the event as a justification for his assertion of

confidentiality. We do not find it a convincing rationale. The present circumstances are far away from the situation of a possibly vulnerable whistle-blower who, as an employee, service user or member of the public, complains about an employer, service provider or authority figure, and wishes a complaint to be treated in strict confidence. There was no imbalance of power between Mr O'Hara and the appellants. Mr O'Hara was a commercial competitor complaining about a rival. There would need to be some particular reason for confidentiality in such a case. We are not convinced that such a reason exists, as further appears below.

67. Mr Sherman's further statement to the investigator that only half of the councillors comprising the JMC had seen the letter is no indication of confidentiality. Only half of the councillors comprising the JMC were present at the meeting at which it was discussed. The minutes were afterwards circulated to the three councils, containing Mr O'Hara's name and the further details.
68. In answer to the specific question, to what extent the contents of the letter were disclosed at the meeting on 27 November 2011, Mr Sherman gave a substantially false answer to the investigator, which indicated or implied that the identity of the complainant and of the person complained about were withheld. This was untrue, as to both points. In our view this answer is more indicative of wishful thinking on the part of Mr Sherman than of there having been an agreement as to confidentiality.
69. In cross-examination Mr Case asked Mr Sherman whether anyone had provided anything in writing to support Mr Sherman's claim of confidentiality. Mr Sherman said that no one had done so. There is no evidence before us, whether oral or written, from anyone who was present at the November 2011 meeting other than Mr Sherman. We also need to state that during the closed session Mr Sherman mentioned for the first time that he was in possession of a letter from Mr O'Hara, concerning the disputed letter. The Commissioner had not seen it. It was produced to us. It was dated 4 July 2013, and was addressed by Mr O'Hara to Mr Sherman. In it Mr O'Hara recited the first two paragraphs of the disputed letter, and stated that he had no objection to those paragraphs being "made available as required". We note the following:
 - a. Mr O'Hara's letter did not say that there was a telephone conversation in which anything was said between him and Mr Sherman concerning confidentiality for the disputed letter.
 - b. In terms of degree of potential sensitivity, the two paragraphs which Mr O'Hara is content to reveal do not appear materially different, in our view, from the remainder of the letter.
70. In the circumstances as set out above, we find ourselves unable to accept Mr Sherman's evidence that there was an agreement, understanding, or

expectation of confidentiality in relation to Mr O'Hara's letter. In our judgment there was no such agreement, understanding or expectation; rather, it was only after the event, when Mr Sherman realised that revealing the letter might provoke the appellants to (from his point of view) cause trouble, that Mr Sherman decided that the letter ought to be treated as confidential. This does not mean that we think Mr Sherman did not have a telephone conversation with Mr O'Hara before the letter was sent. We do not doubt that there was a conversation. The evidence was that the two of them had frequent telephone conversations. But we do not accept that the prior conversation created an expectation of confidentiality for the disputed letter. We find on the balance of probabilities that it did not.

71. If our assessment of Mr Sherman's evidence and conduct is unduly negative, and the unsatisfactory features should be attributed to confusion rather than to anything worse, this would not alter our inability to accept his account of the circumstances in which he received the disputed letter. Given the nature of the documentary material we would remain of the view, on the balance of probabilities, that there was no agreement, understanding or expectation of confidentiality.

Analysis: the 'holding' issue

72. We consider first the issue of whether Colehill Parish Council held the relevant letter at the time when the request was dealt with.
73. The relevant law as set out in FOIA s3 and *University of Newcastle upon Tyne v Information Commissioner; BUAV* [2011] 2 Info LR 54 is not in dispute between the parties.
74. On this point, subject to one qualification which we mention below, we accept the submissions of the Commissioner and reject the submissions of the Council.
75. The parish clerk, Mrs Paine, wrote to the Commissioner on 16 October 2012:

