



[Neutral Citation Number]

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

**Case No. EA/2010/0134**

**ON APPEAL FROM:  
Information Commissioner  
Decision Notice ref FS50206893  
Dated 23 June 2010**

**Appellant:** Channel Four Television Corporation

**Respondent:** Information Commissioner

**Additional party:** British Sky Broadcasting Limited

**Date of hearing:** 15 February 2011

**Date of decision:** 22 February 2011

**Before**

**HH Judge Shanks**

**Steve Shaw**

**Jacqueline Blake**

**Representation:**

Channel 4: Jane Collier  
Information Commissioner: James Cornwell

**Subject area covered:**

Commercial interests/trade secrets s.43

**Cases referred to:**

*Chief Constable of South Yorkshire Police v Information Commissioner* [2011] EWHC 44 (Admin)

*Veolia ES Nottinghamshire Ltd v Nottingham County Council* [2010] EWCA Civ 1214

**Decision**

The appeal is allowed in part and the following substituted decision notice is issued.

**Substituted Decision Notice**

**Public authority:** Channel Four Television Corporation

**Name of Complainant:** Mr P Martin

**The Substituted Decision**

For the reasons set out below, the Public Authority was entitled to withhold those parts of the documents in dispute which are marked in purple in the Closed Supplementary Bundle produced for the Tribunal by virtue of sections 41 and/or 43(2) of the Freedom of

Information Act 2000 and to supply such documents to the Complainant redacted accordingly.

### **Action Required**

The Public Authority shall supply the redacted documents to the Complainant by 1600 on 25 March 2011.

Dated 22 February 2011

Signed

HH Judge Shanks

### **Reasons for Decision**

#### **Background**

1. On 20 March 2008 Mr Martin made a request of the Appellant, Channel 4, under the Freedom of Information Act 2000 by which he sought:

- 1. the contents of correspondence from Channel and minutes of meetings regarding the availability of E4 via the sky satellite of Freeview.**
- 2. the contents of correspondence and agreements from Channel 4 with Sky on the subject of E4 (sic)**

E4 is a TV channel operated by 4 Ventures Ltd, which is a wholly owned subsidiary of Channel 4. Mr Martin's request has all along been treated as covering any relevant agreement between Sky and any wholly owned subsidiary of Channel 4 as well as between Sky and Channel 4 itself.

2. Following an internal review, on 10 June 2008 Channel 4 informed Mr Martin that the information requested would not be supplied by reason of the exemptions in sections 41 and 43 of the Act, the latter of which protects what can loosely be referred to as “commercially confidential information.” Mr Martin complained to the Information Commissioner who issued a detailed decision notice on 23 June 2010. Before the Commissioner Channel 4 relied not only on sections 41 and 43(2) but also maintained that the request was vexatious and that they could therefore rely on section 14(1). The Commissioner was against Channel 4 on section 14(1) and to a large extent on the other sections. The decision notice required Channel 4 to disclose the contents of nine documents apart from certain specified parts which were listed in Annex A to the decision notice. Most importantly, the Commissioner required the disclosure of a large part of a digital distribution agreement dated 9 June 2004 relating to the distribution of the E4 channel by Sky.
3. Channel 4 appealed to this Tribunal against that decision notice on the basis that the Commissioner was wrong on section 14(1) and that he should have found that the balance of the contents of the distribution agreement and certain other documents could be withheld under section 43(2). Sky also maintained that certain parts of the distribution agreement which the Commissioner had said should be disclosed were commercially sensitive so far as it was concerned and they were therefore joined as parties to the appeal. In the course of preparation for the appeal a detailed analysis of the distribution agreement was carried out and the parties were able to reach agreement on the parts where the exemption under section 43(2) applied and the public interest in upholding that exemption outweighed that in disclosure. A copy of the distribution agreement (and other disputed documents) showing the parts which all parties agreed should not be disclosed marked in purple was produced for the Tribunal in a Closed Supplementary Bundle.
4. On the basis of a cursory examination of those documents and the Commissioner’s assurances we are satisfied that the parts of the documents marked in purple do not need to be disclosed. Since these parts go well beyond those which the Commissioner allowed to be withheld in his decision notice it is clear that the appeal must be allowed in part and a substituted decision notice issued as set out above.

### The outstanding issue on the appeal

5. In view of the agreement reached between the parties, Sky withdrew from the appeal. But Channel 4 has persisted with the appeal solely on the basis, as they maintain, that notwithstanding their agreement with the Commissioner on necessary redactions, the entire contents of the distribution agreement were exempt under section 43(2) and that there was therefore no reason for them to disclose the redacted version. In particular they say (1) that where the substantive part of a long and detailed contract is not disclosable by reason of section 43(2) there is no need for a public authority to go through a detailed analysis of the contract extracting any clauses which can be disclosed without causing commercial prejudice and (2) that on a complaint to the Commissioner there is no need for a public authority to go through such an analysis justifying to the Commissioner the commercial prejudice likely to be caused by the disclosure of each clause and that such an exercise is disproportionate and cannot be insisted on by the Commissioner. The Commissioner for his part maintains that the approach he has adopted in this case is entirely consistent with the proper interpretation of the 2000 Act.

