



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

**Appeal No: EA/2014/0237**

**BETWEEN**

**PAMELA IRVING**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Tribunal**

**Brian Kennedy QC  
Nigel Watson  
David Sivers**

**Hearing: 26 February 2015.**

**Location: Field House, London.**

**Decision: Appeal Refused.**

**Promulgated: 8<sup>th</sup> April 2015**

**Subject Matter:** The Freedom of Information Act 2000 (“FOIA”) and reliance by the Arts Council England, (ACE), (“the Public Authority”) on Section 31(a) to withhold disclosure of the requested information.

Section 31(1)(a) FOIA provides that information is exempt if its disclosure would or would be likely to prejudice the prevention or detect of crime.

**Introduction:**

1. This decision relates to an appeal brought under section 57 of the FOIA. The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 18 September 2014 (reference FS50532573) which is a matter of public record but much of which is repeated herein for the sake of clarity and context.
2. A paper hearing took place on 26 February 2015 when the Tribunal deliberated on the issues in this appeal. The Tribunal and parties have been provided with a paginated (1 - 162) and indexed Open Bundle (“OB”) containing all relevant papers together with a Closed Bundle (“CB”) which contains the withheld infor-

mation which for obvious reasons is not in the public domain or with the appellant. We have been provided with final submissions from the appellant dated 29 December 2014 and final submissions on behalf of the Commissioner dated 5 February 2015. We find the Commissioners Response (27 October 2014 pages 26 - 32 OB) to the Grounds of Appeal (16 September 2014 pages 10 - 16 OB) particularly helpful in setting out the factual matrix, background and chronology of the issues and adopt that general format as follows.

### **Background:**

3. The Appellant wrote to the Public Authority on 9 January 2014. The request for information, was made in the following terms: *"1. Any and all advice ACE (or its predecessor body) was either asked for or was given between 28 August 2010 and 18 October 2013, internally or by any third parties, which mention or discuss the status of the City of Adelaide being; a: an archaeological artefact; b: a Class A Listed Building [Scotland] or c: being a historical and cultural object which required her export to be considered under the Waverly criteria."* and 2. *A copy of any material, in any medium held by ACE (or its predecessor bodies) which discusses the export of the Clipper Ship of Adelaide including any correspondence between ACE (or its predecessor bodies) and the Scottish Maritime Museum Arts Council England and DCMS, ACE and Clipper Ship City of Adelaide Ltd., ACE and National Historic Ships UK and ACE and the Foreign and Commonwealth Office between 28 August 2010 and 18 October 2013."*
4. The public authority responded on 27 November 2013. It released some information to the appellant but redacted other information under sections 40(2), 36(2)(b)(i) and (ii) and 36(c) FOIA.
5. The appellant sought an internal review and the public authority responded on 14 January 2014 confirming its view was the withheld information was exempt from disclosure under sections 40(2), 36(b)(i) and (ii) and 36(c) FOIA.
6. Further to a complaint on 4 February 2014 to the Commissioner about the Public Authority's handling of the request for information. During the Commissioner's investigation the public authority disclosed most of the the withheld information to the appellant. The Commissioner therefore focused on the remaining withheld information in his DN and that information is as follows:
  - (a) An e-mail dated 21 October timed at 17,57
  - (b) An e-mail dated 25 September timed at 15.51
  - (c) Part of an e-mail dated 22 October timed at 10.34
7. During the Commissioner's investigation, the public authority withdrew its reliance on section 36 FOIA. It also disclosed the job titles and source of each communication which it had previously disclosed. In light of that, the appellant did not contest the public authority's application of section 40 further (See DN paragraphs 12 -13.)

8. The public authority argued that the exemption under section 31(1)(a) applied to items (b) and (c), at paragraph 6 above, these being two short e-mails the public authority had received from the Home Office's UK Border Force (See DN para. 14).
9. Although ACE itself does not have a law enforcement function, the Home Office's UK Border Force does. ACE argued it was in the public interest to ensure the efficient and effective operation of controls operated by the Home Office, as they are intended to govern the import and export of goods to and from the UK and facilitate the apprehension and prosecution of offenders (See DN Para. 15).

