Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2009/0002
Information Commissioner's Ref: FS50180838

Heard at Care Standards Appeal Tribunal and Finance and Tax Tribunal
On 22 and 23 September 2009

Determination Promulgated

5 October 2009

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

Rosalind Tatam and Gareth Jones

Between

CERI GIBBONS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

Additional Party

Representation:

The Appellant in person.

Ewan West for the Respondent.

Karen Steyn for the Additional Party.

Subject areas covered:

International relations s.27

Confidential information s.41

Commercial interests/trade secrets s.43

Cases referred to:

Attorney General v Guardian Newspapers (No 2) [1990] 1 AC 109

Determination

The Tribunal dismisses the appeal and upholds the decision notice dated 15 December 2008.

Reasons for Determination

Background

1. During 2007 the Appellant, Ceri Gibbons, made a series of requests for information under the Freedom of Information Act 2000 from the Department for Business, Enterprise and Regulatory Reform[1] relating to export licences sought by and

[1] We shall refer to the Department, which is now known as the Department of Business, Innovation and Skills, by its current acronym, BIS.

granted to EDO MBM Technology Ltd and certain associated companies.[2] The precise scope of the requests was in dispute but for the purposes of this appeal the Tribunal can proceed on the basis that Mr Gibbons was asking for all applications and licences from the years 2000 to 2007 for the export of any goods to Israel and the USA and for the export of two particular items, namely the ERU151 and the ZRFAU,[3] whatever their destination. We will refer to this information as the "disputed information".

2. There was no dispute that the ERU151 and the ZRFAU are components which can be incorporated into VER-2 bomb racks for use with F-16 combat aircraft, that those aircraft are used by the Israeli air force, and that from 1998 EDO owned the right to manufacture the ERU151 and the ZRFAU. And it is no secret that Mr Gibbons is opposed to the arms trade and alleged breaches of human rights by the Israeli military and that the purpose of his requests was to establish whether EDO had been exporting those components to Israel during those years, whether directly or indirectly through the USA or other third countries.

3. In response to Mr Gibbons' requests for information BIS informed him by letter dated 22 June 2007 that EDO had authorized it to disclose that it was granted a licence on 9 February 2007 to export two ZRFAUs to a sister company in the USA for scrap. Otherwise, BIS stated that the information requested was confidential and relied on the absolute exemption in section 41 of the 2000 Act as a ground for withholding it, an approach which was upheld in a review letter dated 19 September 2007.

4. On 9 October 2007 Mr Gibbons complained to the Information Commissioner under section 50 of the 2000 Act. The Commissioner issued a decision notice dated 15 December 2008 upholding BIS's position on section 41. It was disclosed in the decision notice that the *only* application for an export licence for a ZRFAU which BIS held was that referred to in its letter of 22 June 2007 and that BIS also held details of applications for export licenses for the ERU151.

[2] The particular companies were named as MBM Techonology Ltd, EDO MBM Technology Ltd, EDO (UK) Ltd, EDO Rugged Systems Ltd, EDO Flexible Systems Ltd; we shall refer to them compendiously as EDO. EDO is based in Brighton and is now a subsidiary of the ITT Corporation.
[3] ERU stands for "ejector release unit" and ZRFAU stands for "zero retention force arming unit".

The appeal

5. On 12 January 2009 Mr Gibbons appealed against the Information Commissioner's decision notice on the ground that the Commissioner had been wrong to find that section 41 applied,[4] as he should have found that there would be a public interest defence to any action for breach of confidence in relation to the requested information because the information would disclose that directors of EDO had lied about the ERU151 and ZRFAU and exports to Israel to various courts hearing cases arising out of activities of protesters against EDO. We shall refer to this defence as the "iniquity defence".

6. Just before the hearing Mr Gibbons also sought to raise arguments for the first time to the effect that the requested information or part thereof was not "confidential" as the Commissioner had found and to rely on public interest defences to breach of confidence other than the pure iniquity defence. However, it was clear that his notice of appeal (even in its amended form dated 28 April 2009) accepted that the requested information was confidential and that the only issue raised by it was whether there would be an iniquity defence. Mr Gibbons therefore sensibly accepted at the hearing that it was not open to him to seek to disturb the Commissioner's findings as to the confidentiality of the information or to raise the new public interest defences.

7. For its part BIS sought at an early stage in the appeal to rely on two new exemptions, namely section 27 ("International relations") and section 43 ("Commercial interests"). BIS maintained that they were entitled to raise these exemptions at any stage and that the Tribunal had no discretion not to entertain them. In the event as we shall explain below we have not felt the need to decide whether to allow them to be raised or whether they in fact apply, but we made it clear at the hearing that we do not accept that there is no discretion in the matter and that we would if necessary have followed the Tribunal's consistent jurisprudence to the effect that it has a discretion whether to allow a new exemption

[4] Section 41(1) provides an absolute exemption under the Act in respect of information "…if - (a) it was obtained by the public authority from any other persona … and (b) the disclosure of the information to the public (otherwise than under [the] Act) by a public authority holding it would constitute a breach of confidence actionable by that or any other person". It is well established that if there would be a public interest defence available in such an action for breach of confidence the section does not apply.

to be raised by a public authority and will only do so if there is a reasonable justification for doing so.

