



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0063**  
**Information Commissioner's Ref: FS50141388**

**Heard at Procession House, London, EC4**  
**On 24 November 2008**

**Decision Promulgated**  
**On 19 December 2008**

**BEFORE**

**CHAIRMAN**

**ANNABEL PILLING**

**and**

**LAY MEMBERS**

**MALCOLM CLARKE**

**SUZANNE COSGRAVE**

**Between**

**JOHN SMART**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**GLYNDWR UNIVERSITY/PRIFYSGOL GLYNDWR**  
**(formerly North East Wales Institute of Higher Education)**

**Additional Party**

**Subject matter:**

FOIA s.41 – Absolute exemption: confidential information

**Cases:**

Secretary of State for the Home department v British Union for the Abolition of Vivisection and the Information Commissioner [2008] EWHC 892 (QB)  
Coco v AN Clark (Engineers) Limited [1969] RPC 41  
Attorney General v Guardian Newspapers [1990] 1 AC 109  
Bluck v The Information Commissioner (EA/2006/0090)

**Representation:**

For the Appellant: John Smart  
For the Respondent: James Boddy  
For the Additional Party: Vincent Ryan

**Decision**

The Tribunal upholds the decision notice dated 3 July 2008 and dismisses the Appeal.

**Reasons for Decision**

**Introduction**

1. This is an Appeal by John Smart against a Decision Notice issued by the Information Commissioner dated 3 July 2008. The Decision Notice relates to a request for information made to the North East Wales Institute of Higher Education, now the Glyndwr University/Prifysgol Glyndwr (the 'GU/PG') under the Freedom of Information Act 2000 ('FOIA'). The GU/PG had withheld the information on the basis that it was exempt from disclosure, relying on the exemptions in sections 40, 41 and 43 of FOIA. The Information Commissioner (the 'Commissioner') concluded that the GU/PG applied FOIA correctly in refusing the request for information by virtue of the exemption in section 41 of FOIA. He also decided that the exemption in section 40(2) of FOIA applied to some of the information withheld.

## Background

2. The Appellant had been employed as a Visiting Professor in the Engineering Department at the GU/PG, formerly North East Wales Institute of Higher Education, since October 2002. In the summer of 2005, the renewal of his contract was being discussed. During the discussions, the Appellant was invited to meet with an external Professor instructed to look at the Engineering Department for its Research Assessment Exercise ('RAE').
3. The RAE is a process carried out by UK higher education funding councils to evaluate the quality of research undertaken by higher education institutions. In order to prepare for this exercise, institutions often seek confidential advice on the strategy they should adopt to achieve the best outcome. An external assessor was therefore instructed to prepare a more detailed review of the quality of the research of the staff within the Engineering Department to assist the GU/PG prepare for the RAE process.
4. The Appellant met with this assessor on 1 December 2005.

## The request for information

5. By e-mail dated 6 July 2006 the Appellant requested under FOIA that the GU/PG provide him with "a copy of the report written by Prof ..... which was on research within engineering."
6. Although the request was for a report written by a named Professor, it became clear that no such report by an author of that name had been commissioned or prepared. The GU/PG confirmed that there was a report that had been prepared by a different external assessor (the 'Report'). It is not clear when the Appellant was made aware explicitly that the author was not the Professor he had named.
7. The GU/PG replied on 17 July 2006, stating that the information requested was subject to both absolute and qualified exemptions from disclosure and refusing to disclose the Report under FOIA, specifically relying on the exemptions in sections

- 40 – personal information, 41 – information provided in confidence and 43 - information likely to prejudice commercial interests.
8. The refusal notice did not contain any explanation as to why each exemption applied or any application of the public interest test, where it was relevant.
  9. The Appellant requested an internal review of the decision to withhold the information. He also requested “all extracts of the report which refer to me.”
  10. The GU/PG responded by letter dated 11 August 2006 upholding the original decision to withhold the Report, and providing more reasons for the refusal and stating that they would be contacting the author of the Report with a view to disclosing the information relating to the Appellant. An answer was received from the author of the Report declining consent.
  11. The Appellant, however, was provided subsequently with the two extracts from the Report that related to him. It is understood that the author gave his consent to limited disclosure only following further correspondence regarding an investigation by the Commissioner under the Data Protection Act 1998.

