



First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0059

Decided without an oral hearing

Before

FIONA HENDERSON
JUDGE

MALCOLM CLARKE
AND
ANDREW WHETNALL
TRIBUNAL MEMBERS

Between

MUSSRAT (MUSARA) HUSSAIN

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

KENT COUNTY COUNCIL

Second Respondent

Subject: s41 FOIA – confidential information
s42 FOIA– Legal privilege
s43 FOIA – commercial sensitivity

Case Law:

R(Prudential plc and another) v Special Commissioner of Income Tax and another [2013] UKSC1, 2 AC 185
APPGER v ICO and FCO [2015] UKUT 377 (AAC)
James Kessler QC v IC EA/2007/0043

DECISION AND REASONS

Introduction

1. This appeal is against the Information Commissioner's (ICO) Decision Notice FS5081094 dated 11th February 2016 which held that Kent County Council (KCC) had correctly applied s42, s43(2) and s41 FOIA to the withheld information.

Background

2. The disputed information relates to a loan that was issued to an individual (who is not party to these proceedings) in the sum of £125,000 to renovate the property that is the subject of the information request, under the “No Use Empty scheme”. The purpose of this scheme is to reduce the number of empty properties and regenerate East Kent. The terms of the KCC loan required repayment upon sale or by 31.3.2011 otherwise interest was payable on the entire sum until the loan was repaid. The repayment date was extended without penalty to 30.6.2012 by agreement, however, the loan was not repaid at that date. The Appellant argues that she is owed monies by the 3rd party (in relation to a beneficial interest) and that her interest was greater than KCC’s. She is an unsecured creditor and believes that DDC, KCC and the Bank have colluded to her disadvantage.
3. At the time that the loan was agreed there was already an existing charge in favour of Lloyds Bank (the Bank). KCC registered their charge as a 2nd charge but did not get a Deed of Priority. Subsequently, the Bank increased the value of their loan without the knowledge of KCC and contrary to indications made prior to KCC taking out their loan. The fact of the increase by the Bank of their lending in the absence of a deed of priority meant that there was no bar to the Bank insisting on all of its lending being repaid first. KCC might therefore not be able to rely fully on its charge to obtain repayment.
4. KCC had issued 2 statutory demands and was contemplating insolvency proceedings. In a file note from 2013 that has now been disclosed, KCC discussed that either it would issue bankruptcy proceedings or they would “*push [the Bank] into it*”.¹ It sent a letter before claim to the Bank who consequently appointed receivers in October 2014. The Appellant argues that the bank were manipulated into appointing receivers by KCC when that would not otherwise have been their course of action. There is support for this in the papers where the bank state that KCC’s: “*aggressive stance is unduly forcing the Bank to foreclose its security without giving [the 3rd party] a fair and reasonable opportunity to repay the Bank...*”²
5. The consequence of this was that the properties were sold by the receiver (rather than more profitably through individual market sale). Two were purchased by Dover District Council (DDC) at what the Appellant considers to have been an undervalue achieved in part she believes because DDC issued an improvement Notice relating to the property prior to the auction which in her view discouraged other purchasers.

Existing Litigation

6. The 3rd party had made a FOIA request against KCC which was concluded following internal review on 13.2.15. The Appellant’s request as set out below was dated 15.2.15. The Bank took legal action against the 3rd party which was initiated on 8.4.15. The 3rd party’s defence was that the Bank and KCC had blocked the pending sales and were therefore themselves responsible. The Appellant joined the proceedings as part owner on 29.4.16 and counterclaimed against the bank and 3rd party. KCC and DDC were not parties. On 6 July 2016 the Court made a 3rd party disclosure order against KCC and

¹ P543 OB

² P787w OB letter of 15.5.14

a copy of the order was provided to the Tribunal. The disclosure order required KCC to provide copies of “all documents passing between itself and [the bank] in relation to matters affecting the security of its charge over [3 addresses]”. The order made provision for KCC to claim privilege if they wished. The Appellant has told the Tribunal that the documents disclosed pursuant to the Order were disclosed to her by the 3rd party as a co-litigant in proceedings. The bank and 3rd party have settled out of Court by way of consent however, the Appellant has outstanding claims against the Bank and the 3rd party.

