IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2010/0118

ON APPEAL:

Information Commissioner's
Decision Notice No: FS50264189
Dated: 20 June 2010

Appellant: Peter Ray

Respondent: The Information Commissioner

Additional Parties: (1) Department of Business, Innovation and Skills

(2) The Institute identified in the confidential schedule to this Decision

Heard at: Richmond Magistrate's Court

Date of hearing: 11 August 2011

Date of decision: 27 September 2011

Before

Chris Ryan
(Judge)

and

Malcolm Clarke
Dave Sivers

Attendances:

For the Appellant:	Mr K Hopley and Mr C Puckett (Representatives)
For the Respondent:	Did not attend
For the First Additional Party:	Mr Charles Banner (Counsel)
For the Second Additional Party:	Mr A Newman and Mr D Brandon

Subject matter: Confidential information s.41
Commercial interests/trade secrets s.43

Cases: Coco v A.N.Clark (Engineers) Ltd (1969) RPC 41

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0118
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed and the Decision Notice upheld.

REASONS FOR DECISION

Introduction

1. This Appeal concerns information supplied by a company to Companies House in connection with an enquiry as to whether it had misled that organisation when seeking to have itself registered under a name that included the designation "Institute". We have decided that Companies House was entitled to refuse to disclose the information because it was exempt information under section 41 of the Freedom of Information Act ("FOIA"). We have also decided that it was exempt information under FOIA section 43 and that the public interest in maintaining that exemption outweighed the public interest in disclosure.

Events leading up to the request for information

2. An unincorporated organisation, which we will refer to only as "the Association", has been involved for many years in the training and representation of volunteers who officiate at certain sporting activities. Between about 2004 and 2006 the Association experienced a number of financial and organisational upheavals and a degree of discord among its leaders about its future direction and management. We have been provided with a great deal of information about those events but do not need to dwell on them. They form the background to the information request we have to consider, but are not of direct relevance to our decision.

3. In March 2006 a group of the Association's officers arranged for the incorporation of a limited liability company under a name that included the word "Institute". We will refer to this company simply as "the Institute", so as to maintain its anonymity (its full name is set out in the confidential schedule to this Decision, which should remain confidential unless its release is ordered by either this Tribunal or any other tribunal or court to which our decision is appealed). As the full name of the Association discloses the sport in which both the Institute and the Association are involved (which will therefore operate as a strong clue as to the identity of the Institute) we also set out its full name only in the

confidential schedule. For the same reason we do not identify the sport in question.

4. The Institute planned to operate in the same broad area of training and developing officials, in the same sport, as the Association did. Prior to being incorporated it submitted to Companies House a 30 page document entitled "Justification for the use of the title 'Institute'". We will refer to this document simply as "the Justification".

5. The Justification was necessary because, under the law that applied at the time, the word "Institute" could not be included in a company name without Secretary of State approval. In practice Companies House would only recommend approval if the company satisfied certain criteria set out in guidance, which it had published under the title "Company Names". This provided that approval for use of the word "institute" or "institution" would normally be given only to:

> *"…those organisations which are carrying out research at the highest level or to professional bodies of the highest standing. You will need to show us that there is a need for the proposed institute and that it has appropriate regulations or examination standards. You will need evidence of support from other representative and independent bodies."*

6. Companies House was satisfied with the Justification and allowed the incorporation to proceed. But shortly thereafter the Appellant, Mr Ray, a member of the Association, raised doubts as to whether that decision was correct. This led in due course to an investigation under section 28(3) of the Companies Act 1986. The effect of that provision in this case was that the Institute might have been directed to change its name, by the removal of the word "Institute", if it was found to have given Companies House misleading information. It should be noted, in passing, that the test was, not whether the original designation had been incorrect, but whether it had been permitted as a result of the Institute having provided misleading information.

7. Companies House obtained from the Institute further information, in the form of a letter from the Institute's Finance Director dated 19 September 2006. The letter responded to various questions raised by Companies House. These covered such matters as the training role of other organisations in the sport in question, the Institute's status as an educational establishment for the purposes of criminal record clearance certificates and the independent validation of its courses. On the basis of that information Companies House decided, on 27 October 2006, that the Institute had not submitted misleading information and that there were therefore no grounds for directing it to change its name.

