Information Tribunal appeal number: EA/2011/0044
Information Commissioner's reference: FS50301023

Heard at:	**Bedford Square London**
On:	**4th. and 5th. August, 2011**
Decision Promulgated On:	**22 September 2011**

BEFORE

DAVID FARRER Q.C.

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and

JACQUELINE BLAKE and MICHAEL JONES

Between

DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

JONATHAN BROWNING

Second Respondent

Representation:

For the Appellant:	Gerry Facenna
For the First Respondent:	Ben Hooper
For the Second Respondent:	Philip Coppel Q.C.

FOIA s.41. Information provided in confidence. Public interests in disclosing and withholding information.

Tribunal Procedure (First - tier Tribunal)(General Regulatory Chamber) Rules, 2009 r.5.

Exercise of the power to admit the requester`s advocate to the closed session.

Cases: ***Coco v A.N. Clark (Engineers) Ltd. [1968] FSR. 415,***
The Higher Education Funding Council for England v ICO and Guardian News and Media Ltd. EA/2009/0036.
People for the Ethical Treatment of Animal Europe v ICO and University of Oxford EA/2009/0076;
British Union for the Abolition of Vivisection v ICO and Newcastle University EA2009/0064;
DEFRA v ICO and Birkett EA/2009/0106
Ritchie v The ICO EA/2010/0041(Annex 1)

Decision

The Tribunal allows the appeal and substitutes a decision notice in the terms indicated below.

Dated 22 September 2011

Signed David Farrer Q.C.

Tribunal Judge

SUBSTITUTED DECISION NOTICE

Paragraphs 154 and 156 of the Decision Notice stand unamended. The Appellant dealt with the request in accordance with the Act in so far as it relied on s.41(1) to withhold information falling under request (1). The Appellant is not required to take any step to ensure compliance with the Act.

Reasons for our decision

Unless the contrary is indicated, all references in the form" s.40" are to provisions of FOIA

Background

1. The United Kingdom is subject to international and EU treaty obligations relating to the export of certain classes of goods. They are enacted in domestic legislation, specifically the Export Control Act, 2002 and the Export Control Order, 2008 made under it. The Export Control Organisation ("the ECO") is part of the Appellant ("DBIS"). It assesses and issues applications for export licences for controlled goods, conducts compliance checks and audits and offers assistance and advice to exporters relating to its functions. In 2010 it issued nearly 17,000 Standard Individual Export Licences, a statistic which gives some idea of the scale of the licensing regime.

2. Controlled goods are mainly military, dual use (potentially military), equipment designed for torture or repression or sources of radio – activity. Whether a licence is required may depend on the identity of the intended end – user, the exact nature of the goods or the existence of sanctions specific to the intended destination. As is well – known, Iran is subject to such sanctions as a result of resolutions of the U.N. Security Council.

3. Mr. Browning, the Second Respondent, is a journalist working in London for the well – known global news agency, Bloomberg News. He completed an internship in 2008 and from March, 2010 has worked in the Europe, Middle East and Asia team on technology, media and telecommunications.

The request

4. By an e-mail dated 9th. September, 2009 Mr. Browning requested from DBIS the following information -

'(1) Which companies applied to the Export Control Organisation for export licences for Iran in the first and second quarters of this year [i.e. 2009]?

(2) For those applications that were refused, on what grounds was there reason for thinking that they would breach either criteria 1 or 7 of the Consolidated EU and National Arms Export Licensing Criteria. Please provide the specific reasoning for each individual application for the first and second quarters of this year [i.e. 2009].

(3) Please provide the specific application forms for each licence.

(4) What was the total value of export licences refused?'

Of these requests only (1) falls for determination on this appeal for reasons that will become apparent.

5. DBIS replied on 17th. November, 2009. It claimed exemption in respect of (1), relying on s.41(1) and s.43(2). It claimed exemptions in respect of (2) and (3) which the Information Commissioner ("the ICO") upheld and which have not given rise to an appeal by Mr. Browning. The information in (4) was provided.