Position of DDC

7. DDC allege that the 3rd party owes unpaid Council tax and business rates. It is understood from the Appellant that this debt is disputed. DDC were in discussion with KCC with a view to undertaking joint proceedings against the 3rd party to bring the matter to a head. DDC contacted the Bank to find out their position in order to avoid issuing proceedings unnecessarily. DDC also had a statutory role in relation to properties owned by the 3rd party pursuant to which they issued the improvement notice.

Information Request

8. The Appellant wrote to KCC on 15th February 2015 referencing previous correspondence and asking for information in the following terms:
*“On 22/04/2014 I wrote to you in reference to both [name redacted] and [name redacted]. I asked that you do not take any action as I was owed monies (in relation to my beneficial interests) and that my interests was far greater than yours.
I now ask that you provide me with full disclosure pertaining to the property known as [address redacted]”.*
9. On 13th March 2015 KCC provided some information but refused the remainder relying upon s21 FOIA (Reasonably accessible by other means), s42 FOIA (legal professional privilege), s43 FOIA (commercial interests), s41 FOIA (duty of confidence), and s40 FOIA (personal data). Following internal review dated 9th April 2015, KCC upheld the refusal upon the same grounds.

Complaint to the ICO

10. The Appellant complained to the ICO on 4th May 2015³ arguing that KCC had wrongly applied the exemptions. During the course of the investigation KCC disclosed information subject to s21 FOIA and disclosed the information to which they had previously applied s40 FOIA to the Appellant alone (i.e. outside FOIA) with the consent of the 3rd party data subject. It was apparent from annotations on this disclosure that some of this information had also been withheld originally pursuant to s41, s42 and s43⁴. The decision notice therefore only dealt with the information that continued to be withheld pursuant to s41,42 and 43 FOIA⁵.

Appeal

11. The Appellant appealed on 09/03/2016. Her grounds of appeal were:

³ P787a OB/1

⁴ E.g p 453 p 538 and 795 OB

⁵ The Commissioner also found that there had been a breach of s10 FOIA due to the timing of the additional disclosures.

- i) The ICO accepted KCC's position without question and without allowing the Appellant to respond.
- ii) She disputes that she was working in tandem with the 3rd party as she has her own proceedings involving him. It was unfair that she was not asked to comment prior to the issue of the decision notice.
- iii) The DDC claim she understands is a disputed claim, she speculates that it might be a false or incorrect claim for money. It would be unfair for a disputed claim to be the basis of an excuse not to reveal information under FOIA.
- iv) LPP has been used as a blanket exemption, there should be limits on its use, her case is that it is not credible that LPP covers everything withheld under that exemption.
- v) She argues that the ICO failed to weigh the balance of public interest correctly.

12. The ICO opposed the appeal on all grounds in a response dated 11th April 2016. responding in relation to the grounds as numbered above that:

- i) It was disputed that the ICO had accepted KCC's position without question, she relies upon having seen the disputed information and having sought further information from KCC. The Tribunal observes that the appeal is a complete rehearing and the Tribunal is not bound by any findings of fact made by the ICO and is able to admit fresh evidence. The Appellant is now aware of the arguments and has had an opportunity to address them.
- ii) The ICO argued that whether the Appellant was acting in tandem with the 3rd party is not material, the ICO's decision was based on analysis of the withheld information and its application to the legal principles. The Tribunal agrees as FOIA is motive blind and any information disclosed to the Appellant under FOIA in effect would also be disclosed to the 3rd party or any member of the public without restriction.
- iii) The ICO's case is that because the claim is disputed, the ongoing nature of the dispute increases prejudice in disclosure. The ICO's decision is not predicated on the basis that any claims by KCC, DDC or the Bank are necessarily meritorious. The Tribunal observes all defended claims are disputed. It does not mean that they are false or incorrect and there are legal processes to resolve them. It is not within the jurisdiction of this Tribunal to assess the merits of the competing claims, nor is this a function of the ICO
- iv and v) The ICO stood by her assessment of LPP which is based upon having seen the disputed information, the Appellant's arguments do not alter the assessment of where the public interest lies in relation to any of the exemptions relied upon.