8. Both the Justification and the letter of 19 September 2006 were subsequently released to Mr Ray following a freedom of information

request. The release took place during the course of an investigation by the Information Commissioner into the initial refusal to disclose, but without the need for an adjudication by him.

9. On 11 March 2009 the Institute sent an email to its members explaining that the leadership wished to *"concentrate our resources and energies towards our core activity of education"* by ceasing to operate as a membership organisation. It expanded on the rationale for that decision as follows:

> *"To remain innovative leaders in the field of … training, we must continue to invest in our product. Running an extensive membership base with all its associated costs, particularly in relation to high insurance premiums, has detracted from our main objective and in the current financial climate had made the maintenance of such a base, uneconomical"*

   In the course of this Appeal the email has been characterised by Mr Ray as a clear indication of the unreliability of any financial data previously given to Companies House in order to justify incorporation as an Institute, including in particular any information about actual or prospective sponsors. It has been characterised by the Institute as simply a change of direction designed to consolidate its role as an independent training organisation, to which national organisations of officials may outsource their training activities, and not as a competitor to those organisation. Whatever the true position, a copy of the e-mail was sent to Companies House by Mr Ray's local MP on 20 March 2009, requesting that the Institute be asked "*whether it lied to Companies House in order to register as an Institute".* Although that letter, read on its own, does not limit the question to funding and sponsorship as at February 2006, it is clear that, in context, that was the focus of the proposed enquiry.

10. In pursuing the enquiry requested by the MP Companies House drew the Institute's attention to a reference to its finances in the Justification. It appeared towards the end of the document, following a paragraph commenting on the perceived financial weakness of the Association, and read:

> *" By contrast the [Institute] has prospective major commercial stakeholder capital funders and JVP sponsors in place, ready to 'sign up' – subject only to official approval for the use of the title 'Institute' by Companies House."*

   We should add that this was the only reference in the Justification to the Institute's finances that we could find and that none of the parties was able to identify any others. This is not surprising, given that the criteria identified in the guidance referred to above do not include any financial issues.

11. Companies House wrote to the Institute, drawing attention to the part of the Justification quoted above, and seeking comments. The Institute provided a certain amount of information, which it marked as "commercial in confidence". Companies House then wrote to Mr Ray's

MP on 15 June 2009 confirming that, in the light of that information, it was satisfied that the mention in the Justification of the Institute's capital and sponsorship had not been misleading.

12. On 10 July 2009 Mr Ray submitted a freedom of information request to Companies House for the information which had led it to that conclusion.

13. We observe at this stage that no attempt was made at any time to apply for Judicial Review in respect of any of the Companies House decisions. That is to say, the decision in March 2006 to incorporate the Institute, the Decision in October 2006 not to direct a name change, or the decision in June 2009 not to reconsider that decision. We nevertheless received a great deal of material about the accuracy of information set out in the Justification and the reliability of projections it contained. We have firmly resisted the temptation of revisiting those three decisions or any of the issues, arising in the course of reaching them, that fall outside the confines of the particular request for information which we are required to consider.

Events since the request for information

14. Companies House refused the request for information by letter dated 4 August 2009, on the grounds that the requested information was exempt from disclosure under FOIA section 41 (confidential information obtained from another) and section 43 (disclosure likely to prejudice commercial interests). That decision was upheld following an internal review. Mr Ray was informed of that decision on 13 August 2009 and complained about it to the Information Commissioner on 15 October.

15. The Information Commissioner investigated the complaint and on 10 June 2010 issued a Decision Notice in which he concluded that FOIA section 41 applied to all the requested information. It was therefore exempt from the obligation of disclosure imposed by FOIA and Companies House had been entitled to reject the information request. Having reached that decision the Information Commissioner decided that it was not necessary for him to consider whether or not the section 43 exemption would also have been engaged.