... it is an absolute fact that the information sought by Mr and Mrs Case was not and has never been in the possession of the Parish Council. Therefore no searches were made because no information is held.
76. Mrs Paine's approach was based on a misunderstanding of the correct position, in particular a lack of appreciation that information held by a third party on behalf of a public authority is 'held' by the public authority for FOIA purposes.
77. The JMC is a public body which acts on behalf of the three councils, for the fulfilment of their public functions as burial authorities, as her letter also

acknowledges. Its membership comprises councillors from the three councils. In our view it is clear that information held, and actions taken, by the JMC are taken on behalf of the three councils. If a council wishes to obtain a copy of any particular document held by the JMC, all it has to do is to ask the Clerk, and the Clerk is obliged to supply it. This was effectively acknowledged in the Council's response to the appeal, which stated in regard to JMC minutes: "... should any further reference be needed a request can be made of the Clerk to the WCJMC". In the present case the Council took this course in order to deal with the Commissioner's inquiries. Whether, physically, particular items of information are held at a council office, by a council officer, or by the Clerk to the JMC, makes no difference. In all such cases they are held by or on behalf of the relevant councils.²

78. Mr Mitchell emphasized to us that the JMC was a separate body which needed to and did hold information for its own purposes. We see no reason to disagree with this, but it does not affect the question whether the JMC and in particular its clerk also held information on behalf of its constituent councils.
79. We have not received any submissions on whether the JMC is itself a public authority which is subject to FOIA in its own right. As Mr Lee for the Commissioner correctly submitted, whether a body which holds information for a public authority is a public body in its own right does not affect the issue. Whether or not the JMC is a public body, and whether or not it is directly subject to FOIA, the request which is the subject of this appeal was made to Colehill Parish Council, and in our judgment the relevant information held by the JMC was held on behalf of that Council at least, as well as on its own behalf.
80. The qualification to our acceptance of the Commissioner's submissions arises in relation to his submission that pursuant to *BUAV* the issue is whether there is an "appropriate connection" between the information and the public authority. We firmly disagree. We are confident that in *BUAV* the phrase "appropriate connection" was not put forward as a test to replace the statutory wording, or as a definition of the issue to be decided, but was used by way of shorthand explanation in the discussion of the statutory words and of the examples given in paragraph [47] of the First-tier decision. As the Upper Tribunal said at [29]:

I do not regard the tribunal's reference to the need for "an appropriate connection between the information and the authority" as a misguided attempt to replace the statutory language with its own "rather nebulous" test On the contrary, the tribunal was simply pointing to the need for

² It is conceivable that there could be items of information which relate exclusively to one council and not to the general business of the JMC or to the other two councils. Such information might be held by the clerk to the JMC on behalf of the one council only. This qualification is of no relevance to the present case.

the word “hold” to be understood as conveying something more than the simple underlying physical concept, given the intent behind section 3(2).

81. This disagreement with the Commissioner’s submissions does not affect our conclusion on the holding of the information in this case.

Analysis: the s 41 issue

82. The next issue is the question of confidentiality for the purposes of FOIA s 41.

83. The exemption in s 41 applies where-

- a. the information was obtained by the public authority from another person, and
- b. disclosure of the information to the public (otherwise than under FOIA) would constitute an actionable breach of confidence.

84. The first of these requirements is not in dispute, since the disputed letter was obtained from the person who sent it.

85. The Commissioner submits, and the other parties agree, that the relevant legal tests in the present case for the purposes of an actionable breach of confidence are those set out in the Commissioner’s Decision at paragraphs 29-31, 39, 43 and 45; in brief-

- a. whether the information has the necessary quality of confidence,
- b. whether it was imparted in circumstances importing an obligation of confidence,
- c. whether an unauthorised use of the information would result in detriment to the confider,
- d. whether there would be a public interest defence to an action complaining of disclosure.

86. The Decision Notice properly drew attention to the attenuation of the requirement of detriment in *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 256C.