6. Mr. Browning sought a review by solicitor`s letter of 17th. December, 2009. DBIS indicated by letter dated 18th. February, 2010 that its review confirmed its original reply.

The complaint to the ICO

7. Mr. Browning`s solicitors complained on his behalf by letter of 5th. March, 2010 as to each of the three unsatisfied requests.

The Decision Notice

8. As to request (1), the ICO upheld Mr. Browning` s complaint but on a quite narrow basis. He ruled that the information had been obtained by

ECO from a third party, namely the exporter. Adopting the three – fold test laid down in *Coco v A.N. Clark (Engineers) Ltd. [1968] FSR. 415,* he concluded that the information had the quality of confidentiality and had been imparted in circumstances imposing an obligation of confidence. He found, however, that the evidence of resulting detriment to the confiding exporter was unconvincing. He referred to paragraph 43 of *The Higher Education Funding Council for England v ICO and Guardian News and Media Ltd. EA/2009/0036* as authority for the proposition that detriment meant commercial detriment. Accordingly, he ruled that no actionable breach of confidence was involved. Similarly, he found that the s.43 exemption was not engaged due to a lack of firm evidence from the exporters that their commercial interests were likely to be prejudiced.

9. S.41(1) provides an absolute exemption. S. 43(3) provides for a qualified exemption. In the light of his findings as summarised, the ICO did not consider the balance of public interest in relation to s.43(3).

The appeal

10. DBIS appealed the ICO`s decision in respect of request (1) on 14th. February, 2011. On 28th. February, 2011, Mr. Browning applied to the Tribunal to be joined as a respondent. On 14th. March, 2011, the ICO issued his reply to the notice of appeal. restating his position as set out in the Decision Notice. Mr. Browning was joined on 7th. April, 2011.

11. For the purpose of the appeal DBIS marshalled further evidence which had not been placed before the ICO when he was considering his decision under s.50. That further evidence included a survey of exporters` reactions to the prospect of identification and statements from the Director – General of the British – Iranian Chamber of Commerce and two exporters whose statements were contained in the closed bundle and who gave evidence to the Tribunal in closed session.

12. DBIS communicated to the ICO on 3rd. May, 2011, during preparations for this appeal, its extensive correspondence with exporters indicating

their reaction to disclosure of this information. It persuaded him to abandon opposition to the appeal as he judged that the evidence of detriment was now sufficient to satisfy s.41(1).

13. This change of position was not unprecedented. Indeed, if the ICO took that view of the evidence to be relied on before the Tribunal, it was the only proper course for him to adopt. Nevertheless, his change of stance provoked a sharp protest from Mr. Browning that matters were being compromised – in effect – behind his back. That was an understandable reaction but it had no forensic justification. Mr. Browning was free to argue the case abandoned by the ICO and did so through Mr. Coppel, with force and style. He suffered the practical disadvantage of finding himself without an ally in relation to the closed bundle and the closed session during the hearing. His attempt to tackle that problem during the hearing is dealt with below.

14. Any failures punctually to serve Mr. Browning and his solicitors with copies of the grounds of appeal, the ICO`s response or the reply of DBIS would be another matter. Once joined, he was entitled to a prompt sight of all such material. DBIS asserts that he was served with the appropriate material as soon as joined.

The issues

15. They may be summarised as follows :

- Was the information, namely the names of the exporters, information obtained by DBIS from another party, namely the exporters or rather information created internally by DBIS ?
- Was the information confidential in nature ?
- Did its communication to DBIS import a duty of confidence ?
- Was any detriment shown ?
- Was disclosure likely to prejudice the commercial interests of exporters ?

- If so, did the public interest in maintaining the exemption under s.43(2) outweigh the public interest in disclosure ?

The evidence

(1) The open session evidence for DBIS.

16. In open session DBIS adduced evidence from Tom Smith, Head of the ECO and Martin Johnstone, the Director – General of the British – Iranian Chamber of Commerce.

