



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2012/0188

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50446593
Dated: 2 August 2012**

Appellant: MR DAVID NUTTALL MP

Respondent: THE INFORMATION COMMISSIONER

2nd Respondent: THE CHARITY COMMISSION

Heard on the papers: at Field House

Date of Hearing: 12 December 2012

Before

Fiona Henderson

Judge

and

Malcolm Clarke and Richard Fox

Tribunal Members

Date of Decision: 26 February 2013

Subject matter:

FOIA– s41 Confidential information
S43 Commercial interests

Cases:

R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin)

Birkett v IC and SB 2011 UKUT 39 AAC

DECISION OF THE FIRST-TIER TRIBUNAL

Appeal Part Allowed.

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50446593 dated 2nd August 2012 which concluded that the Charity Commission were entitled to rely upon s41 FOIA to withhold the disputed information¹.
2. The Charity Commission opened a regulatory case into the W O Street Charitable Trust (the Trust) in 2010 following complaints from members of the public received concerning the manner in which the trustees were exercising their discretion in respect of the distribution of the Charity's income and the fees that were being charged by the 2 professional trustees². Arguments had been raised that capital was being drawn down to meet the costs of administration and that the costs were disproportionate in relation to the income available for distribution for charitable purposes. There were also concerns that insufficient money was being distributed within the County Palatine of Lancaster in accordance with the wishes of Mr Street. The Charity Commission was satisfied that discretion was being properly exercised and that the power to charge was not being exercised in breach of trust and closed the regulatory case on 31st March 2011.
3. A stage one review confirmed the decision and no further action was taken to challenge this decision.³
4. The wishes of the settler⁴ included that "*preference be given*" to applications coming from the County Palatine of Lancaster. The Appellant's constituency falls within this area and as such he has an interest on behalf of his constituents. He wrote to the Charity Commission on 16th September 2011 in a letter with 18 numbered paragraphs asking for information and the answers to some questions. The information request that is the subject of this appeal has been summarized by the Information Commissioner as:

¹ In light of this finding the Commissioner did not go on to consider s43 FOIA

² Bank Trust Company Limited (Barclays) and a Consultant Solicitor from Withers.

³ By way of a stage 2 review or judicial review.

⁴ The person who set up the Trust and donated money to it.

“Please supply copies of all the correspondence between yourselves and the Trustees concerning the issue of the level of their fees? In particular please provide the details of the basis for the calculation of Barclay’s fees at the rate of [figure given] per hour. Also please provide information on the hourly charging rate applies⁵ by Withers in respect of services supplied by [name].

5. On 14th October 2011 the Charity Commission disclosed some of the information and withheld the rest under s21 FOIA (information accessible by other means), s40 FOIA (data protection)⁶ and s43 FOIA (commercial interests)⁷. It stated that it did not hold any information relating to the hourly charging rate applied by Withers. Further information was disclosed on 8th December 2011 following a review but the Charity Commission upheld its original decision in relation to the remainder of the material. Additionally they relied upon s41 FOIA (confidentiality).
6. The Disputed information comprises information relating to Barclays’ hourly rates and information from Coutts provided to Barclays as to their approach to charging as a professional trustee.

Scope of the Appeal

7. The Appellant seeks a declaration from the Tribunal that *“a Member of Parliament has an obligation to protect the public interest where the interest of his constituents and wider public are adversely affected by decisions of public authorities”*. This is outside the jurisdiction of the Tribunal whose powers are set out in s58 FOIA⁸.
8. In his Decision Notice the Information Commissioner stated:

“the Charity Commission has stated that it does not hold information about the charging rate of Withers and, as the complainant has not challenged this, it will not be considered as part of the [Information] Commissioner’s decision”⁹

In his grounds of appeal the Appellant argued that the Information Commissioner’s statement concerning Withers fees is incorrect, as his request had asked to be supplied with information relating to Withers’ fees. He argued that *“For the Charity*

⁵ Sic.

⁶ This was not challenged by the Appellant before the Commissioner.

⁷ In light of his findings relating to s41FOIA the Commissioner did not go on to consider s43 FOIA in his decision notice.