13. KCC were joined by order of the Registrar dated 30th March 2016. They defended the appeal with a response dated 10th May 2016 in which they adopted the ICO's response and applied for the appeal to be struck out⁶. This application was refused by the Chamber President in a decision dated 12th May 2016.

⁶ P44

14. All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) (*Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (GRC Rules)*), being in receipt of an open bundle of documents comprising some 805 pages, a closed bundle (as detailed in the case management notes of 30.3.16 and 19.8.16) and the open and closed written arguments advanced by the parties and supplementary bundle totalling a further 48 pages. In proceeding without an oral hearing the Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules and has had regard to costs, proportionality and the narrow issues in this case. The Tribunal has adjourned the case as set out below and taken into consideration the responses of the parties to these. It has had regard to all the documentary evidence before it, even where not mentioned directly in this decision. The Tribunal has not prepared a closed annex as it is satisfied that it can address the arguments and its reasons in an open decision without disclosing the contents of the closed bundle.
15. This case was listed for a paper hearing on 26th January 2017. Upon consideration of the open and closed bundles the Tribunal was unable to determine the case as it did not have sufficient information. The case was adjourned and open and closed directions were issued dated 4th April 2017 for the provision of further information by the 2nd Respondent and Appellant. Further submissions and information were received from the Appellant dated 5th June 2017 and KCC dated 9th June 2017. Additional information was sought from KCC in the further adjournment directions dated 27th August 2017 and the Tribunal is in receipt of their response dated 2nd October and the Appellant's submissions of 3.11.17.

Sufficiency of search

16. Although not pleaded in the original grounds of appeal it became apparent that there was a factual issue as to whether all the material in scope had been identified. The Appellant had provided a number of documents which she questioned why they had not been provided in disclosure to her (under the FOIA 3rd party disclosure and in the Civil proceedings). KCC were directed to detail what steps it had taken to ensure that all material in scope has been identified.
17. KCC's evidence in response to the 4th April 2017 adjournment was that one of their Solicitors searched the voluminous electronic legal file and the client file. The solicitor considered every document held in relation to the 3rd party and not simply those documents which specifically related to the named address. This was because the Appellant requested "full disclosure" of all documents relating to the named address and the view taken was that all documents held by KCC pertaining to the 3rd party related in some way to the named address. Accordingly, all documents were reviewed, including those which did not specifically mention the named address and those that concerned other properties owned by him. No other files were identified which might contain relevant information.
18. The Appellant's submission of 3.11.17 speculates as to whether documents that have subsequently been disclosed should have been included in the closed bundle. She argues that the documents disclosed would never have fallen within the exemptions claimed. She argues that the appearance of documents not previously included in either the open or closed bundles as a result of disclosure following the Court order is

evidence of KCC's failure to disclose them to the Tribunal or consider them in relation to this FOIA request.