The Appeal

16. On 26 June 2010 Mr Ray submitted to this Tribunal a Notice of Appeal against the Decision Notice.

17. Directions were given for Companies House to be joined as a party. In fact, Companies House is not itself a public authority for the purposes of FOIA section 3. It is an executive agency of the Department for Business, Innovation and Skills. Accordingly it is that Department that has been a party to the Appeal since then although, for convenience, we will continue to refer to it as Companies House. Subsequently the

Institute was also joined as a party and the appeal was determined by a different panel of this Tribunal, based on the papers and without a hearing.

18. That decision was set aside by the Upper Tribunal on the grounds of procedural unfairness, in that the Institute's request for a hearing had not been complied with. The Appeal was remitted to be heard by a differently constituted panel of this Tribunal. Further directions were then made and the Appeal was heard on 11 August 2011. In view of the state of Mr Ray's health a direction was made, without objection from other parties, that he could be represented by two of his colleagues from the Association. It was also directed that, as one of the three parties objected to the members of the Tribunal panel reading the decision that had been overturned on appeal, they would not do so. The Information Commissioner opted not to appear before us but the other parties all attended.

19. The Tribunal was provided with copies of the requested information and the Institute also filed closed evidence intended to verify and support the materials on funding and sponsorship included in it. That body of closed material was discussed during the course of two closed sessions during the hearing.

20. Our jurisdiction on this Appeal is determined by FOIA section 58. It requires us to consider whether the Decision Notice was in accordance with the law, or, to the extent that it involved an exercise of discretion, whether the Information Commissioner ought to have exercised his discretion differently. In the process we may review any finding of fact on which the Decision Notice was based. It follows that our role is to consider, not whether it would be right to withhold the requested information today, but whether it was right to have done so in August 2009, the date when Mr Ray was informed of the outcome of the internal review by Companies House of its original refusal.

21. In addition to the Institute's closed evidence referred to above, two witness statements were filed on behalf of Companies House. The first was by Judith Chainey, one of its Information Rights Officers. She described the history of the Institute's original incorporation, the three decisions summarised above and the manner in which the information request was handled. The second witness statement was by Paul Coles, a Policy Advisor in the Policy and Planning Team at Companies House. He provided detail of the process by which an organisation may be incorporated under a corporate title that includes the word "institute". Neither of these witnesses were required to attend the hearing for cross examination.

22. Mr Ray and the Institute both filed documents described as statements or witness statements. On the whole, however, they consisted of argument, rather than evidence, and such evidence as was included focused on the minutiae of the background dispute between the

Association and the Institute. They contained very little, if anything, which was of direct relevance to the specific issue we are required to determine. However, Mr Ray had filed a statement that did include a few facts about the role played, within the Association, by certain individuals who subsequently became involved in the running of the Institute and he attended the hearing in order to be cross examined on what he had written. We refer, later in this decision, to one part of the evidence he gave.

The relevant law and the issues the Tribunal must decide

23. FOIA section 1 imposes an obligation on public authorities to disclose information in the following terms:

> *"(1)Any person making a request for information to a public authority is entitled—*
>
> > *(a)to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
> >
> > *(b)if that is the case, to have that information communicated to him."*

24. That obligation is expressed to be subject to, among other sections, section 2 (2), which is in these terms:

> *" In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
>
> > *(a)the information is exempt information by virtue of a provision conferring absolute exemption, or*
> >
> > *(b)in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

25. FOIA section 41 is an absolute exemption. Its relevant part is in these terms:

> *"(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."

26. The part of FOIA section 43 on which Companies House relies is in these terms

    "(1)…

    (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)".

27. Section 43 is a qualified exemption. If it is engaged, therefore, disclosure may still be required unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

28. We will deal with each of the exemptions relied on in turn.

<u>Section 41</u>

29. In his Decision Notice the Information Commissioner concluded that the requested information had been "obtained" from the Institute which, for these purposes, should be treated as falling within the meaning of the word "person". This was not challenged by any party to the Appeal.

30. In considering whether disclosure of the requested information, otherwise than under FOIA, would have constituted a breach of confidence actionable by the Institute, the Information Commissioner adopted the test set out in the leading case of *Coco v A.N.Clark (Engineers) Ltd* (1969) RPC 41. That requires that
    a. the information must have the necessary quality of confidence;
    b. it must have been passed to the party holding it in circumstances importing an obligation of confidence; and
    c. the party holding it must have made unauthorised use of it to the detriment of the confider

    All the parties to the Appeal accepted that this was the correct test to apply.