#### The complaint to the Information Commissioner

12. The Appellant complained to the Commissioner by letter dated 1 September 2006. He submitted that the information requested was of such a general nature that it could not, in practice, be regarded as personal information. He also submitted that the information required for the RAE is given publicly by other universities, usually published on a University's website and is not regarded as confidential. He did not accept that the Report would contain any information that could be regarded as likely to prejudice commercial interests as the RAE process was well known.
13. Owing to the volume of cases before the Commissioner, no complaints officer was appointed to deal with this matter until April 2007, although the Appellant was kept informed of the position.

14. By letter dated 18 April 2007, the Commissioner asked the GU/PG to provide further details as to how it had applied sections 41 and 43 of FOIA.
15. The GU/PG responded the same day; at this stage believing that the matter had been concluded as it had now disclosed the extracts of the Report concerning the Appellant. The Commissioner confirmed that in addition to the subject access request, dealt with under the Data Protection Act 1998, the request had been for a copy of the full Report under the FOIA and that the Commissioner was under a duty to consider the GU/PG's response to that request.
16. There was further correspondence and, having considered the arguments of both parties, the Commissioner wrote to the Appellant on 28 November 2007, setting out his view that for the information constituting personal data for third parties, the exemption under section 40 of FOIA had been applied appropriately. The Appellant did not accept this decision and submitted, again, that the third party information likely to be in the Report would be trivial and normally available on a University's website. He provided three examples of the availability of such information.
17. The caseworker dealing with the Appellant's complaint left the Commissioner's office before completing the matter. Another caseworker was allocated and additional information sought from the GU/PG as to the circumstances in which the Report was commissioned and prepared.
18. A Decision Notice was issued on 3 July 2008. The Commissioner concluded that the GU/PG had correctly refused the request by virtue of the absolute exemption at section 41 of FOIA. He concluded that the information had been obtained by the GU/PG from another person and that disclosure would constitute an actionable breach of confidence by that or any other person. In reaching that conclusion, the Commissioner considered that the GU/PG had to satisfy the elements of the test set down in Coco v AN Clark (Engineers) Limited [1969] RPC 41:
  - (i) that the information has the necessary quality of confidence;

- (ii) that the information was imparted in circumstances importing an obligation of confidence; and
- (iii) that there was an unauthorised use of the information to the detriment of the confider.

The Commissioner also considered whether there would be any defence in the public interest which would mean that a breach of confidence would no longer be actionable.

19. In considering whether the constituent elements of an actionable breach had been made out, the Commissioner concluded that the information in the Report is an assessment of the quality of research carried out by certain members of staff in the GU/PG's Engineering Department, is not widely known and is not trivial therefore has the necessary quality of confidence.

20. He was satisfied that the author of the Report had a reasonable expectation that any report would be treated in confidence and that the author had specifically declined to consent to the full Report being disclosed.

21. He was also satisfied that, even though the loss of privacy may be considered sufficient detriment, the disclosure of the Report could have a detrimental impact on the author as it is a summary of a professional opinion that was intended to be given in confidence, not for wider public scrutiny.

22. The Commissioner considered the public interest defence that could be mounted to any breach of confidence. In the Decision Notice he outlined the factors taken into account and concluded that the public interest in disclosing the Report was not particularly strong and certainly not strong enough to outweigh the public interest in maintaining the confidence.

23. He also decided that the exemption at section 40(2) of FOIA applied to some of the information withheld. Although it was not necessary to then consider whether the information was exempt from disclosure under section 43 of FOIA in detail, the Commissioner did not consider that the information related directly to a commercial activity within the meaning of section 43 of FOIA.

24. The Commissioner also found that the GU/PG had breached the following sections of FOIA: section 17(1)(b) and (c) in that it failed to specify the subsection of section 43 upon which it relied and to explain why the exemption applied; section 17(3)(c) by failing to include particulars of the public interest factors considered in relation to a qualified exemption; and section 17(7)(a) by failing to set out the details of any complaints procedure and details of the complainant's section 50 rights.