19. Having compared documents provided by the Appellant and those they disclosed to the 3rd party, KCC do accept that documents in scope had been omitted from the closed bundle. The Tribunal sought further clarification and from KCC's submissions dated 2nd October 2017 KCC confirmed that variously they were now either before the Tribunal in the open bundle or had clearly been considered because they were annotated in manuscript with the exemption relied upon and formed part of the disclosure to the 3rd party pursuant to the Court order. We are satisfied from this that on the balance of probabilities the search was adequate and that this omission amounts to a "clerical error" due to the volume of material searched. We are satisfied that all the material in scope has now been identified and do not require any further steps to be taken. In rejecting the Appellant's arguments, the Tribunal is concerned with what has been withheld under FOIA and not the adequacy of disclosure in the Court case. That is a matter for the Judge in that case and as set out below disclosure under FOIA is a separate matter.
20. We also consider that the Appellant's view of the scope of the exemptions is too limited and when assessing whether an exemption is engaged and the balance of public interest concerning disclosure we have to have regard to the circumstances which applied at the date of the refusal.

Scope

21. In relation to the points raised by i) and ii) above, this appeal amounts to a complete rehearing, the Tribunal is not bound by the ICO's decision or the evidence and arguments before the ICO. The ICO's decision was not predicated upon the Appellant and 3rd party working in tandem and it is not a material consideration in relation to the applicability of the exemptions and the public interest test. The Tribunal is satisfied therefore that there is no issue for it to determine on these points.

Legal Professional Privilege

22. S42(1) FOIA provides that:
Information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is exempt information. ...
23. KCC has claimed Legal Professional Privilege (LPP) in relation to a large section of the withheld information and provided a letter from the Bank demonstrating that it too considered part of its information to be covered by LPP.
24. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. We have had regard to the contents of the closed bundle, including the range of actions being considered at a particular date and who was handling the issue and are satisfied that the information withheld in reliance upon s42 FOIA all falls within the category of litigation privilege.
25. We are satisfied that litigation privilege covers all communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, which "*relates to the rights, liabilities, obligations or*

remedies of the client either under private law or under public law".⁷ The communication is made for the sole or dominant purpose of obtaining legal advice and in light of our finding that litigation was in contemplation, it includes correspondence between parties. We are satisfied that the withheld information consists of:

- Discussions between lawyers,
- Discussions between lawyers and officers from KCC and
- Discussions between lawyers and the other parties relating to the issues.

26. In assessing this exemption the Tribunal must be satisfied that at the relevant date:

- LPP could be maintained in legal proceedings,
- The information was confidential and privilege had not been waived.

27. During the currency of the ICO's investigation KCC disclosed to the Appellant certain documents to her alone (i.e. outside FOIA)⁸. Some of these documents have s42 written on them in manuscript and appear therefore originally to have been withheld in reliance upon LPP. Although no manuscript annotation is written on p543, as it is a file note of a conversation between a lawyer and KCC Officers it seems likely that this too was withheld pursuant to s42.

28. KCC was therefore directed⁹ to provide further submissions upon the waiver or partial waiver of privilege in light of the s42 disclosures already provided to the Appellant and those made to the 3rd party in the litigation.

29. KCC stated in their response of 4th April 2017 that the disclosure pursuant to the Court proceedings was more than 1 year after the date of refusal. Aside from instances of redaction which can be seen in the disclosed documents, KCC waived any privilege applying to this correspondence with the Bank.

30. We are required to confine our consideration of the exemptions to the "relevant date" which pursuant to the reasoning in APPGER v ICO and FCO [2015] UKUT 377 (AAC) is the date of the public authority's refusal. We are satisfied from the content, nature and circulation of the documents that the information was confidential at the relevant date. The Tribunal has to have regard to the position that existed at the date that the original request was refused. We are satisfied that this was 13th March 2015. Although KCC disclosed documents to the 3rd party in compliance with a Court order dated 6 July 2016 without restriction and waived privilege in relation to the documents then disclosed, we note that the terms of the Order made provision for the maintenance of privilege and are therefore satisfied that KCC could have maintained privilege in legal proceedings had they chosen to.

