FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2014/0068 (FS50525689 dated 27 March 2014)
Appellant:	Joerg Thieme
Respondent:	The Information Commissioner
Second Respondent:	Department for Business Innovation and Skills
Judge:	Peter Lane
Member:	Nigel Watson
Member:	Michael Jones
Hearing Date:	Decided without a hearing on 29 January 2015
Decision Date:	12 February 2015

DECISION NOTICE

For reasons given below, the appeal is dismissed.

REASONS

1. As its title suggests, the Export Control Act 2002 gives the Secretary of State the power to control the export of goods, by means of a licensing regime governed by the Export Control Order 2008. In 2012, two companies were granted export licences for dual-use substances for six months. The licences were issued by the Export Control Organisation ("ECO"), part of the Department for Business Innovation and Skills ("DBIS"). The effect of the licences was to confer permission on the companies to export the substances to Syria. In the event, neither company did so.

2. On 25 October 2013 the appellant requested information from the DBIS, as follows:-

> "Apparently two British companies were granted export licences for the dual-use substances for six months in 2012 while Syria's civil war was raging. Potassium Fluoride and Sodium Fluoride can be used in connection with chemical weapons.
>
> 1. What are the names of the UK companies involved in this trade?
> 2. Why were they given licences from the UK business secretary to sell the chemicals in 2012"

3. DBIS responded to the appellant on 22 November 2013. It provided him with the information requested at paragraph 2(2) above but refused to disclose the information comprising the names of the companies. After an internal review, DBIS maintained its position. Its refusal was based on sections 41 and 43(2) of the Freedom of Information Act 2000.

4. Section 41 reads as follows:-

> "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.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

5. 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)."

6. On 27 March 2014 the Information Commissioner concluded that DBIS had correctly applied section 41 so as to withhold the names of the two companies. The appellant appealed that decision.

7. The Commissioner's decision was that disclosure of the names would constitute an actionable breach of confidence. Section 41(1) is an "absolute" exemption, not subject to a public interest test. The Commissioner concluded that the withheld information was received by the ECO in its role as the body responsible for making licensing decisions. The information could not, accordingly, be said to be publicly available or otherwise accessible. Nor could it be said to be trivial, since it amounted to sensitive commercial information regarding export licences granted while Syria's civil war was ongoing. Given that the information, read with that already provided, would link the companies to specific export licences, the Commissioner took the view that the information in question was personally sensitive and thus, had the necessary quality of confidence.

8. The Commissioner turned to whether the information was imparted in circumstances importing an obligation of confidence. DBIS explained how the information was received. An applicant for an export licence has to submit sufficient information to allow the Secretary of State to determine whether or not to grant it. That would include details of the goods to be exported, as well as details of the intended end use and final recipient. If the relevant information were not forthcoming, it was plainly unlikely the licence would be issued. The evidence from DBIS, which the Commissioner

accepted, was that there was a long-standing understanding across the exporting community that departments involved in the export licensing process would treat applications for export licences (and related information) as being supplied in confidence (including both the names of the companies applying for an export licence and the names linked to specific licence details). The evidence further indicated that although the application form at the time did not contain an express confidentiality statement, it explicitly stated the circumstances in which data would be shared, and that companies making applications would not expect the information supplied to be disclosed outside the departments and international organisations mentioned in the form. In other words, they would expect the information to be treated as confidential. The Commissioner accordingly concluded that there was an implied obligation of confidence on the part of the ECO that it would not share information provided as part of the process in circumstances other than those set out on the application form.

9. The third element of the test of confidence was the likely detriment to the confider if the confidence was breached. The test under section 41 is where the disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person.

10. The evidence before the Commissioner, supplied by DBIS, was that the companies concerned had objections to disclosure on the basis that:-

(a) Disclosure could result in harm to the employees of the company, anonymity being important in protecting those employees.

(b) Disclosure could result in harm to the company and its facilities.

(c) Disclosure of the information, linking the companies to the materials to be exported, was of a sensitive nature, the disclosure of which would be likely to be prejudiced to the company's commercial interests.

(d) Disclosure was likely to be prejudicial to the companies as possibly relationships with its customers, supplies and investors.

11. Although section 41(1) is an absolute exemption, the Commissioner was mindful of the fact that case law suggests a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner accordingly examined the evidence to see whether such a defence could be said to arise in the present case.