17. Mr. Smith gave evidence as to the licensing regime in general and the particular anxieties surrounding exports to Iran due to the repeated failure of the current Iranian government to comply with the requirements of the International Atomic Energy Agency in respect of its nuclear programme. Such conduct fuels international suspicion that nuclear weapons are being or are intended to be developed. Sanctions have been applied through both the UN and the EU. In 2009 the sanctions regime relating to Iran was contained in EU Regulation 423/2007, labelled “the Iran Regulation”. It required licences to be issued in respect of certain types of export and placed prohibitions on others. The categories of goods affected were broadly those described in paragraph 2 but included specifically technology which might assist in the development of a nuclear programme or the production of missiles. Additionally, a licence is required in dual use cases where the exporter suspects that otherwise “innocent” goods may be intended for prohibited purposes.

18. He stated that DBIS does not publish the names of applicants for licences generally for reasons of commercial sensitivity. It provides statistics periodically which indicate, in relation to a particular market, the number of applications and the types of export involved.

19. He gave evidence as to the exporter`s expectation of confidentiality, regardless of the destination of the export. Applications are made online

through the SPIRE system, the ECO`s database. The licence application form and the DBIS guidance to applicants, including different categories of FAQs were exhibited. The application form specifies that an applicant must understand that information that it provides may be passed to international organisations or other governments in accordance with commitments entered into by the government. It was argued that this clearly showed that such information was not communicated in the expectation that it would remain confidential. An alternative view is that there was a clear implication that there would be no passing of such information beyond that required to fulfil those commitments.

20. Among the answers to FAQs relating to technical issues, applicants are reassured as to the security of data in the SPIRE system. They are told that, for reasons of commercial sensitivity, there is no publicly accessible database of licences only of overall statistics.

21. Perhaps most significantly, albeit inaccurately, DBIS tells applicants that no additional information, save possibly as to criteria for the grant of licences, is to be made publicly available because it is commercially sensitive hence exempt from disclosure by virtue of FOIA s.41(sic). What matters is the message not the specific provision.

22. He further explained why the problems with Iran gave rise to a particular need for confidentiality as to the identity of licensed exporters. Exporting to Iran arouses strong opposition in certain quarters and unfavourable media coverage, which can do great reputational damage to a company which is trading perfectly lawfully or, indeed, in many cases, has not begun trading at all. Many applications are precautionary, designed to cover possible future trade. Many involve exports which do not, in fact, require a licence.[1]

23. An additional and disturbing problem arises as a result of US policy on sanctions on Iran. The US government, with which the UK cooperates in

[1] We were told that, of 560 applications made in 2009 for Iran licences, 270 were returned because no licence was required.

trade policy with Iran, has imposed wider sanctions than the UK, EU or UN, amounting to a virtual ban on trade. It asserts jurisdiction worldwide, not only on US entities but, in effect on UK companies and other nationalities by drawing up lists of companies which have "breached" US sanctions or are seen as supportive of Iran with the threat of asset – freezing and refusal of export licences. Such sanctions affect directly exporters with a US presence. A wider indirect effect is the threat that institutions vulnerable to US sanctions policy may cease to do business with an identified exporter to Iran. Most importantly, UK banks, which depend on US licences to maintain dollar trading, are said to have withdrawn banking facilities from customers known to trade with Iran. This particular threat was closely and sceptically scrutinised by Mr. Coppel in cross examination. We heard further direct evidence on the issue in closed session. We describe this state of affairs as disturbing because the Tribunal felt some concern at the prospect of a UK company, trading quite lawfully in terms of UK, EU and international law, suffering possibly fatal commercial damage through the extraterritorial intervention of our closest ally, which wants the rest of the world to go further in imposing sanctions. It is right to add that no evidence was called from any US agency to confirm, rebut or explain these claims, an omission relied on by Mr. Browning as weakening the Appellant`s case on detriment or prejudice.