8. In addition to the evidence from Ms Carpenter to which we refer below, the Tribunal heard evidence from Dr. Anna Stavrianakis, a lecturer in international relations at the University of Sussex, Brinley Salzmann, the Overseas Director of the Defence Manufacturers Association, and Liane Saunders, Head of the Counter-Proliferation Department at the Foreign and Commonwealth Office. All three gave impressive evidence on topics which are undoubtedly of considerable legitimate public interest but on which the Tribunal does not in the event need to make any findings.

9. Before turning to the issues argued on the appeal we would also record that EDO was expressly given the opportunity to participate in the appeal but chose to play no part.

The iniquity defence

10. Mr West for the Commissioner helpfully referred us to a passage in the opinion of Lord Goff in *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at pp 282/3 which sets out the relevant legal principles:

> **…although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply … to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.**
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> **Embraced within this limiting principle is … the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud"… But it is now clear that the principle extends to matters of which the disclosure is required in the public interest … [A] mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all**

the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation…

11. In order to make good his iniquity defence Mr Gibbons relies on a number of statements made on behalf of EDO as follows:

I can confirm that, to the best of our knowledge and belief, none of our components, particularly weapon release systems, are incorporated into systems which are exported by any third country supplier to Israel.

Additionally, I can confirm that the company has not supplied any defence products directly to Israel during the last ten years…

[letter from David Jones Managing Director of EDO to Brighton & Hove Palestine Solidarity Campaign dated 25 May 2004]

We supply release mechanisms but never for an F-16. We have never sold them…We bought the technology and have never received an order for those parts…

[evidence given by Mr Jones on 13 December 2004 in R v Levin before District Judge Arnold]

… the true position is that [EDO] does not apply (sic) any of its products to [Israel]

[written submissions made by counsel for the Attorney General in November 2005 in course of a High Court action EDO and David Jones v Campaign to Smash EDO et al]

… we purchased a range of products from Lucas Western Gear in, I believe, 1998 [including] the 151 ejector release unit which Lucas Western Gear had previously sold for F-16s. We have never made a 151 ejector release unit…

…we have never sold a 151 ERU but we have the capability of manufacturing if we ever had an order for them…

[evidence given by Mr Jones on 7 December 2005 in course of an appeal to Lewes Crown Court in R v Marcham et al]

To my certain knowledge [EDO] has never sold military items either directly or indirectly to the Israeli government. We currently do not supply any military equipment to the Israeli government…

To my knowledge and belief [EDO] have not manufactured or sold ZRFAUs directly or indirectly to the Israeli Government…

… [EDO] have not sold [the VER-2] or parts thereof to the Israeli Government. We do have the licence for it … but the DTI can confirm we have never sold it…

[evidence given by Peter Davis, a director of EDO, in police witness statements dated 28 February 2007]

12. Mr Gibbons alleges (at paragraphs 46 to 48 of his Amended Grounds of Appeal) that, contrary to those statements, between 2000 and 2007 EDO (a) exported military equipment to Israel either directly or indirectly (b) manufactured and exported the ERU151 to another country and (c) manufactured and exported the ZRFAU to Israel either directly or via another country. He asserts that the information he has requested from BIS would show that these allegations are true and would therefore confirm that the statements set out above were false and that EDO and its directors have therefore lied to the courts and the public. Such lies would amount to iniquity, the argument goes, and the disputed information should therefore be disclosed as there would be a good iniquity defence to any action for breach of confidence. Neither Ms Steyn for BIS nor Mr West for the Commissioner disputed any of these propositions except for the all important factual premise that the disputed information supports the allegations made by Mr Gibbons about EDO's activities, which is hotly disputed.

13. Mr Gibbons is obviously at a disadvantage in showing that the disputed information would provide evidence to support his allegations since, for obvious reasons, he

has not seen it. The Tribunal has, however, carried out "such investigations as are reasonably open to [it]" (to adopt Lord Goff's words quoted above) and satisfied itself that BIS has also done so. Under a directions order made on 16 March 2009 BIS provided to the Tribunal copies of all export licence applications coming within Mr Gibbons' request and the contents of their associated paper files. This material was reviewed by the Deputy Chairman who raised a number of written queries to be dealt with in BIS's "closed" evidence. That evidence was provided by Jayne Carpenter, a senior civil servant at BIS who is the Head of the Policy Group in the Export Control Organization. Having read the disputed information all the members of the Tribunal questioned Ms Carpenter closely during the closed session about what it showed and the search that had been undertaken to locate it. Having conducted that exercise we are satisfied, having regard to all the circumstances of the case, that nothing in the disputed information provides support for any of Mr Gibbons' allegations. The consequence of that is that the allegations remain only allegations and that there would be no public interest defence to a common law action for breach of confidence were the disputed information to be disclosed.

14. Mr Gibbons' case therefore fails on the facts. There being no factual basis for the suggested iniquity defence it is clear that section 41 must apply to exempt the information he seeks from the requirement of disclosure under the Act and that the Commissioner was right so to conclude.

New exemptions

15. That conclusion means that there is no need for the Tribunal to consider whether BIS should have been allowed to argue the section 27 and 43 exemptions and, if so, whether they applied in fact. All we will say is that, had we concluded matters in Mr Gibbons' favour on section 41, there would obviously have been a very strong public interest in disclosure of any relevant information and that that public interest may well have outweighed the public interest in maintaining those exemptions so that, as qualified exemptions, they would not have applied in any event.

Conclusion

16. Mr Gibbons' appeal is dismissed and the Tribunal upholds the decision notice dated 15 December 2008.

17. Our decision is unanimous.

Signed

Murray Shanks

Deputy Chairman Dated: 5 October 2009