### The Appeal to the Tribunal

25. By Notice of Appeal dated 24 July 2008 the Appellant appealed against the Commissioner's decision on the following Grounds:

- (a) That the exemption in section 41 of FOIA was not engaged because
  - (i) the information did not have the necessary quality of confidence;
  - (ii) was not imparted in circumstances importing an obligation of confidence;
  - (iii) there would be no detriment to the confider; and
  - (iv) there would be a public interest defence.
- (b) That limited redactions could be made to the Report to remove the parts which fall within section 40 of FOIA.

26. The Commissioner served a Reply in which it was submitted, inter alia, that the information in the Report was not widely known and the information on the website links provided by the Appellant was not the same kind of information; the Report contains an expert opinion about matters by an individual and that it is important for public authorities to be able to commission and receive sensitive advice on matters directly affecting staff.

27. The Tribunal joined the GU/PG as an Additional Party.

28. The GU/PG served a Reply pursuant to a Direction from the Tribunal. This dealt predominantly with the chronology and interpretation of communications with the Commissioner. With regard to the Grounds of Appeal, the GU/PG agreed with the

Commissioner's consideration of the public interest and provided more detail as to the publication of the RAE assessment.

29. The Appeal has been determined without an oral hearing on the basis of written submissions and an agreed bundle of documents. Although all parties were given the opportunity to provide detailed written submissions, only the Commissioner did so.

30. The Tribunal was also provided with a copy of the Report that is the subject of this Appeal. This was not made available to the Appellant, as to disclose it to him would defeat the purpose of this appeal.

31. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

### The Powers of the Tribunal

32. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

*(1) If on an appeal under section 57 the Tribunal considers-*

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*



33. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

34. The question of whether the GU/PG was entitled to refuse to disclose the information on the basis of the exemption in section 41 of FOIA is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion; section 2(3)(g) of FOIA makes it clear that section 41 of FOIA is an absolute exemption.

#### The questions for the Tribunal

35. The Tribunal has concluded that the relevant issues in this Appeal are as follows:

- a) Would the disclosure of the information constitute an actionable breach of confidence such that the exemption in section 41 of FOIA is engaged?
- b) If not, does some or all of the information amount to personal information such that the exemption in section 40(2) of FOIA is engaged?

Would the disclosure of the information constitute an actionable breach of confidence such that the exemption in section 41 of FOIA is engaged?

36. Section 41(1) of FOIA states:

*Information is exempt information is-*

- (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.*

37. There is no “definitive test” that we should apply to determine what amounts to an actionable breach of confidence. The Tribunal has had the benefit of the decision of the High Court in Secretary of State for the Home Department v British Union for the Abolition of Vivisection and the Information Commissioner [2008] EWHC 892 (QB), an appeal from a differently constituted panel of this Tribunal. Although its focus was the interplay between section 41 and 44 of FOIA in the context of the Animals (Scientific Procedures) Act 1986, the High Court made a number of helpful observations on the law of confidence which we have borne in mind, including its comments as regards the relevance of the European Convention on Human Rights.

38. We consider therefore that the well known statement in Coco v A N Clark (Engineers) Ltd [1969] RPC 41 should not be adopted as an exclusive statement of the “test” but is a relevant test in the context of this case. No party suggests that the test as applied by the Commissioner should not be applied.

39. We are therefore satisfied that the issues to be determined are:

- (i) Does the information have the necessary quality of confidence;
- (ii) Was the information imparted in circumstances importing an obligation of confidence; and, if so,
- (iii) Would disclosure be a breach of that obligation?

40. We consider each of these in turn.

*Does the information have the necessary quality of confidence?*

41. The Appellant submits that the information upon which the Report is based will be widely known and the conclusions self-evident. He argues that the information will be published on universities’ websites and would usually consist of information on research grants, research supervision and the research papers written by an

individual. He provided a number of examples of material he submitted were identical to that he believes are contained in the Report.

42. We are satisfied that the examples provided by the Appellant do not bear any similarity to the contents of the Report. The examples provided contain large amounts of factual and biographical data. If the Report was a repetition of data available elsewhere, we would agree that the Report did not have the necessary quality of confidence.