87. We are conscious that the law of confidence has moved on since the four requirements set out above were formulated in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415. The requirement of detriment has almost disappeared, and in the realm of personal privacy the law has moved towards a concept of misuse of private information. We have therefore hesitated before accepting

the parties' joint approach to the relevant law. However, there has been no suggestion that in the present case a breach of confidence might be actionable by anyone other than Mr O'Hara, and we can see no justifiable ground for regarding disclosure of the disputed letter as constituting disclosure of information about Mr O'Hara's private life. In the circumstances of the case we have concluded that we can properly adopt the legal framework put forward by all three parties, on the ground that the respects in which the law has developed are not relevant to the present circumstances.

88. In our view the information in the disputed letter was capable of having the necessary quality of confidence. It was not trivial, but was information of significance. But there is a live question in this case whether the information in fact had the necessary quality of confidence at the time when the request for it was made.
89. In our judgment, at least most of it did not, because the basic attribute of inaccessibility³ was not present. The letter, and much of the information in it, was mentioned at the public meeting of the JMC. Any member of the public could have listened to what was said and asked to look at the letter. After the meeting the minutes were distributed to the three constituent councils and made available to a substantial number of people, all without any suggestion of confidentiality. At the next subsequent meetings of those councils any member of the public could have asked to see the material documents, being both the minutes and the letter. The minutes could have been seen at once. The letter could have been obtained if none of the persons present had a copy of it. The minutes in version W, which revealed much of the content of the disputed letter, were held available for public inspection by Wimborne Town Council. The appellants could have gone and looked at them at any time. Accordingly, much of the information was readily accessible to anyone interested in it. In view of our conclusion on the next requirement, it is not necessary for us to resolve any issue concerning which, if any, residual parts of the letter were sufficiently inaccessible to the public to have the necessary quality of confidence.
90. We conclude that the information in the disputed letter was not imparted in circumstances importing an obligation of confidence. As set out above, we have felt unable to accept the critical element of Mr Sherman's account of the prior telephone call. We are also wholly unpersuaded that the letter attracted an expectation of confidentiality simply by virtue of its content. To the contrary, the letter itself envisaged wider circulation of the allegations contained in it, and contained no suggestion that confidentiality was required or expected. We do not consider that Mr O'Hara, as a business competitor of the appellants, could reasonably expect that either his identity or the details set out in the letter would be kept confidential. Nor has he said that he had such an expectation. The information concerning a competitor was

³ *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 215.

volunteered by him to a public body which was directly or indirectly subject to FOIA.

91. If we had accepted that the information had the necessary quality of confidence and had been imparted in circumstances importing an obligation of confidence, we would have accepted also that unauthorised use of the information would result in detriment to the confider, within the attenuated meaning of 'detriment' explained in *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, in so far as any such requirement of detriment is still legally required.
92. Whether there would be a public interest defence to an action for breach of confidence is not a straightforward question in the present case. In order to decide it we would need to make further findings than already made above concerning the truth or otherwise of the matters stated in the disputed letter, and how the interests of the public were affected by those matters and the way in which they were dealt with by Mr O'Hara, Mr Sherman and the JMC. Since we have decided that the information in the disputed letter lacked the necessary quality of confidence and was not imparted in circumstances importing an obligation of confidence, the s 41 exemption is not established, and it is not necessary for us to lengthen this already over-long statement of our reasons by resolving the issue of whether, if we were wrong about those two elements, there would be a public interest defence to an action for breach of confidence.

Conclusions and remedy

93. We conclude that the Council held the information, within the meaning of FOIA s 3, at the material time, and that the s 41 exemption is not established. The disputed letter must therefore be disclosed.
94. The reasons which we have given are those of Anne Chafer and the chairman. Mr Whetnall is in agreement with much of the reasoning but his concerns about the evidence of the clerk to the JMC are of a lesser degree. Nevertheless, he concurs in the result because he is not satisfied on the balance of probabilities that the Second Respondent has established the existence of the first and second criteria for the s 41 exemption set out in paragraph 85 above, particularly given the contents of version W of the minutes and the absence of anything in writing in 2011 which supports the case for confidentiality.

(Signed on original)

Andrew Bartlett QC, Judge

Date: 12 November 2013