NCN: [2022] UKFTT 00243 (GRC) **Case Reference: EA/2021/0185**

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Heard: by determination on the papers
Heard on: 1 March and 11 July 2022
Decision given on:

Before:
Judge Alison McKenna
Naomi Matthews
David Cook

Between:

GEORGE GREENWOOD	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**First Respondent**
-and-	
UK RESEARCH AND INNOVATION	**Second Respondent**

DECISION

1. The appeal is dismissed.

REASONS

Mode of Hearing

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules[1].

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 124. It also considered a closed bundle comprising pages 1 to 593.

4. Adjourning part-heard on 1 March 2022, the Tribunal directed the Second Respondent to file and serve additional material and to make additional submissions. The other parties were invited to make further submissions in response but elected not to do so. The panel reconvened on 11 July 2022.

Background to Appeal

5. The Appellant made a request to Innovate UK ("IUK"), (a part of UK Research and Innovation, "UKRI") on 2 March 2020 for disclosure of information relating to the Catapult organisations sponsored by IUK[2]. The request was as follows:

> *"1. Please provide a copy of all communications between the*
>
> *a) Executive Chair*
>
> *b) Chief Investment Officer*
>
> *Of Innovate UK and Rob Bryan concerning the delayed progress and value for money issues within the Catapult Network from July 1st 2018 to date.*
>
> *2.Please provide a copy of all board, risk committee, remuneration committee and audit committee minute papers for Catapult Networks funded by Innovate UK from July 1st, 2018 to date. Please note even if any redactions are required, the remaining information must be disclosed.*

[1] https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules

[2] "The Government established a network of technology Centres ('Catapults') to commercialise new and emerging technologies in areas where large global market opportunities exist. The Catapults were set up as independent research and technology organisations, established and overseen by IUK, though structured to operate as private sector organisations". [Decision Notice paragraph 5].

3.Please provide the anonymised salary figures for all current board members of Catapults funded by Innovate UK.

4.Please provide the anonymised current diversity figures for all Catapults funded by Innovate UK. This should include gender and ethnicity.

5.Please state the total number and value of NDA settlement agreements between Catapults and staff of these catapults in each of the last three financial years, and the current financial year to date".

6. IUK responded on 27 March 2020. It refused to comply with point 1 of the request, citing s. 12 of the Freedom of Information Act 2000 ("FOIA") (cost of compliance); point 2 was refused without citing an exemption but stating that the information was held as confidential information; requests 3, 4 and 5 were refused on the basis that the information was not held.

7. The Appellant requested an internal review and refined the scope of his request in relation to point 1, to include e mails containing the following key phrases (and any similar forms of the same words): '*Funding model'; 'Value for money'; 'One third (in the context of the 1/3, 1/3, 1/3 funding model)'; 'Non-disclosure agreement'; 'Salary/ies (in the context of Catapult board members',* retaining the same time period.

8. Following an internal review, IUK wrote to the Appellant on 26 June 2020, stating that no information was held within the scope of points 1, 3, 4 and 5 and that it refused to disclose the information requested under point 2 in reliance upon s. 41 (1) and s. 43(1) FOIA. These exemptions relate to information provided in confidence and to the protection of commercial interests.

9. The Appellant complained to the Information Commissioner, limiting the scope of his appeal to point 2 of his requests. The Information Commissioner issued Decision Notice IC-45501-H9Q6 on 22 June 2021, upholding UKRI's reliance on s. 41 (1) FOIA and required no steps to be taken. The Decision Notice did not determine UKI's reliance on s. 43 or (later) s. 40 FOIA. The Appellant appealed to the Tribunal.

The Law

10. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

> *"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."*

11. Section 41 FOIA is an absolute exemption under s. 2 (2) (a) FOIA.

12. Section 41 FOIA provides as follows:

"(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".

13. An actionable breach of confidence arises where the information concerned has the necessary quality of confidence, has been imparted in circumstances importing an obligation of confidence, and where the unauthorised use of that information is to the detriment of the person imparting it. *See Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

14. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"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."*

15. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

The Decision Notice

16. The Decision Notice upheld UKRI's reliance on s. 41 (1) FOIA. Eighty-five sets of minutes were found to be within the scope of point 2 of the refined request. The Decision Notice concluded that these had the necessary quality of confidence, had been obtained by UKRI in circumstances importing an obligation of confidence, and that their disclosure would be to the detriment of the Catapults' commercial interests.

17. The Decision Notice found that the minutes had been supplied to UKRI by the Catapults under an express obligation as to confidentiality, so as to give rise to an action for breach of confidence if disclosed. It found that an express obligation as to confidentiality arose by virtue of the contractual terms of the grant funding agreement ("GFA") between each Catapult and IUK. Further, that the minutes themselves were marked 'confidential'. Each of the Catapults confirmed its position to the Information Commissioner as being that information provided to IUK by the Catapults was confidential and that they expected IUK to observe a duty of confidence in respect of the minutes within the scope of the request. Furthermore,

solicitors acting for six of the Catapults informed UKRI that they considered disclosure of the minutes would constitute an actionable breach of confidence and of contract and would apply to the Courts for injunctive relief if it disclosed the minutes in response to the information request.