31. The Appellant argues that because some information which was originally withheld on the grounds of s42 has now been disclosed¹⁰, there were never good grounds for relying

⁷ R(Prudential plc and another) v Special Commissioner of Income Tax and another [2013] UKSC1, 2 AC 185

⁸ E.g. p470, 491, 496, 524, 525, 527, 538

⁹ 4th April 2017 adjournment directions

¹⁰ E.g. p470, 491, 496, 524, 525, 527, 538 OB these documents have s42 written on them in manuscript and appear therefore originally to have been withheld in reliance upon LPP

on s42 at the relevant date¹¹. We take into consideration that when the decision to rely upon s42 was made, although legal proceedings were contemplated there were at that time no proceedings and it was not yet apparent whether she, KCC, DDC or the Bank would be involved in litigation, what form it would take and who the parties would be. By the date of the disclosure pursuant to the Court Order (20th July 2016) it was apparent that KCC were not a party despite the Appellant by then having joined the proceedings.

Public interest

32. S42 is subject to the public interest test pursuant to s2(2)(b) FOIA namely that:

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

33. In favour of disclosure, the Appellant argues that:

- i. disclosure was necessary to enable her to assess the strength of her legal case to see if KCC and the Bank were acting inappropriately together to undermine her interests,¹²
- ii. the close relationship between KCC and DDC was a cause for concern and that DDC benefitted from the actions of KCC and the Bank to the detriment of a member of the public. 2 houses sold at auction due to the actions of KCC and the Bank (rather than to private buyers) were bought by DDC in circumstances where she believes they were able unfairly to influence the sale price due to their statutory role.
- iii. She argues that there was possible collusion between KCC and the Bank to take wrongful action undermining assets of members of the public. She notes that in correspondence from KCC to the Bank, they threaten legal action against the Bank on the basis that the Bank misled them, not because of any fault of the borrower.¹³
- iv. Disclosure would expose KCC's failure in due diligence (as they never entered a Deed of Priority with the Bank), the consequent renegeing of a commitment by the Bank because of that failure, and the resultant repossession action by the Bank.
- v. She relies upon the fact that she is an individual in comparison to large commercial organisations with the implication that it is in the public interest that she should not be manipulated and bullied by large public organisations.
- vi. She argues that the public must be assured that in its dealings with a public authority they are made in good faith. KCC should not abuse its power for their own commercial gain.

¹¹ She makes similar arguments in relation to subsequent disclosures of information originally withheld under s41 and s43 FOIA

¹² P22 OB1

¹³ Letter of 22.1.14

34. We accept that disclosure would provide transparency, showing how public funds are allocated and protected. It would provide visibility for the nature of the relationship between DDC and KCC and its commercial relationship with the Bank. It would also increase accountability shedding light on the circumstances in which KCC failed to take legal steps to protect their investment. However, the Tribunal observes that it is already in the public domain that KCC did not take out a deed of priority and that DDC purchased 2 of the houses concerned at auction and the price obtained. Consequently, there is some existing visibility and the Appellant is already in a position to make her arguments and press for accountability in a public forum which weakens the public interest in disclosure.
35. Additionally, there are alternative remedies available through fraud investigations and court actions specific to the issues rather than through anticipatory FOIA requests. It is accepted that the Appellant is an individual in dispute with a large organisation however, the Appellant in effect is asking the Tribunal to usurp the jurisdiction of the Courts in disclosing the material outside of legal proceedings to fulfil the Appellant's aims. It was an ongoing issue at the date of the request and in light of the Appellant's contemplation of litigation and allegations of fraud and collusion there would be an inequality between the parties if the public authority was required to disclose its advice and correspondence unilaterally when the other party need not. Disclosure would provide access to their thinking, the analysis of strengths and weaknesses of their case. As evidenced by the order for disclosure dated 6.7.16 obtained by the 3rd party there is a Court process to manage the equitable disclosure of relevant information. The ICO had very limited information about potential litigation at the time of her consideration of the Appellant's appeal. It was not her function to anticipate disclosures that might be appropriate in the context of the litigation in prospect, nor was she in a position to assess what these might be.
36. Arguments in favour of withholding the information. KCC argue that there is a strong public interest in a public authority having the ability to take legal action to retrieve public funds owed to it and unilateral disclosure would impact upon that ability. We agree.
37. Both the Respondents rely upon the adverse impact on the course of justice by weakening the principle of LPP. Whilst not absolute we accept that this is a strong public interest.¹⁴ In assessing the weight to give these arguments we are satisfied that:
- i. Public authorities need the ability to communicate freely with legal advisors in confidence and to receive advice in confidence.
 - ii. If legal advice were routinely disclosed this would act as a disincentive to seek advice or to provide full and frank instructions
 - iii. If legal advice were routinely disclosed caveats and qualifications might be given which would prevent free and frank correspondence.