24. Mr. Smith gave oral evidence of the results of the survey of exporters which had been conducted for the purposes of the appeal. In his witness statement he had summarised the response by saying that the "overwhelming majority" of respondents "had strongly objected" to being identified. It transpired that of 166 companies contacted by e-mail, 92 had replied; 52 had objected very strongly; 40 had consented to identification, either conditionally or subject to a range of unidentified conditions. He accepted in evidence in chief that he had exaggerated the balance, an exaggeration which, Mr. Coppel submitted, undermined his evidence on the issue generally. He added that, in his view, some of the smaller exporters were politically naïve and failed to appreciate the

potential damage to their businesses. He acknowledged that much of his evidence was second hand, which, given his position, was inevitable.

25. Mr. Smith`s further evidence dealt with the public interest in maintaining the s.43 exemption. He contended that disclosure of the identity of exporters might encourage evasion of the licensing system or discourage the frank provision of sensitive information on which a busy licensing regime depends. As to Iran, there was a risk that applicants would abandon the cautious approach to the need for a licence which the government favours.

26. He acknowledged in cross examination that he had presented his evidence without regard to the issue of air safety in Iran linked to export restrictions which was at the forefront of Mr. Browning` s concern. He had not been aware of the incidence of fatal accidents involving Iranian aircraft.

27. Mr. Johnstone gave evidence as to the effects of disclosure which broadly supported Mr. Smith. He too referred to the threat of withdrawal of bank facilities. He deposed to the reaction of US companies to the discovery that a UK company traded with Iran.He based his testimony on frequent contact with exporters who discussed their problems. He had not conducted a particular investigation when asked to testify. He knew the concerns of exporters. He referred to the threat of boycotts and hostile action by pressure groups such as the “Stop the Bomb” campaign. We noted that the activities of this group, which received support from a number of highly regarded public figures, were largely confined to Germany. Mr. Johnstone was cross examined by Mr. Coppel as to his personal experience of the effects that he described, the suggested lack of specific examples of victimisation by banks, indeed the value of secondary or hearsay evidence was put clearly in issue.

28. We heard further evidence in closed session from two further witnesses giving evidence of the experiences of their own companies as to the risks of exporting quite lawfully to Iran.

29. At a very late stage, indeed immediately before the closed session began, Mr. Coppel applied to be admitted to the closed session on the basis of undertakings as to the confidentiality of the evidence to be heard. The alternative possibility of appointing special counsel was mooted. Having heard argument from all parties and having been referred to decisions of the Tribunal on similar applications, we indicated that the application was rejected for reasons that would be given as part of this decision. Those reasons we now give.

Mr. Browning`s application to attend the closed session

30. Mr. Coppel invoked the general case management powers of the Tribunal contained in r.5(1) of the *Tribunal Procedure (First - tier Tribunal)(General Regulatory Chamber) Rules, 2009 ("the GRC Rules")* and the overriding objective enshrined in r.2 and described Mr. Browning` s concerns at the prospect of such evidence remaining untested by his counsel. He relied on the critical need for fairness. He was not able to point to factors specific to this case which demanded a departure from standard practice but that will often be the case since counsel does not know the content of the evidence.

31. We were referred to the following Tribunal decisions on such applications, all of them apparently rulings on preliminary hearings -

People for the Ethical Treatment of Animal Europe v ICO and University of Oxford EA/2009/0076;

British Union for the Abolition of Vivisection v ICO and Newcastle University EA2009/0064;

DEFRA v ICO and Birkett EA/2009/0106

Ritchie v The ICO EA/2010/0041(Annex 1)

32. We derive from those decisions the following principles, each of which we consider well – founded –

(i) GRC r.5(1) empowers the Tribunal to grant such an application;

(ii) The replacement of the 2005 Rules with the GRC Rules did not alter the Tribunal`s powers nor modify the approach that should be adopted to such applications. In particular, GRC r.14 (which empowers a GRC Tribunal to prohibit disclosure to any person of information or of a document where disclosure might cause harm to that person or another) has no bearing on the exercise of the r.5(1) power on such an application.