18. Having considered the minutes themselves and the information contained within them, the Decision Notice concluded that a public interest defence would not be available were they to be disclosed in breach of the duty of confidence. Having considered the Appellant's arguments as to the need for transparency when public money is invested in private companies, the Decision Notice concluded that the minutes did not contain information which revealed misconduct and that the public interest in maintaining confidentiality should prevail.

Submissions and Evidence

19. The Appellant's Notice of Appeal dated 19 July 2021 relied on three grounds of appeal: (i) that it was unlikely that it would be to the detriment of UKRI to disclose all of the information contained in the minutes; (ii) that it was unlikely that there would be legal proceedings for breach of confidence in the context of public and quasi-public bodies; and (iii) that there was a strong public interest in disclosure in view of concerns expressed about the Catapults in a BEIS report published in 2017.

20. The Information Commissioner's Response dated 23 August 2021 resisted the appeal and maintained his analysis as set out in the Decision Notice. It was submitted that the grounds of appeal consisted of arguments previously made to the Commissioner and considered in the Decision Notice itself, and that no error of law or inappropriate exercise of discretion had been pleaded.

21. The Appellant's Reply dated 3 September 2021 submitted that the Information Commissioner had underestimated the public interest in disclosure and had erred in assuming that the contents of documents could be exempted in a blanket manner. He submitted that there was a strong public interest in knowing whether poor practice or lack of oversight had led to the loss of large sums of public money within the Catapult system.

22. UKRI's Response dated 25 October 2021 resisted the appeal and responded to the Appellant's grounds of appeal as follows: (i) there is an express provision as to the confidentiality of the requested information in the Catapults' GFAs which has not been disapplied in respect of the minutes; (ii) that the test of whether there is an 'actionable' breach of confidence refers to whether such a claim arises as a matter of law, and there is no test as to the likelihood of proceedings being commenced; and (iii) that the minutes do not reveal evidence of any misconduct which support the Appellant's submissions as to the public interest in disclosure.

23. The Appellant's Reply dated 26 October 2021 submitted that the disclosure of appropriately redacted minutes could not cause detriment to the Catapults' interests. Further, that there was a clear public interest in disclosure in the public interest.

24. UKRI relied on witness evidence from Simon Edmonds, the Chief Business Officer of IUK, dated 6 December 2021. He states that prior to 2018, UKRI staff had attended Catapult board and committee meetings as observers only and that agendas, minutes and supporting papers were provided to the observers in confidence. He

states that the disclosure of the minutes would be to the Catapults' detriment as they may reveal information which could give an advantage to competitors.

25. The Open Hearing Bundle contains the information provided to the Information Commissioner by UKRI. This includes a letter from solicitors instructed on behalf of six Catapults making clear that in their view the obligation of confidentiality contained in the GFA applies to the minutes and that disclosure would give rise to an actionable breach of confidence. They state that they are instructed to apply for injunctive relief to prevent UKRI from disclosing the minutes otherwise than to the Information Commissioner.

26. The Tribunal's Open Hearing Bundle for 1 March 2022 contained a note of a telephone conversation between the Information Commissioner's Office and UKRI from which it is clear that copies of the GFAs were requested, but it did not appear that these had ever been provided to the ICO. The Decision Notice quotes just one clause from a GFA, which had been referred to in correspondence. The Tribunal was provided only with an extract from what is clearly a blank template for a generic GFA. The Tribunal was not provided with copies of the executed GFAs said to contain the obligations relied upon by UKRI. The Tribunal therefore adjourned and directed UKRI to provide it with copies of the executed GFAs for each Catapult, together with additional submissions thereon. Subsequently, unredacted copies of the GFAs were provided to the Tribunal and (with the Tribunal's permission) redacted copies were provided to the Appellant.

27. Reconvening on 11 July 2022, the Tribunal carefully considered the relevant GFAs and UKRI's further submissions dated 30 March 2022, together with a second witness statement from Simon Edmonds dated 28 March 2022.

28. Simon Edmonds' second witness statement contained a helpful schedule of the GFAs and exhibited them. The GFAs he provided to the Tribunal were those actually in force at the time of the relevant board meetings, the minutes of which are within the scope of the request. They are not identical to each other in content or in duration. We note that some of the GFAs have expired, and it is unclear whether their provisions are still capable of enforcement.

29. Each GFA has the word '*confidential'* on its title page and defines '*confidential information'* as including any information that is marked as confidential, together with other information that would be regarded as confidential by a reasonable businessperson.

30. The GFAs generally permit IUK to send an observer to board meetings and all except one expressly provide that that observer is bound by the confidentiality provisions of the GFA. We note a general provision that a party to the GFA may disclose information *"to the extent required by law…or by a court or other authority of competent jurisdiction…",* provided it gives notice to the other party sufficient to enable it to take steps to resist or apply for an injunction.