31. The Information Commissioner decided that the requested information satisfied all three limbs of the test. Mr Ray's representative, Mr Hopley, did not challenge the Decision Notice in respect of the circumstances in which the information was passed to Companies House (i.e. the second part of the *Coco v Clark* test) and we think that it is self-evident that this element of the test was satisfied in the circumstances of this case. But he did argue that it did not satisfy the first and third limbs of the test. He said that it concerned sponsorship, which is, by its very nature, public. He argued that three years after the date of the

Justification, the sponsorship would either have been confirmed (releasing the information into the public domain) or it would have become clear that it would not materialise, (in which case no damage would be incurred by disclosure). The information was therefore either not confidential or, if it was, no detriment would be suffered by having it disclosed.

32. We remind ourselves, at the outset, that it is not open to us to impose any conditions of confidentiality on Mr Ray. The release of any information to him will, therefore, be equivalent to releasing it to the public at large, including other organisations which may consider seeking sponsorship from the same sources.

33. We do not accept Mr Hopley's argument that the information on sponsorship should not be treated as confidential. Although information on the existence and identity of a sponsor will no longer be confidential once the sponsorship has been announced publicly, it remains confidential until then. Even after the existence of a sponsorship deal has been publicly announced other information about the agreement reached may remain a valuable commercial secret. Moreover, in this case our inspection of the requested information and closed evidence demonstrated that some at least of the organisations identified as potential sponsors in 2006 remained live prospects at the time when the information request was refused.

34. We have no hesitation in saying that information about sponsorship, whether secured or considered to be in prospect, is the sort of business information that an organisation, even a not-for-profit one, is entitled to keep confidential. Even if a prospect had withdrawn from discussions by the time of the information request (and we make no comment in this open decision as to whether or not any of the Institute's prospects had done so), an organisation is entitled to maintain confidence over the identity of an individual or company whose interest it may wish to resurrect at some future date.

35. As to detriment, it was argued on behalf of the Institute that it would suffer particular damage due to the fact that Mr Ray would use any information he received on a website he operates, which has published a number of allegations and criticisms about it. It was also suggested that he would also use the information to contact any organisations with which the Institute appeared to have dealings in order to discourage them from continuing to work with it. We have seen extracts from Mr Ray's website, which provide some support for those fears, but we do not think we need to make any finding as to the likely use to which Mr Ray may put any disclosed information. The reasons we have given for treating the requested information as confidential demonstrate, on their own, sufficient likelihood of harm to the Institute's business prospects to support the notional breach of confidentiality claim section 41 requires.

36. Satisfying the three elements of the *Coco v Clark* test is not sufficient on its own to engage the section 41 exemption. The Information Commissioner rightly decided that, before he could reach that conclusion, he also had to be satisfied that Companies House would not have had a sustainable defence to the notional breach of confidence action. It is well established that there would be a defence if it could be shown that the public interest in disclosing the information outweighed the public interest in maintaining confidences. The Information Commissioner acknowledged that there was a public interest in ensuring public scrutiny of the operations of Companies House, both generally and in respect of Mr Ray's complaint that it had failed properly to perform its duties in respect of the Institute's incorporation. However, the Information Commissioner did not think that this outweighed the public interest in protecting the Institute's confidences, particularly because the obligation of confidence in this case was an express one, there was a significant public interest in maintaining confidence over commercially sensitive material and that interest was increased by the difficulty Companies House would experience in persuading companies to disclose information to it if they could not be confident that it would remain confidential.

37. Before us Mr Hopley argued that the Information Commissioner had not given sufficient weight to the doubts which ought to exist as to the veracity of any information provided to Companies House. He obviously had the difficulty of having to make his case without having seen the requested information or the closed evidence. He therefore based his argument on the alleged shortcomings of some of those involved in the Institution's formation while they were members of the Association. He focused, in particular, on the annual accounts of the Association for 2004 and on the fact that the auditors had been sanctioned by their professional organisation for the manner in which they allowed the Association's officers to book an invoice issued by the Association shortly before the end of its financial year (with the effect of turning a deficit into a surplus), which was then cancelled by the issuing of a credit note within a few weeks of the year end. It was suggested that, as the Institute's founders included the Association's officers responsible for these actions, including the owner of the business to which the invoice had been issued, the truthfulness of the Justification required to be checked with particular care.