12. DBIS contended forcefully that disclosure of the companies' names, supplied in confidence, linked to information about the type of materials and end user would compromise the willingness of companies and future applicants to share full details of trade activity because of concerns that the information would not remain confidential. That could lead to companies looking to trade through overseas subsidiaries, where the export control system might be different. This, in turn, would prejudice the ECO's ability to maintain confidence in the UK's system of export control. Disclosure would thus

impact on the ability of the United Kingdom to be involved in legitimate business by reducing unlicensed exporting activities.

13. The Commissioner also recognised the wider public interest of preserving the principle of confidentiality; in particular the strong public interest in the export licence application process operating effectively, so as to ensure that exporters and potential exporters properly cooperated and engaged with government departments. There is also a public interest in avoiding detriment to the commercial interests of the specific companies that have applied for licences.

14. Having regard to the disclosure already made to the appellant regarding reasons for the licences being granted, the Commissioner concluded that there was no public interest defence in the present case. Section 41 accordingly applied. In those circumstances, the Commissioner did not go on to consider whether section 43(2) also exempted the disclosure of the information.

15. In his grounds of appeal, the appellant relied on Article 19 of the International Covenant on Civil and Political Rights and on Article 10 (Freedom of Expression) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

16. In his response to the notice of appeal, the Commissioner contended that the sole pleaded ground was unsustainable in law. Article 19 of the International Covenant was a "non-binding and unimplemented international law" instrument; whilst the Supreme Court had held in Kennedy and the Charity Commission [2014] UKSC 20 that Article 10 of the ECHR did not give rise to a free-standing right of access to official information. In any event, sections 41 and 43(2) of the FOIA provided a consideration of the public interest, materially comparable to a proportionality exercise, appropriate to a "qualified" right such as Article 10.

17. As regards section 41 and the issue of breach of confidence, this had been considered in detail in very similar circumstances by the Upper Tribunal in Browning v Information Commissioner and DBIS [2013] UKUT 236 (AAC), where the Upper Tribunal held that the name of a company making an application for a statutory licence had the necessary quality of confidence. So far as public interest factors were concerned, the Commissioner pointed out that since the licences were not in fact ever used, the public interest in who was given them was substantially lessened.

18. In its response, DBIS strongly supported the Commissioner's decision and line of reasoning. DBIS also submitted that the harm that would be likely to be caused to the employees of the companies and to the companies' relationships with customers, investors etc, as found by the Commissioner in the context of section 41, meant that disclosure of the requested information would also be likely to prejudice the commercial interest of the main companies, and that the public interest balance favoured maintaining the exemption. Thus, section 43(2) also applied in the present case.

19. In this appeal, the parties were content for the matter to be decided without a hearing. In all the circumstances, we consider that there is no need for an oral hearing, having regard to the overriding objective in rule 2.

20. In his latest written submission, the appellant continues to seek to rely on Article 10 of the ECHR. For the reasons given above, however, that is simply not possible in the light of the Supreme Court judgement in Kennedy. The appellant has not begun to show how his invocation of Article 10 is anything other than "free-standing". He seeks to rely on a decision of the Information Tribunal in EA/2006/0014 as suggesting that third parties "are not bound by the protection under commercial interests". We have considered that case but find that it in no way supports the appellant. The case turned on its own facts. In any event, the law is as set out in Kennedy and so far as the issues in Browning are concerned, by the judgment of the Court of Appeal in [2014] EWCA Civ 1050, upholding the determination of the Upper Tribunal in a case strongly comparable to the present.

21. We agree with and adopt the reasoning of the Commissioner in his decision letter, as expanded in his response (settled by counsel). In his letter of 17 May 2014, the appellant disagrees with the finding that the public interest favours prevent the relevant information from being disclosed. But that view, strongly and sincerely held, is merely a disagreement. The appellant has not begun to grapple with, in particular, the risks that might arise to employees of the companies, were the names of those companies to be disclosed. Nor does he address the point that these two companies, unlike those in Germany and elsewhere, did not in the event send anything to Syria pursuant to the licences.

22. Our decision (which is unanimous) is that the appeal falls to be dismissed.

Peter Lane

Chamber President

Dated 12 February 2015