(iii) Closed sessions are commonplace in this jurisdiction, That is regrettably inevitable, given its nature. An application will succeed only if there are exceptional circumstances specific to the appeal.

(iv) Practice in competition litigation provides no assistance in the field of information rights.

(v) Tribunal members are accustomed to making critical appraisals of the evidence and will generally be able, in the ordinary run of cases, to make a fair assessment of the value of evidence heard in closed session. The position may be different where complex technical issues or voluminous documentation are involved.

(vi) The use of special counsel, as an alternative, is likewise exceptional. Particular problems arise where an advocate cannot take instructions from a client nor otherwise communicate with him.

We note that the application failed in each of these cases. Special counsel was appointed by the Tribunal in *Campaign against the Arms Trade v ICO EA/20060040* but only because the case was *"exceptional, having regard to the nature and extent of the documents concerned"* and the fact that the appeal was joined to another.

33. There was nothing exceptional about the closed session evidence in this case. It was quite straightforward and came from two businessmen who exported to Iran. This we knew when refusing the application. The evidence, when heard in closed session, reinforced that conviction. As we indicated before the session began, we were ready to review the

position, if our preliminary impression, for any reason, changed. It did not.

34. We concluded that this was far from an exceptional case and refused the application.

(2) The closed session evidence

35. The asserted need for confidentiality relates only to the names of the witnesses and their businesses and the nature of those businesses, from which the names might be deduced. The effect of their evidence was straightforward and can be shortly summarised in the publicly available decision.

36. Both had direct experience of lawfully exporting to Iran over a substantial period, hence of the licensing regime. Both had experienced critical problems in the withdrawal of banking facilities by major UK banks because of their trade with Iran. The bank`s letter withdrawing facilities was exhibited to the statement of one of the witnesses. Both suffered repeated rebuffs from other banks, which they approached to provide facilities. One ultimately overcame the problem by “disguising” the source of payment through routing via a foreign bank. The “disguise”, apparently, was required by the bank that eventually provided facilities so that there was no evidence that it knew that funds came from Iran – surely a deplorable state of affairs. Similar problems were confronted when attempts were made to transfer funds, lawfully held in Iraq, to a UK account. European banks refused to act. Eventually a bank within the EU agreed to make transfers but at a very high rate of commission.

37. Both witnesses stated that these problems had done immense damage to their businesses, indeed that they had faced closure. Both spoke of competitors facing these difficulties.

38. Their evidence confirmed that the risk of withdrawal or refusal of banking services extended to European and, plainly, to US institutions.

39. It was made clear to them that this aversion to Iranian transactions was the result of the perceived risk of withdrawal of US correspondent banking licences without which a bank cannot trade in US dollars. Major European banks have, of course, a considerable presence in the USA for more general business purposes.

40. Evidence was also given of the potential loss of business from US companies, if this trade were publicised. On the other hand, major suppliers refused to do any business with a company trading with Iran, even for the purposes of exporting to a quite distinct end user.

41. More generally, both companies feared scrutiny by the US authorities and their inclusion on a blacklist which would cut off all trade contacts with the USA and perhaps more widely. We were referred to the website of the Office of Foreign Assets Control ("OFAC"), an organ of the US treasury, which enforces economic sanctions worldwide and blacklists companies and individuals with which US entities are prohibited from trading.

42. All these measures are liable to be taken against companies engaging in trade which is perfectly lawful according to EU law and the domestic law of the country in which they are registered and controlled.

43. One of the witnesses emphasised his expectation of confidentiality in making a licence application, having regard to the consequences of disclosure which he described.

The open session evidence for Mr. Browning

44. Mr. Browning gave evidence, in the course of which he explained the reasons for his interest in the identities of exporters to Iran and, related to that, the public interest in their disclosure.

45. Bloomberg had become interested in the issue of export licences in 2009 as a result of a series of disastrous airline accidents in Iran, involving many hundred civilian deaths. On behalf of the Iranian foreign ministry it was asserted that these accidents resulted from US trade sanctions which starved Iranian airlines of parts needed to ensure airworthiness. Bloomberg carried a series of stories relating to the continuing sequence of crashes and the consequent loss of life.