¹⁴ James Kessler QC v IC EA/2007/0043

- iv. Legal advice may include arguments for and against a course of action which can undermine public confidence in decision making. Without comprehensive advice the quality of decision making would be reduced as it would not be fully informed and balanced.

38. Taking all these matters into account we are satisfied that the public interest in withholding the information at the relevant date outweighed the public interest in disclosure.

Commercial interest

39. s43 FOIA provides:

... (2) 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).

40. We have considered whether the information is commercial. The Appellant believes that it is not. She gives the example of the tender for a contract as falling within the exemption. The ICO argues that the provision of bank loans is a commercial activity even when the benefit is not to achieve a direct monetary profit because the recovery of loans is so inherently tied to their provision that it falls within the same category¹⁵. We agree. Additionally, the definition of commerce is the activity of buying and selling¹⁶, and is generally considered to relate to business. The terms of the loan included the payment of interest if late and in those circumstances we are satisfied that it was commercial even if the aim was not profit but regeneration and replenishment of housing stock.

41. We are satisfied that the material withheld under this exemption relates to the commercial interest of KCC, the Bank and DDC (all of whom consider that they were owed money¹⁷ by the 3rd party and may have legal claims to funds recovered from him through the sale of the properties).

42. The Bank: We remind ourselves that disclosure under FOIA is to the world at large. As set out above we do not take the 3rd party's personal data into account, but disclosure of commercially sensitive information in our judgment would reduce confidence in other clients unconnected with this case that the bank would be able to retain their client information in confidence. We accept this and also are satisfied that the information would also include information relating to their tolerance to default on the debt which would be unhelpful in a commercial setting.

¹⁵ DN para 29

¹⁶ OED

¹⁷ In the case of DDC the Appellant disputes that the claim was valid.

43. KCC and DDC: At the time of the request litigation was in prospect and they argue that disclosure would highlight their considerations in respect of the debts which would hinder their prospects of recovery. Whilst we note that there is no evidence that the Appellant has a direct involvement in the debt that DDC allege is owed by the 3rd party, and she refutes the suggestion that she and he are working in tandem; disclosure under FOIA is to the world at large without restriction, and anything disclosed to the Appellant under FOIA is disclosable to the 3rd party.
44. KCC advanced arguments relating to the 3rd party however, in light of his agreement to disclose his personal data to the Appellant we have not considered his commercial interests in this decision notice. In any event the evidence relating to 3rd party appears to be speculative (unlike the bank and the district council, he does not appear to have been asked).
45. S43 is also subject to the public interest test as set out in S2(2)(b) FOIA. As with the material withheld under s42, some information originally withheld under s43 was disclosed pursuant to the Court order of 6th July 2016. This was after the relevant date and accordingly, the 2nd Respondent's position with regard to this issue is unchanged and we repeat our findings as set out in paragraphs 29-31 above.
46. The Appellant argues in her submission dated 3.11.17 that DDC was involved in KCC's efforts to influence the Bank, with DDC writing unsolicited letters to the Bank claiming the 3rd party owed DDC money and was therefore in financial difficulty.
47. It is accepted that disclosure of the commercially sensitive material would:
- i. Provide greater clarity and transparency re spending, management and recovery of public funds.
 - ii. Enable scrutiny of KCC's, and DDC's decision making and propriety of conduct.
 - iii. Shed light on a situation which may result in a loss of public money, how it came about and steps taken to rectify it.
48. DDC argue that they are pursuing a debt relating to a claim for Council tax and business rates from the 3rd party. DDC has a legal duty to collect revenue. These are public funds. It is in the public interest that DDC can pursue action it feels appropriate in recovering monies owed (including we observe writing to those whose legal action may impact upon their strategy) without exposure to the public domain. Disclosure would jeopardize future dealings with the 3rd party and therefore the commercial interests of the authority would be jeopardized.
49. In favour of withholding the information we accept:
- i) The purpose behind the exemption – Including the capacity for the information to undermine KCC's, DDC's and the Bank's ability to retrieve a commercial loan.
 - ii) That where there are competing claims there is an administrative and legal process including disclosure to resolve them. We are satisfied that it is not in