38. Although we received signed statements from some of those involved in the actions that Mr Ray criticised, we do not make any findings on this aspect of the case. The evidence to support such a serious allegation was less than persuasive – it was included in submissions filed by Mr Ray at a time when it was expected that the Appeal would be decided without a hearing. And when Mr Ray was cross examined on it before us he was forced to concede that fraudulent collusion by the individuals he named was only one possible conclusion that might be reached, based on the materials he had submitted. He did not call for those who had signed statements to attend the hearing to be cross

examined, although he was told of that option during a pre hearing review.

39. In his submissions before us Mr Hopley very fairly made it clear that he did not expect us to reach any firm conclusion about this. But he suggested that it raised sufficient doubts about those involved in the Institute's creation that we should be suspicious of statements about sponsorship made by them in 2006, particularly because, it was said, no sponsors had actually signed up by March 2009. He invited us to accept that the best predictions of future behaviour may be found in past behaviour. We decline that invitation, at least to the extent that it is intended to encourage us to assume that those named in Mr Ray's allegations had committed the fraud he claimed that they had (the evidence was wholly inadequate to enable us to come near to such a conclusion.) and that their alleged wrongdoing should be taken to tarnish the honesty of others involved in the founding of the Institution and the preparation of the Justification.

40. We did, however, inspect carefully the requested information and the closed evidence filed by the Institute. In the course of a closed session we tested the accuracy of what had been written in the Justification against the content of both. Our conclusion was that it did not establish, as a fact, that Companies House had been misled by the extract from the Justification quoted above. Nor did it raise in our minds a suspicion that had sufficient strength to give weight to the public interest in disclosing the requested information, so that the public could form its own conclusion on the point.

41. The public interest in disclosure is further undermined by the fact that, as the guidance referred to above makes clear, the funding of the Institute was not an issue that is regarded by Companies House as being of particular significance when deciding whether to permit a company to use the designation of "institute". It is no doubt for that reason that it was dealt with so shortly in the course of the Justification, a document that, with appendices, ran to some thirty pages.

42. Set against the public interest in disclosure is the public interest in protecting confidences. We have already recorded our conclusion on why the Institute was entitled to treat the requested information as confidential and the detriment that it would suffer were it to be disclosed to the public. The same factors that led to those conclusions support the public interest in commercial organisations in general being able to protect their commercial secrets. We are satisfied that the public interest in disclosure does not outweigh the public interest in maintaining secrecy. In fact, we believe that the public interest in maintaining confidentiality comfortably outweighs the very limited public interest in disclosure.

43. We conclude, therefore, that the Institute would have had an actionable claim for breach of confidence had Companies House disclosed the

requested information other than in response to a freedom for information request.

44. In light of the conclusion we have reached it is not necessary for us to reach a firm decision on the correctness of the following argument put to us by Mr Banner on behalf of the Department. It was that the case law on the public interest defence to a breach of confidence claim made it clear that it permitted the disclosure to a regulator (or other public body having a similar interest in the subject matter of the information), but not to the public at large unless it could be shown that the public interest could not be protected by a more limited disclosure. Mr Banner conceded that Article 10 of the European Convention on Human Rights (freedom of expression) might have the effect of extending the permitted disclosure to the public at large but he argued that, as it may not be relied on by an arm of the state, it would not have been available to Companies House in this case. We reach no conclusion on the correctness of the argument, first, because it is not necessary to do so in view of the decision we have made and, secondly, because we would have wished to have heard it fully argued before us. In particular we would have wished to examine whether the case law on which Mr Banner relied needed to be reconsidered in the light of more recent authority, such as the Court of Appeal in *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491, and the change in the approach to the release of information to the public introduced by the FOIA itself.