43. However, we did not consider that the Commissioner's test of whether the information was "widely known" or "trivial" to be the most appropriate test of whether the Report had the necessary quality of confidence.

44. We are satisfied that the Report does have the necessary quality of confidence because it is, in effect, a number of performance appraisals containing the personal opinion of the external assessor and would not ordinarily be publicly disclosed.

*Was the information imparted in circumstances importing an obligation of confidence?*

45. The external assessor was asked by a letter dated 20 July 2005 to "...give your confidential opinion..." and told that "...any conclusion ... will not be quoted in relation to the actual outcome for this UOA." He was contacted in August 2006 and specifically asked if he would consent to the Report being disclosed and he declined to give consent on the basis that he had provided the Report in strict confidence.

46. We are aware that subsequently the external assessor gave consent for the Appellant to be provided with those parts of the Report that referred to him and that this was done.

47. The Commissioner and the GU/PG submit that this is a clear example of an explicit obligation of confidence.

48. The Appellant submits that at other higher education establishments he was aware that "such reports were commissioned and discussed within the department and there is no expectation of confidentiality within the department."

49. We are concerned with the confidentiality of this Report and not the RAE submission or any information provided as part of that process. We were not assisted by the submission as to what has occurred previously at different establishments, although we note that this may have become relevant if the GU/PG was attempting to establish an implicit obligation of confidence.
50. We observe that simply deeming a document “confidential” or stating that a report has been provided “in confidence” is insufficient to satisfy this constituent of the test. The information will only fall within the exemption in section 41 of FOIA if it is by its very nature confidential.
51. We are satisfied that this Report was prepared and provided in circumstances that imported an obligation of confidence. For the same reasons as detailed above, we consider that the Report is, in effect, a performance appraisal containing the personal opinion of the external assessor and would not ordinarily be publicly disclosed.

*Would disclosure be a breach of that obligation of confidence?*

52. The Commissioner has considered the “third” constituent element of the test for what amounts to be an actionable breach of confidence to be whether disclosure would result in any detriment to the author of the Report. He noted that in some cases the loss of privacy is a sufficient detriment in itself and he concluded that disclosure of the contents of the Report could have a detrimental impact on the author if it became widely known. This was because:

- (i) The content of the Report is a professional opinion about research carried out in the Engineering Department;
- (ii) The Report was clearly not written for a wider audience and there was no expectation that the conclusions would be made public;
- (iii) The Report is only a summary of more detailed conclusions that were reported by the author verbally; and

- (iv) The author was acting in an individual capacity, had no reasonable expectation of disclosure and had been given specific assurances prior to preparing the Report that his conclusions would not be disclosed.

53. The Appellant submits that if the Report is based on fact, and fact that is widely known, then there can be no detriment to the author by disclosing it, unless it is inherently flawed. We have already indicated that the Report does not contain factual information of the nature suggested by the Appellant but is, in effect, a performance appraisal of individuals within the Engineering Department containing the author's personal opinion.

54. With respect to the Commissioner, we do not agree that he applied the relevant test. In Coco v A N Clark (Engineers) Limited, Megarry J expressed doubt as to whether an element of detriment is required in all cases. This was considered by the House of Lords in Attorney General v Guardian Newspapers [1990] 1 AC 109 where Lord Goff agreed with Megarry J that it was appropriate "to keep open the question whether a detriment to the plaintiff is an essential ingredient of an action for breach of confidence." It was also said in that case, by Lord Keith, that in cases of personal privacy, loss of that privacy could amount to sufficient detriment.

55. This issue was considered by a differently constituted panel of this Tribunal in Bluck v The Information Commissioner (EA/2006/0090) who concluded that the principle to be drawn from the case law is that if "disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information, then the absence of detriment in the sense apparently contemplated in the argument presented on behalf of the Appellant is not a necessary ingredient on the cause of action." That case concerned a request for medical records of a deceased individual and it was argued that as the deceased could suffer no detriment, the medical records could be disclosed. The Tribunal concluded that deceased's medical records remained confidential and disclosure would amount to an actionable breach of confidence even though she would not personally suffer any detriment and were therefore exempt under section 41 of FOIA.