46. Bloomberg`s concern – and that of Mr. Browning - extended to the operation of the UK export licensing regime, since the UK is a leading manufacturer of civilian aircraft parts. He believed that the information initially requested from DBIS would help to test whether UK licensing policy was contributing to these disasters. Even the more limited request ("Part 1") with which this appeal is concerned had potential value in highlighting which companies were seeking to export to Iran goods that required or might require a licence.

47. The public were entitled to examine the effects of sanctions on a broader basis, so as to see whether sanctions caused disproportionate suffering to the civilian population and whether the UK applied them with greater rigour than its international obligations demanded.

48. He further pointed to the public interest in illuminating the extraterritorial interventions of the US treasury and their impact on the conduct of banks. These were matters which might be ascertained directly from the licensed exporter, if he could be identified.

49. Mr. Browning reviewed the information which he had obtained from published statistics and the redacted material which DBIS had disclosed. He demonstrated how it fell short of what was needed for a proper assessment of the effects of UK sanctions and restrictions.

50. He was cross examined as to the alternative lines of inquiry which were available to him. We do not doubt that disclosure of the information originally requested would shed more light on the issue than what he had obtained from DBIS. We are prepared to accept that even the more

restricted information covered by Part 1 of the request would take the investigation some way further.

Submissions of the Parties

51. S.41 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. Cogently as they were presented and developed, the written and oral arguments do not demand very detailed relation, since the elements of the s.41 and s.43 exemptions were not significantly in dispute for the purposes of this appeal and the critical issues, identified at paragraph 15, were, with one exception, factual

53. That exception is the issue raised by Mr. Browning as to whether the requested information was "obtained" by DBIS from the exporter. Mr. Coppel`s resourceful argument is that the information the subject of this appeal, the names of the licence applicants, was not obtained but created by DBIS in the records it holds and the licences it issues.

54. This seems to us, with respect, an impossible proposition. DBIS records information which it receives – "obtains" - in an application form submitted by the applicant. What DBIS creates is its own internal document recording and repeating the information obtained. The distinction between the information and the form in which it is held or

communicated is recognised in s.11, which permits the requester to express a preference for receiving the information in a particular form and requires the authority to comply with the request so far as practicable. Mr. Coppel`s interpretation would nullify the s.41 exemption, save where the information happened to be held in a document supplied by the provider of the information. That the exemption should be dependent upon such an irrelevant chance is inconceivable.

55. Is the identity of the applicant information which is confidential in nature? In our view it clearly is. The purpose of this condition spelled out in *Coco v Clark* is plainly to prevent the protection of information which cannot reasonably be deemed sensitive but which is imparted on a confidential basis for unsustainable reasons.

56. Quite apart from the considerations specific to Iran, an intention to contract in a particular jurisdiction and to seek permission to do so is a matter which an exporter will often not wish to publicise in advance for good commercial or even political reasons, the more so as he runs the risk of refusal.

57. Equally, we are in no doubt, despite Mr. Coppel`s able argument, that applicants communicate their names and other information in the expectation that they will remain confidential, subject to disclosure in compliance with international obligations. We consider that the DBIS guidance, summarised above at paragraphs 19 – 21, gives the clearest assurance that the licence information will be treated in confidence, except as specified.

58. So we come to consider detriment, agreed by all parties for the purposes of the appeal before us to be a necessary ingredient of an action for breach of confidence.

59. We accept Mr. Coppel`s argument that most, if not all of the evidence in the open session was first - or even second – hand hearsay, in so far as it related to problems with the banks, loss of customers and suppliers and the threat from the US authorities. It is equally the case that DBIS

called no evidence from OFAC or the US treasury as to their treatment of UK exporters to Iran. However, hearsay evidence may carry considerable weight when it comes from authoritative bodies, such as, here, the Treasury and the British – Iranian Chamber of Commerce with extensive and apparently reliable sources of information. The lack of US evidence does not surprise us and, in reaching our decision, we regard it as an entirely neutral factor.