<u>Section 43</u>

45. The conclusions we have reached above on the Institute's potential detriment, if confidentiality were breached, lead to the inevitable conclusion, when we turn to the section 43 exemption, that the commercial interests of the Institute would be prejudiced if the requested information were to be disclosed to the public. The exemption is therefore engaged. The public interest test that we must then apply is in this case tipped slightly more in favour of disclosure but, as we have made clear in paragraph 42 above, we are satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure. Accordingly the requested information is covered by the exemption under section 43 as well as section 41.

<u>Conclusion</u>

46. We conclude that the requested information was exempt and that the Information Commissioner had been correct in concluding that Companies House had dealt correctly with Mr Ray's information request. The appeal is therefore dismissed.

47. Our decision is unanimous.

Chris Ryan (Tribunal Judge) **27 September 2011**

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2010/0118

ON APPEAL:

Information Commissioner's
Decision Notice No: FS50264189
Dated: 20 June 2010

Appellant:

Peter Ray

First Respondent:

The Information Commissioner

Second Respondent:

(1) Department of Business, Innovation and Skills

Third Respondent:

(2) The Institute identified in the confidential schedule to the Decision dated 27/09/11

Decision on Application for Leave to Appeal

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1. The Appellant, Mr Ray, seeks leave to Appeal to the Upper Tribunal (Administrative Appeals Chamber) from our decision dated 27 September 2011 ("the Decision").

2. An application for permission to appeal is made under Rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"). Although the document filed with the Tribunal is in the form of an appeal we are prepared to treat it as a request for permission to appeal. We are satisfied that, in all other respects, the Application satisfies the procedural requirements of Rule 42 and that it was made in time.

3. Rule 43(1) provides that, on receiving an application for permission to appeal, we should first consider whether to review our decision. The procedure for such a review is set out in Rule 44 which reads, in relevant part:

   "(1) The Tribunal may only undertake a review of a decision –
   (a) pursuant to rule 43(1) (review on an application for permission to appeal); and
   (b) if it is satisfied that there was an error of law in the decision."

4. The basis for the Appellant's proposed appeal is that we erred in law and/or had insufficient evidence to support our decision and/or did not give adequate reasons for our decision. That general basis for appeal is then reflected in a number of specific criticisms. They may be summarised as follows:
   a. An earlier decision on the same appeal had been in the Appellant's favour. It had been overturned on appeal, and remitted to be determined by a differently constituted panel of this Tribunal, not on the merits, but on the procedural failing that it should have been determined at a hearing and not solely on the papers (Upper Tribunal Case No. GIA/384/2011). We came to a different conclusion from that of our colleagues after an oral hearing at which evidence was taken and tested on cross examination and the parties had been able to make extensive oral submissions. It does not follow from the differences between the two decisions that our decision was wrong in law.
   b. We had not given sufficient weight to the Appellant's allegations that those who set up the Third Respondent lacked integrity and that the organisation itself had never been, genuinely, a going concern. It is said that this had led us into the error of accepting that the information in dispute possessed the necessary quality of confidence to fall within the exemption provided by section 41 of the Freedom of Information Act 2000 ("FOIA"). We are also said to be in error, on the same basis, in concluding that the public authority would have been liable for unauthorised disclosure of that confidential information had it disclosed it, other than under the FOIA. We believe that the conclusion we reached on both these issues was correct in law and properly based on the evidence presented to us.
   c. We should have concluded that, as in the Appellant's view the information in dispute contained false assertions by the Third Respondent, it could have been disclosed by the Second Respondent because it would have been entitled to a public interest defence to any claim for breach of confidence brought by the Third Respondent. It is contended that the section 41 exemption would therefore not apply. We again believe that the conclusion we reached was correct in law and properly based on the evidence presented to us.

5. In the light of what we have said we do not believe that there is any error of law in our decision and we accordingly decline to review it.
6. Having refused to review our decision we are required, by Rule 43 (2) to consider whether to give permission to appeal. For the reasons given above we decline to do so.