### Findings of fact

6. Before turning to Channel 4's detailed arguments, we record two important findings of fact. First, it is fair to say that the agreed redactions to the distribution agreement involve the removal of the central and most important obligations in the contract (its core or "guts" as it was put at the hearing) and that the disclosure of what remains is unlikely to be of great interest or value to the public. However, a substantial portion of the contract does remain, including a large number of definitions, the provision as to the term of the contract, and many so-called "boiler plate" clauses, all of which may be of some interest.
7. Second, we accept the written evidence of Nick Swimer, who is a senior lawyer at Channel 4, that, as part of preparing for the appeal, Channel 4 carried out detailed work providing explanations and evidence to the Commissioner in relation to individual clauses in the distribution agreement and that that exercise took him three to four working days and his assistant Ms Ahmed five working days and involved solicitors' costs of around £7,200 plus VAT. Mr Swimer also gave frank

and helpful oral evidence to the Tribunal: it was clear to us from this evidence that, at the time of the request, he would have been able to go through the distribution agreement identifying commercially sensitive clauses, to consult with Sky, to redact the distribution agreement so as to extract such clauses and to supply a redacted copy to Mr Martin along with a section 17 refusal letter in under the notional 18 hours allowed under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.<sup>1</sup>

#### Channel 4's arguments and the Tribunal's conclusions

8. Channel 4's first argument in support of the propositions we set out above in paragraph 5 is based on the "plain and ordinary meaning" of the words in sections 1 and 43(2) of the Act. Channel 4 say that the plain and ordinary meaning of the word "information" in section 43(2)<sup>2</sup> "... comprises the whole contract, including its substance". We do not accept that proposition. It is obvious from the legislation and has always been the understanding of the Tribunal that there is a clear distinction between a document and the information in it and that a document may well contain many pieces of information some of which must be disclosed under the Act and others which need not be disclosed. Mr Martin requested "the contents" of the relevant contract which to our mind clearly indicates that he wanted all the contents or as many of the contents as he was entitled to. In the context of this argument, Channel 4 also drew the Tribunal's attention to the well established rule in the law of contract that a contract must be construed as a whole. That is no doubt entirely right as a rule in the law of contract but we are dealing in this case with the rules of law arising out of the Freedom of Information Act 2000.
9. Channel 4's second argument relates to the statutory purpose of the section 43(2) exemption, which is rightly said to be to enable public authorities not to disclose information whose disclosure might damage the commercial interests of any party. It is said that Parliament must have intended that the exemption should be capable of being applied "practically" and that reliance on it should not be "impractical" or

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<sup>1</sup> SI 2004/3244. See regulations 3(1), (3) and 4(4). As we record below these regulations are strictly speaking irrelevant to the issues in this appeal but they provide an obvious reasonable benchmark for this finding.

<sup>2</sup> The exact wording of the section is as follows: "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)"

unworkable.<sup>3</sup> Channel 4 point out that public authorities often hold contracts which are commercially sensitive running to hundreds or thousands of pages, that the process of analysing such contracts to extract material not covered by section 43(2) can be time-consuming and expensive, that that process is not, it seems, covered by regulation 4(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004,<sup>4</sup> and that public authorities (including Channel 4 itself apparently) sometimes have very limited budgets so that to apply section 43(2) in the way contended for by the Commissioner would be impractical and unworkable. So far as this particular case is concerned, we refer to our finding of fact at paragraph 7 above which in our view disposes of this argument: to have applied section 43(2) in relation to Mr Martin's request in the way the Commissioner contends for would have been perfectly practical and workable. As to the general hypothetical case raised by Channel 4, we are not persuaded that it is sufficiently realistic to influence our interpretation of the Act, which, as we have already indicated in paragraph 8 above, is in our view clear on this point.

10. Channel 4 also say in the context of this argument that section 50 of the Act (which deals with what the Commissioner does in response to a complaint about the way a public authority has dealt with a request for information) must be construed in such a way that the Commissioner deals with complaints in a proportionate way and that requiring Channel 4 to provide detailed evidence in relation to individual clauses was disproportionate, particularly where the confidentiality of the bulk of the contract was self-evident and of a very high degree. The route by which the Commissioner reaches his decision on a complaint under section 50 is a matter for his discretion and is not a matter for this Tribunal (unless perhaps he issues an information notice under section 51 which is appealed to the Tribunal under section 57(2)); in any event, the fact that a public authority may be involved in time, expense and trouble as part of the appeal process under the Act is unremarkable and is the inevitable consequence of the system which Parliament has instituted.