**Decision Notice: - Section 31(1)(a) engaged:**

10. The Commissioner accepted that the controls that are in place for the export of goods, including issues of detection, tariffs and items that may or may not be flagged to customs on export. He therefore accepted that disclosure of that information could potentially be used in conjunction with other information that may be available by those wishing to circumvent border controls and checks. That he accepted, would be likely to prejudice the Home Office's ability to operate effective and efficient border controls and ultimately to prevent and detect crime (See DN para. 19).
11. The Commissioner having been satisfied that disclosure would be likely to prejudice the prevention and detection of crime and that section 31(1)(a) FOIA was engaged, therefore went on to consider the public interest test (See DN para. 21).

**The Public Interest Test:**

12. The Commissioner accepted that there was a public interest in transparency and accountability and in information being made available relating to customs controls and export licensing. He also accepted that the appellant had specific issues with how the City of Adelaide was exported and that she believed the rules and regulations that govern such exports were manipulated in such a way as to enable the ship to be exported. It was the appellants view that serious maladministration had occurred (See DN para. 25).
13. However the Commissioner also noted that ACE had disclosed all of the recorded information which it held and which fell within the scope of the request, with the exception of the very limited information contained in the three e-mails referred to at para. 6 above. The contents of the two e-mails at para 6 (b) & (c) above, which engaged section 31(1)(a) FOIA, related more to certain aspects of border control in general, rather than to the case of the City of Adelaide specifically or how the ship came to be exported. (See DN para. 26).
14. The Commissioner accepted that even the very limited amount of information contained in the two e-mails could potentially be used by those wishing to avoid detection and could be used in conjunction with other information available to cir-

cumvent the border checks carried out by the UK Border Force Officials (See DN para. 27).

15. The Commissioner considered the public interest in understanding why the City of Adelaide was exported in the way that it had been had, to a very great extent , been met by the degree and extent of disclosure made during the course of his investigation. The Commissioner considered that the public interest in maintaining the effectiveness of the UK Border Force controls and the potential prevention of crime by those wishing to avoid border control detection carried far greater weight than the very limited amount of additional transparency which would be achieved by disclosure of the withheld information. (See DN para. 27).
16. The Commissioner concluded that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption at section 31(1)(a), (See DN para. 28).
17. The Commissioner went on to consider the application of section 41 FOIA to the e-mail referred to at para 6(a) above. He concluded that that exemption was not engaged by the information in question and ordered its disclosure. That finding is not in dispute in this appeal and is therefore not discussed further.

#### **Grounds of Appeal:**

18. This Tribunal has considered carefully the Grounds of Appeal (“grounds”) at pages 13 & 14 Open Bundle (“OB”) before us and as set out in section 5 of the Notice of Appeal dated 16 September 2014.
19. The appellant clearly understands the purpose of the exemption being claimed and the reasons for it as she sets them out in detail in the second paragraph of her Grounds. She does not challenge the application of the section 31(a) exemption other than to argue that it is not appropriate or reasonable in this specific instance.
20. In the third paragraph of the grounds she indicates the significant public interest in exposing what is described therein as the “disingenuous” actions of the public body in their administration of the Export of Cultural Goods Regulations as related to the export of the City of Adelaide and this having wide public interest implications. Importantly she argues this is because *“The Regulations assume that once in public ownership in an appropriate museum, cultural goods are not at risk of export for commercial gain. There are now a number of other cases besides the City of Adelaide which show that this assumption is no longer valid. I therefore suggest that while I can understand that specific operational details might need to be redacted from the three e-mails withheld, that is not a justification for withholding all the material particularly when there is no ongoing enforcement operation related to the subject request. The full contents of these, and any others, the existence of which may not have been disclosed, which could help to explain how and why the Export of Cultural Goods Regulations failed to be enforced in the export of the City of Adelaide, should be provided on the basis that public accountability in the administration in public office must in this instance override the section 31 contention that disclosure may undermine*

*and prejudice law enforcement methods, which in this specific instance clearly were available but were not applied”*