56. In this case, the Report was not only provided and written in confidence, it also contains a performance appraisal of other identifiable individuals. The test under section 41 of FOIA is whether disclosure by the GU/PG would constitute a breach of confidence actionable by the person who provided the information ***or any other person*** (our emphasis). While we consider that there may be a breach of the confidence owed to the author, a stronger consideration, in our opinion, is that disclosure of the Report would be a breach of the confidence owed to the individuals whose performances are appraised in it. Disclosure without their consent would be a breach of the obligations owed under the Data Protection Act 1998.

57. We are of the opinion that the information in the Report has the necessary quality of confidence, was imparted in circumstances importing an obligation of confidence, and disclosure would be a breach of that obligation.

*The public interest*

58. A breach of confidence will not be actionable where there is a public interest defence.

59. We remind ourselves that disclosure under FOIA is to disclose to the public. There is no provision for a public authority to create conditions of use or to indicate that information disclosed should be treated in confidence by the requestor.

60. The Commissioner noted that the balancing exercise, of weighing up the competing factors in favour of disclosure and in favour of maintaining confidentiality, for this defence is similar to that set out in section 2(2)(b) of FOIA, except that where the competing factors are equal, the information should not be disclosed.

61. The factors in favour of disclosure are said to be informing the public of the process leading up to an RAE and to assist them understand what decisions have been taken that have led to either and over- or under-achieving institutions. The Appellant submits that this is analogous to the situation where government briefing documents have been made available under FOIA requests.

62. Having had sight of the Report, we cannot see that the disclosure of it would in any way assist the public understanding of the RAE process. The results of the relevant RAE will be published via the RAE website on 18 December 2008. This may include parts of information provided by the higher education institutions, subject to the Data Protection Act 1998. Even if the Report had been submitted as part of the RAE process, we do not consider that the information contained in the Report would be published in light of this. The Appellant's submissions regarding the public interest in understanding the RAE process will be met by the publication of the results in December 2008 and can be met by material about the RAE process in the public domain.

63. It may be helpful to address the analogy suggested by the Appellant regarding disclosure of government briefing documents. Without knowing the precise details of the cases he has in mind, we observe that although the substance of documents may have been disclosed, personal information would have been redacted.

64. In favour of maintaining confidentiality, it is said that public authorities should be able to commission and receive sensitive advice on matters affecting staff without putting that advice in the public domain. The author had agreed to provide the Report in confidence and had specifically refused consent to disclose. The Report amounts to a performance appraisal of identifiable individuals.

65. We cannot see that there is any public interest in disclosing the Report. If there is public interest in seeing how the Engineering Department is performing, this will be satisfied by the publication of the RAE results in December 2008 not by the disclosure of the information in this Report.

### Other matters

66. Having reached that conclusion we have not gone on to consider in detail the position regarding section 40(2) of FOIA. The parties appeared to be in agreement that if the Tribunal concluded that section 41 of FOIA did not apply, then the Report could be disclosed with the redaction of personal information. We would agree with

that, although add that, in our opinion, slightly more of the Report amounts to personal information than that identified by the Commissioner.

67. A number of points have been raised by the Appellant and, to some extent, the GU/PG that have had no direct bearing on this appeal and are not within the jurisdiction of this Tribunal. In particular, we cannot comment on any complaint about the way in which the Commissioner's office dealt with the original investigation.

68. The GU/PG had taken a pragmatic approach to the simple error in the initial request, that is, the Appellant's reference to the information as the report by a named Professor, and had proceeded to deal with this as a request for information and to confirm that such a report did exist although the author was a different individual. However, in relation to the public authority's duties under section 16(1) of FOIA, it would have been sensible to correct the error of understanding at an early stage as failure to do so seems to have given rise to a number of exchanges concerning information or views attributed to the named Professor and there may be one or more engineering professors of that name who may feel aggrieved to be unwittingly implicated.

#### Conclusion and remedy

69. We have concluded that the Report is exempt information under section 41 of FOIA and should not be disclosed to the Appellant. We therefore refuse this Appeal.

70. Our decision is unanimous.

Signed

Annabel Pilling

Deputy Chairman

Date: 19 December 2008