Chris Ryan
Tribunal Judge

Dated: 28 October 2011

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. GIA/83/2012

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant:	Peter Frederick Ray
First Respondent:	The Information Commissioner
Second Respondent:	Department for Business, Innovation and Skills (for Companies House)
Third Respondent:	The International Institute of Cricket Umpires and Scorers Ltd
Tribunal:	First-tier Tribunal (Information Rights)
Tribunal Case No:	EA/2010/0118
Tribunal Venue:	Richmond Magistrates' Court
Date of Hearing:	11 August 2011
Date of Decision:	27 September 2011

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

The application to the Upper Tribunal for permission to appeal was made late. However, I extend the time for making the application under rule 5(3)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and admit the application for consideration.

I refuse permission to appeal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS

1. This application is a "second time around" case. The history will be familiar to the parties and need not be repeated here in any detail. Suffice to say that in at the original (paper) hearing before a First-tier Tribunal (FTT) chaired by HH Judge Shanks, the appeal by Mr Ray against the Information Commissioner's Decision Notice succeeded. In the Upper Tribunal case of *IICUS v Information Commissioner, BIS and Ray* [2011] UKUT 205 (AAC) (also under file number GIA/384/ 2011), I allowed the appeal by IICUS and remitted the matter for rehearing before a new and differently constituted FTT. That new FTT was presided over at an oral hearing by Judge Ryan. The new FTT reached a different conclusion, dismissing Mr Ray's original appeal and upholding the Decision Notice. Mr Ray now applies to the Upper Tribunal for permission to appeal against the decision of the new FTT.

2. The application for permission to appeal is late. Judge Ryan refused permission to appeal in a ruling dated 28 October 2011. The time limit for renewing the application before the Upper Tribunal is one month. The Upper Tribunal office did not receive a fully completed

application until 29 December 2011, a month out of time. However, Mr Ray had lodged initial papers (but not a complete application) by e-mail dated 19 November 2011. In the light of the problems he mentions, I do not think it right that his application should be ruled out of time simply because of that delay. I therefore exercise my discretion to extend time to admit the application for consideration on its merits.

3. The first ground of appeal is that the first FTT's decision was set aside on a "technicality" and that it is extraordinary that the new FTT has arrived at a different decision. There is no error of law disclosed here, not least as the two tribunals had different evidence before them – the second tribunal had the advantage of testing oral evidence. I simply endorse and adopt Judge Ryan's reasoning at paragraph 4a of his decision on the application for permission.

4. The remaining grounds of appeal all turn on issues of fact. It is axiomatic that the facts are for the FTT to determine. The fact that a disappointed appellant contests a finding of fact made by the FTT does not of itself give rise to an error of law. Certainly any minor errors of fact such as misspelling a name are not material to the overall decision. Something more is needed and I can see no arguable case here for suggesting that the second FTT committed some error of law. The right of appeal to the Upper Tribunal is subject to a permission requirement precisely because it is not an opportunity to re-litigate the facts. There is no suggestion either on the face of the FTT's decision or articulated with any specifics in the subsequent grounds of appeal that the new FTT misdirected itself on the fundamental legal principles governing sections 41 and 43 of FOIA.

5. The proposed grounds of appeal, in short, are an attempt to reargue the facts, which is not the purpose of an appeal on a point of law. For these reasons the appeal to the Upper Tribunal on a point of law has, in my view, no realistic prospects of success. In summary, I am satisfied in this case that the tribunal directed itself properly on the relevant law, made appropriate findings of fact on the evidence before it and gave adequate, and indeed commendably clear and comprehensive, reasons for its decision. **I therefore must refuse this application for permission to appeal.**

6. It should be noted that rule 22(3) to (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698, as amended) provide that the applicant may apply for this decision to be reconsidered at an oral hearing before the Upper Tribunal, but any such application must be made within 14 days of the date on the letter accompanying this determination.

7. A copy of this determination refusing permission to appeal should be sent to all parties, given the convoluted history of this matter.

(Signed on the original) **Nicholas Wikeley**
Judge of the Upper Tribunal

(Dated) **02 February 2012**

THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Information Note for respondents

Where the appellant has been refused permission to appeal without an oral hearing.

1. The decision of the Administrative Appeals Chamber of Upper Tribunal is attached. A copy has been sent to all parties.

2. The appellant has a right to apply within 14 days (or longer if time is extended) for the refusal to be reconsidered at an oral hearing.

3. If the appellant does apply for reconsideration you will be notified and told the listing arrangements.