21. The appellant continues in the fourth paragraph of the grounds to confirm that the public authority; *“In October 2013 - - - released 72 e-mails. Following intervention of the Information Commissioner a further 38 were released in June 2014. All of these show a high level of public concern at the export of the ship without an individual export license application under the Export of Cultural Goods Regulations. ACE’s stance that export under Open general Export License was appropriate has yet to be provided. Neither has ACE explained how and why in the light of the legal advice provided to them, HMRC was persuaded that enforcement action was not required.”*
22. The Commissioner in his Response to the grounds of appeal at pages 31 - 33 of the OB also quotes at length from the grounds and these are worthy of note also. It is helpful if we refer again to the Commissioner’s response before we indicate our views on refusing this appeal

### **REASONS**

23. The Commissioner argues that the issue of transparency and accountability of the public authority in relation to its own duties and administrative functions under the Export of Cultural Goods Regulations is not the question for this Tribunal. It is not denied that it is something of significant importance generally and that the appellant is passionate about it. In fact it is probably something she will understandably take further action about. However the Commissioner argues that this subject matter is not the issue before this appeal. While this Tribunal accepts that this is not the primary issue before us, it clearly must have some bearing on the public interest balance that we need to consider in deciding on the question of the disclosure of the requested information. The Commissioner recognises this and has dealt with it in his DN.
24. However it is the essence of the engagement of the exemption under section 31(1)(a) here, as the Commissioner argues, that the question as to the public interest in avoiding prejudice to the Home Office’s ability to operate effective and efficient border controls and to detect and prevent crime is an equally important factor in the consideration of that balance.
25. We accept, as does the appellant (as can be seen from the grounds) that there has been substantial disclosure on the issues of concern to the appellant. We accept that all of the available information, except the two short e-mails, identified at paragraph 6 (b) & (c) above, has now been disclosed.
26. Most significantly, we accept the Commissioners argument that disclosure of the two withheld e-mails will not actually provide any more material or significant transparency or accountability in relation to the public authority’s discharge of its

own functions in regard to the export of the City of Adelaide. We further accept, having seen the requested information, disclosure would give a material insight into the Home Office's approach to certain aspects of border controls. We agree with the submission from the public authority that disclosure of the withheld information would allow individuals to build a picture of border checks in relation to export of cultural goods and, in conjunction with other available information, attempt to take steps to circumvent those checks and controls. We are satisfied that even though this may not have been applied to this specific case (for any number of reasons) it is still a live concern in the bigger picture of criminal activity. As the appellant has alluded to, the very disclosure of the remaining requested information would expose, to the public at large, part of the modus operandi used in the prevention and detection of crime to those intent in criminal activity.

- 27.** Accordingly this Tribunal agree with the Commissioner that less weight should be attached to the question of transparency and accountability in the concerns of the appellant, and generally, about compliance by the public authority with the Export of Cultural Goods Regulations than to, in the circumstances and the facts of this case, the more significant public interest in the prevention and detection of crime.
- 28.** Accordingly we are of the view, in all the circumstances of this specific case that the disclosure of the remaining requested information would add little if anything to the proper quest of probing the effective administrative functions of the ACE. We are satisfied that there would be no significant benefit to the public interest in that quest by disclosure of the remaining requested information. On the other hand we are of the view that there would be a significant detriment to the public interest in the wider public authority functions and operations in the detection and prevention of crime.
- 29.** We have considered the final submissions of the appellant (29 December 2014) and of the Commissioner (5 February 2015) and find them particularly helpful in explaining any confusion that may have arisen as to the meaning and effect of "gateways" but find nothing new in relation to the substance of the issues we have to decide hereon and in particular the balance in the public interest test.
- 30.** Appellant has failed to persuade us that the Commissioner was wrong in concluding that, on the facts of this particular case, the public interest here favours maintaining the exemption. We agree with and adopt the Commissioners' decision for the reasons given in his DN and his response to the Grounds of Appeal.
- 31.** For the above reasons we refuse the appeal herein.

Brian Kennedy QC

8th April 2015.