60. More importantly, we were strongly impressed by the strength of the evidence on detriment which we heard in closed session and which we tested with some care. We readily accept that these witnesses – and doubtless others – were treated by large banks in the manner which they describe and suffered the other trading difficulties summarised above. On the evidence adduced before us we are satisfied that a climate of fear as to US treasury reaction frequently inhibits not just US institutions but many European ones from dealing with those who trade quite lawfully with Iran.

61. Taken as a whole, we found the evidence as to detriment resulting from disclosure entirely compelling.

62. We judge that disclosure of the information specified in part 1 of the request would constitute a breach of confidence by DBIS actionable by a 2009 applicant for a licence to export to Iran.

63. Since, by virtue of s.2(3)(g) s.41 provides an absolute exemption, we allow the appeal with the substitution of a decision notice in the terms set out above.

64. In the light of that finding, we deal quite shortly with s.43(2) which 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)..."*

65. We have dealt with the issue of detriment in the context of s.41. For the reasons specified we conclude that disclosure would be likely to prejudice the commercial interests of applicants. Given the strength of the evidence as to the impact of disclosure, we do not need to explore nice distinctions as to the meaning of "likely".

66. We accept that there is a clear public interest in disclosure even though it is uncertain whether Mr. Browning could accomplish what he seeks with nothing more than the information in Part 1. That uncertainty is nevertheless a factor in judging where the balance of interest lies, between disclosing and withholding information. The interest in disclosure goes beyond the general interest in transparent government and administration. It is important that, consistently with the UK`s legitimate political and commercial interests, the public should know the effects of a trade embargo directed against a particular regime. It is particularly important where there are serious suspicions, whether or not well – founded, that it is resulting in grave hardship or death within the innocent civilian population of the country concerned.

67. Against those considerations must be weighed, in our judgement, the high probability of serious damage to a significant number of British businesses, which may or may not have traded with Iran. There is a significant public interest in protecting large and small firms which trade lawfully and legitimately from economic harm from a form of embargo imposed by banks, competitors, suppliers, clients and possibly foreign governments. Mr. Browning` s dismissive reference to the "self – serving interests of individual businesses" is beside the point. The Tribunal is concerned with the public interest not that of any individual business but the public interest is engaged in the economic fate of significant numbers of British companies.

68. We also have regard to DBIS` argument that disclosure endangers the frankness and caution with which intending exporters currently appear to approach the question of export control. It seems to us to have some force.

69. We bear well in mind that information must be disclosed if the balance of public interests is inconclusive. Given the doubt as to whether the information now sought would achieve what is claimed, the very high likelihood of real harm to a large number of companies resulting from disclosure of their identities and the ancillary point as to deterrence from candour in the licensing process, we conclude that the public interest firmly favours the withholding of this information.

70. Accordingly, we rule that the exemption provided by s.43(2), as to which the ICO gave no ruling, would also justify the refusal to comply with Mr. Browning` s request.

71. In reaching these conclusions we do not doubt the sincerity of Mr. Browning`s concerns over a very troubling issue nor the importance of the questions raised.

72. Our decision is unanimous.

73. For these reasons we allow this appeal.

David Farrer Q.C.

Tribunal Judge

22 September 2011

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) GENERAL REGULATORY CHAMBER

Appeal number: EA/2011/0044

Between

JONATHAN BROWNING

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS

Second Respondent

RULING ON APPLICATION FOR PERMISSION TO APPEAL

DECISION

Permission to appeal is refused on all grounds.

REASONS

1. Mr. Browning of Bloomberg is designated as Appellant in these reasons and the original appellant accordingly as a respondent .