31. The GFAs acknowledge that the parties will treat any threatened or actual breach of the confidentiality provisions as actionable, but they also absolve IUK from liability to the Catapults for breach of confidentiality if disclosure is made under FOIA *"…provided that Innovate UK has made all reasonable efforts to avoid the disclosure…".*

32. UKRI submitted that the GFAs require all information disclosed by a Catapult to be treated as confidential unless UKRI has a legal obligation to disclose it. It is submitted that the eighty-five sets of minutes within the scope of the request are covered by that duty of confidence because they are marked as confidential and were supplied to UKI in its role as observer, which itself imported a duty of confidentiality. UKRI's submission, therefore, was that the GFAs are evidence that there existed a common law duty of confidence in respect of the requested minutes, which themselves have the necessary quality of confidence and were imparted in circumstances importing an obligation of confidence. This duty of confidentiality should, in its submission, weigh heavily with the Tribunal because it was expressly stated in contractual form.

Conclusion

33. The legal test for the engagement of s. 41 FOIA is correctly stated in the Decision Notice. We remind ourselves that this is whether the requested information was obtained by the UKRI from another person and whether the disclosure of that information (otherwise than under FOIA) would constitute an actionable breach of confidence.

34. It is clear from the evidence before us that the minutes in question were supplied to UKRI by the Catapults for use in connection with UKRI's role as an observer at board meetings and that the minutes were provided to UKRI by the Catapults in connection with that function. We conclude without hesitation that the test in s. 41 (1) (a) FOIA is met in this case.

35. We found it more difficult to decide whether the test in s. 41 (1) (b) FOIA was met. This was in part because of the heavy reliance in the Decision Notice and in UKRI's Response on the contractual obligations imposed by the GFAs. We were concerned that weight had been placed by the Information Commissioner on agreements which it had not actually seen and that UKRI had not provided a sufficiently granular analysis of the obligations on which it relied.

36. Having obtained and reviewed the GFAs for ourselves (some 1,800 pages), we conclude that it is far from clear that they have the effect contended for by the Catapults and UKRI and on which the Decision Notice rests. As noted above, the GFAs permit disclosure of otherwise confidential information if it is required by a Court or Tribunal, and we understand the GFA to provide that UKRI would not be in breach of its confidentiality obligations if it was directed to make disclosure under FOIA, provided that it had made reasonable efforts to resist such disclosure. This would suggest that the injunction proceedings threatened by the Catapults could only have been successful on an interim basis, pending any direction to disclose made by this Tribunal (or the Upper Tribunal on appeal). We find it difficult to believe that the GFAs would have been interpreted by any Court so as to bind UKRI in a way that ousted the jurisdiction of this Tribunal.

37. We conclude that disclosure of confidential material under FOIA was in the contemplation of the parties to the GFAs and that, provided UKRI resisted disclosure until directed to disclose by a Court or Tribunal, there would be no breach of the GFA if it complied with such a direction. Our understanding of the GFAs on this point thus differs from that set out in the Decision Notice. We observe that it would

have been appropriate for the Information Commissioner to have obtained and read the GFAs in full.

38. Nevertheless, the test under s. 41 (1) (b) FOIA is not whether a contractual obligation as to confidentiality is enforceable, but whether disclosure (otherwise than under FOIA) would constitute an actionable breach of confidence. UKRI's later submissions were clearer on this point, arguing that the GFAs were evidence of the existence of a common law duty of confidence between UKRI and the Catapults, which was also evidenced by the circumstances in which UKRI came to be in possession of the minutes and the respective roles of the parties.

39. The question for the Tribunal is whether there exists as a matter of law an actionable breach of confidence in relation to disclosure of that information. We understand this to mean no more than that a party could properly be advised to bring an action. We do not understand the test to be whether it is likely that proceedings would actually be commenced (as the Appellant has argued) or whether, if commenced, they would be likely to succeed (the test applied at paragraph 35 of the Decision Notice). We conclude, having had regard to all the evidence, that there would be an actionable breach of confidence at common law in this case in respect of the eighty-five sets of minutes. We reach this conclusion having applied the three-part test set out at paragraph 13 above. We take into account the particular circumstances in which the minutes came to be in the possession of UKRI, their contents, and the clear intention of the parties, evidenced by the markings on the documents themselves and the signing of the GFAs (whether enforceable or not) that they should not be disclosed to any third party. We conclude that this duty of confidence applies to the minutes in their totality and so we do not direct disclosure of redacted versions.

40. The contents of the minutes, which we have read, are not trivial and we accept that disclosure of the particular information in them could be of advantage to a competitor and so disadvantage the Catapults. The Decision Notice records that, having read the minutes, there was no evidence of misconduct such as would support a public interest defence to an action for breach of confidence. The Tribunal, having also read the minutes for ourselves concurs with that view. We accept the Appellant's argument that there is a public interest in transparency where public money is invested in private companies, but we agree with the Decision Notice that there is a prevailing public interest in upholding duties of confidence between individuals in circumstances where there is no evidence of wrongdoing which would raise a public interest defence.

41. For all these reasons, although we differ somewhat from the Decision Notice in our analysis, we reach the same conclusion as did the Information Commissioner and now dismiss this appeal.

(Signed)

JUDGE ALISON McKENNA **DATE: 20 July 2022**

Promulgation date 26th July 2022

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