11. Channel 4's third argument draws attention to a specific provision in the Environmental Information Regulations 2004, namely regulation 12(11), which

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<sup>3</sup> We were referred to Bennion on Statutory Interpretation section 313 for this proposition. We note that the word used by the editor is actually "impracticable" rather than "impractical."

<sup>4</sup> See *Chief Constable of South Yorkshire Police v Information Commissioner* [2011] EWHC 44 (Admin).

expressly states that a public authority cannot refuse to make available any environmental information "... contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information." Channel 4 say that the absence of such an express provision in the 2000 Act indicates that Parliament cannot have intended public authorities to have to engage in an onerous process of redaction in the case of information not covered by the 2004 Regulations. There are a number of problems with this argument: (a) the 2004 Regulations have a very different origin and structure to the 2000 Act; we do not consider it helpful to interpret one in the light of the other; (b) the natural interpretation of the Act (including section 2(2)) as it has always been understood is that a process of redaction is required where parts of a document are discloseable under the Act and parts are not; (c) if Channel 4 was right the argument would apply to any document, not just long contracts, and would apply whether the process of redaction was onerous or not. We are not persuaded that the absence of a provision equivalent to regulation 12(11) in the 2000 Act assists Channel 4. For what it is worth, we would observe that if there had been such a provision in the 2000 Act which had to be satisfied in this case, we would have found that the unredacted parts of the distribution agreement were "...reasonably capable of being separated..." from the rest.

12. Channel 4's fourth argument relies on the importance of the common law right of confidence and related rights under the European Convention of Human Rights. It is said that the Commissioner's interpretation of the 2000 Act is inconsistent with upholding these rights because its effect is that a public authority is only able to preserve the commercial confidentiality of a document like the distribution agreement if it is willing and able to go through the expensive and time-consuming task of considering each clause to identify whether or not it is exempt under section 43(2) and then justifying its conclusions to the Commissioner.

13. Channel 4 referred us in this connection to *Veolia ES Nottinghamshire Ltd v Nottingham County Council* [2010] EWCA Civ 1214, a case recently decided in the Court of Appeal. That case concerned a provision of the Audit Commission Act 1998 which on its face gave the public an unfettered right of inspection of a contract



between Veolia and the county council which contained commercially confidential information. The Court of Appeal upheld Veolia's contentions that commercially confidential information fell within the concept of "possessions" for the purposes of Article 1<sup>5</sup> of the first protocol to the ECHR and that the relevant section of the Audit Commission Act therefore had to be "read down" so as to be subject to Veolia's rights under Article 1. It seems to us that the crucial point in the *Veolia* case was that the Audit Commission Act contained no equivalent to section 43(2); but in the 2000 Act that section (read in the context of the whole carefully constructed framework of the Act) provides the very protection required by Article 1. There are several references by the Court of Appeal in the *Veolia* case to the 2000 Act which implicitly accept that its provisions are consistent with Article 1 and any common law right of confidence. We think it is also very significant to note that in the *Veolia* case the claimant only sought to prevent disclosure of certain parts of a long commercial contract and that the Court of Appeal cited with approval passages from a decision notice of the Information Commissioner arising out of an earlier request for the same contract under the 2000 Act in which the Commissioner had produced a detailed schedule showing parts of the contract which could be redacted and parts which had to be disclosed which took a similar form to the Annex to his decision notice issued by the Commissioner in this case.<sup>6</sup>

14. In our view there is no inconsistency between the provisions of the 2000 Act as interpreted by the Commissioner and the rights of Channel 4 and Sky to preserve the confidentiality of commercially sensitive information under the common law and EHRC. As long as there is a proper legal framework and it is in the public interest such rights can always be overridden, as expressly provided in Article 1. The fact that the carefully constructed legal framework in the 2000 Act may have involved Channel 4 and Sky in the expenditure of money and time in order to vindicate their rights of confidentiality when faced by a member of the public seeking to exercise his rights under the Act cannot possibly mean that there is such an inconsistency: such expenditure is the natural consequence of the framework and procedures that Parliament has constructed in order to balance the two sets of rights.

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<sup>5</sup> Article 1 provides: "Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ..."

<sup>6</sup> See paras 72 to 78 of the Court of Appeal decision.

## Outcome

15. For all those reasons, although we have some natural sympathy with them and certainly do not regard the stance they have taken in this appeal as unreasonable, we reject all the arguments put to us by Channel 4. Their appeal is nevertheless allowed in part on the basis we have already explained.
16. Our decision is unanimous.
17. Under the Tribunal's rules of procedure an appeal against this decision on a point of law may be submitted to the Upper Tribunal. A party wishing to appeal must make a written application to this Tribunal for permission to appeal which must arrive at the Tribunal within 28 days of this decision being sent out. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can be found on the Tribunal's website at [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk).

Signed

HH Judge Shanks

Dated 22 February 2011