the public interest for one party to be required to provide more information to the benefit of another outside of the established process.

- iii) The public interest in the public having confidence in banks to protect their commercially sensitive information and for banks not to be disadvantaged in its ability to respond individually to customers.

50. Taking all these matters into account we are satisfied that the public interest in withholding the information at the relevant date outweighed the public interest in disclosure.

Information Provided in Confidence:

51. s41 FOIA provides:

(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.

52. We have had regard to the withheld information and are satisfied that the information withheld under this exemption was provided to KCC by DDC. We have considered whether the information has the necessary quality of confidence. We are satisfied that at the relevant date the information was not otherwise accessible and the information withheld was more than trivial it included strategic, financial and commercial information.

53. We have considered whether the information was imparted in circumstances importing an obligation of confidence. The Appellant argues¹⁸ that the information was freely given without any caveat. She speculates that they may have applied “*given in trust*” retrospectively because it later became inconvenient for them to disclose.

54. The information relates to issues of 3rd party debts, financial information relating to a private individual, how debts might be retrieved and the legal situation. From the nature of the information and the context in which it was given we are satisfied that the intention was to share the information in confidence and that this would have been apparent to the recipient.

¹⁸ P787q OB

55. We have considered whether a breach of confidence would be actionable. Again we do not take into consideration the interests of the 3rd party in assessing this. We are satisfied that it would have been actionable by DDC in light of its content. Although S2(3)(g) FOIA provides that the public interest test is not applicable, there is a defence to an action for breach of confidence if a strong public interest exists in disclosure (justification).
56. It is alleged that DDC bought the houses cheaply as a result of their actions and that it is in the public interest that there should be transparency surrounding this. The Appellant argues that disclosure is justified in order to:
- Highlight misconduct, wrong doing or risks to the public¹⁹.
 - Promote openness and transparency.
 - Shed light on decision making and financial management in a public authority.
57. Arguments in favour of withholding as advanced by the ICO and KCC (on behalf of DDC) are that details of DDC's finances, procedures, strategies, thinking and tolerances would be disclosed at a time when issues were live. They argue that there is a strong public interest in the duty of confidence being maintained with regards to this information.
58. More generally it is argued that disclosure would undermine the spirit of confidentiality which is to maintain trust and preserve the free flow of information to a public authority in order to maintain its statutory functions.
59. In assessing justification for breach of confidence we repeat our analysis as set out earlier in the decision that the private interests of individuals can be maintained by the Courts without breach of confidence to the world at large which is more proportionate. In relation to transparency the chronology of the issue of the improvement notices and sales, the identity of the purchaser, the value and the circumstances of the sale are already in the public domain and the Appellant is in a position to mount her arguments in this regard with no recourse to a breach of confidence.

Conclusion

60. For the reasons set out above we refuse the appeal.
61. Our decision is unanimous.

Signed

Judge of the First-tier Tribunal
Date: 19.12.2017

¹⁹ We repeat that it is not the function of this Tribunal to assess competing claims between parties to a dispute.