2. This case concerns the Appellant `s ("JB`s") Freedom of Information Act ("FOIA") request to the Second Respondent ("DBIS") dated 9th. September, 2009, which originally sought four items of information but which, for the purposes of this appeal, had been refined to a single request, namely :

   "Which companies applied to the Export Control Organisation for export licences for Iran in the first and second quarters of this year"

3. DBIS claimed a number of exemptions in relation to these requests and maintained such claims on review. The exemption relevant to this appeal is the absolute exemption provided for by FOIA s. 41(1).

4. The First Respondent ("the ICO") issued a Decision Notice dated 17th. January, 2011, rejecting, so far as relevant to this appeal, the claim to exemption under s.41(1), namely that disclosure by DBIS of the requested information would amount to an actionable breach of confidence. He did so by reference to the test laid down in *Coco v A.N. Clark (Engineers) Ltd. [1968] FSR. 415*, finding that, although the information was of a confidential nature and was imparted in circumstances giving rise to a duty of confidence, the requisite element of detriment in the event of disclosure was not established on a balance of probabilities. He relied upon paragraph 43 of the decision in *The Higher Education Funding Council for England v ICO and Guardian News and Media Ltd. EA/2009/0036* as requiring commercial detriment.

5. DBIS appealed and served further evidence on the IC regarding commercial detriment to exporters to Iran. That further evidence was treated as confidential and was not served on JB. It formed the basis of evidence submitted to the

Tribunal in the closed bundle for this appeal, namely two witness statements from such exporters. It persuaded the ICO to change his stance and abandon resistance to the appeal.

6. JB applied to be joined as a party, served his response and was represented by Mr. Philip Coppel Q.C. at an oral hearing.

7. The Tribunal allowed the appeal of DBIS. JB now seeks permission to appeal on seven grounds.

That -

(i) The Tribunal wrongfully refused to give JB`s legal representatives access to the closed evidence or to participate in the closed session.

(ii) The Tribunal misinterpreted s.41(1)(a) as extending to information which the public authority itself recorded.

(iii) The Tribunal wrongly treated the name of a company making an application for a licence as having the quality of confidentiality.

(iv) The Tribunal wrongly ruled that the information had been imparted in circumstances giving rise to a duty of confidence.

(v) The Tribunal accepted the evidence of detriment without reference to the five alleged weaknesses in that evidence relied on by JB.

(vi) The Tribunal did not address the prejudice that would be suffered nor the commercial interest concerned nor the likelihood that such prejudice would result from the disclosure sought.

(vii) The Tribunal wrongly concluded that disclosure under FOIA might inhibit the frankness with which exporters currently deal with the issue of export control.

8. Pursuant to Rules 43(1) and 44 the Tribunal must first consider whether it should review its decision on the ground that it is satisfied that there was an error of law. It is not so satisfied.

9. The Tribunal must then consider, pursuant to Rule 43(2), whether to give permission to appeal in relation to its decision or part of it.

10. It would do so if it concluded that one or more of the grounds of appeal raised arguable points of law.

11. In my opinion, grounds (ii) involves a point of law but I do not consider that it is seriously arguable.

12. Ground (i) involves the exercise of the Tribunal's discretion, which was exercised in the same way and for the same sufficient reasons as predecessor decisions of the Tribunal, otherwise constituted (see the Decision). In considering the reasonableness of this decision, I have some limited regard also to the fact that the application was made without warning, just as the closed session was to begin, suggesting that JB's advisers, now asserting a significant disregard for principle, had not themselves considered making such an application until the very last moment. I refuse permission on this ground.

13. The remaining grounds, (iii),(iv),(v),(vi) and (vii) are all complaints as to adverse findings of fact, which, whether from direct evidence or reasonable inference, the Tribunal was entitled to make. If, contrary to my view, either or both of (iii) and (iv) raise(s) an issue of law, it is not seriously arguable. If the Upper Tribunal becomes seised of this matter, it will have available the closed part of the Tribunal's decision, though the only significant element of the evidence excluded from the open decision is the identities of the witnesses and any particulars as to their companies.

David Farrer Q.C.
Tribunal Judge Dated: 30th November 2011