⁸ Although see paragraph 41 et seq below

⁹ DN paragraph 11

Commission to refuse the request for a s8 enquiry¹⁰ without asking for information on fees charged by both trustees seems perverse”.

9. The adequacy of the response to the s8 request is not a matter for this Tribunal, the Tribunal is concerned with what is held, not what should be held. Our jurisdiction is provided for by s57(1) FOIA:

Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice”.

10. The Appellant’s complaint to the Information Commissioner pursuant to s 50(2) FOIA¹¹ did not include this issue¹². This was clarified by the Information Commissioner in his email to the Appellant dated 17th May 2012 in which he said that the focus of his investigation would be s43(2) FOIA and s41 FOIA:

“Please contact me within the next 10 working days... if there are matters other than these that you believe should be addressed... If I do not hear from you by this date my investigation will focus only upon the matters identified above”.

This delineation of scope was not challenged by the Appellant consequently the failure of the Information Commissioner to deal with this issue in his Decision Notice was not an error and we have no jurisdiction. This ground therefore fails.

11. Although the Decision Notice did not reach a conclusion upon s43 FOIA in light of the findings relating to s41 FOIA, the s43 FOIA exemption was raised by the Appellant in his s50 FOIA complaint. Pursuant to the letter of 17th May 2012 the Information Commissioner indicated that it would be included within the scope of his investigation. The Tribunal sought clarification as to whether the Charity Commission was content for the case to be determined upon s41 FOIA alone. They indicated that they sought a determination in relation to s43 FOIA as they had relied upon all their submissions to the Information Commissioner in their defence of the appeal.

12. Neither the Information Commissioner nor the Appellant has objected to this course of action and the Tribunal is satisfied that it has jurisdiction in light of the matters set out above.¹³

¹⁰ Enquiry pursuant to s8 of the Charities Act 1993

¹¹ Application for decision by Commissioner as to whether an information request has been dealt with in accordance with Part I of FOIA

¹² Letter dated 27th April 2012

¹³ Also see *Birkett v IC and SB 2011 UKUT 39 AAC*.

Confidential information

13. S41 provides

(1) Information is exempt information if –

- a) It was obtained by the public authority from any other person... 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...”*

14. The Charity Commission argue that disclosure of the disputed information would be actionable by Barclays¹⁴. The Tribunal is satisfied that the questions for the Tribunal to determine are as set out below, they are dealt with in turn as follows.

Has the information been obtained by the public authority from any other person?

15. The information was provided to the Charity Commission by Barclays (and some in turn was provided by Coutts to Barclays). Consequently we are satisfied that s41(1)(a) FOIA is met.

The information must have been imparted in circumstances importing an obligation of confidence

16. The Charity Commission argue that it is commercial information that is not available to the public. Although the information was provided following a request from the Charity Commission, Barclays were aware that they could be compelled to co-operate under the Charities Act 2011, hence their co-operation cannot be seen as waiving confidence.

17. The Information Commissioner concluded in his Decision notice that it was commercially sensitive (information generally available was restricted to the “ad valorem” rate¹⁵).

18. The Appellant argues that there is no evidence of any marking implying confidence or any restriction placed upon the use of the information. He further disputes that the information is commercially sensitive as it relates to a charitable trust which ought to be transparent and justifiable since all charges levied reduce the money available for charitable purposes.

¹⁴ Who were consulted by the Charity Commission and are of the same view.

¹⁵ Charging a percentage based upon the value of the Trust.

19. There is no evidence as to the circumstances in which Coutts provided the information to Barclays, we therefore base our consideration of this limb upon the provision of the information by Barclays. We are satisfied that the information was provided in confidence in that the circumstances of the provision of the information were that Barclays did not expect that the information would go any further and that this was also the expectation of the Charity Commission. We find support for this in the fact that Barclays have not consented to its disclosure under FOIA.

Does the information have the necessary quality of confidence?

20. The Tribunal has considered the extent to which this information has disseminated elsewhere and in what circumstances and the way in which the information has been treated by the Charity Commission and Barclays.

21. The Charity Commission confirmed (following an enquiry from the Tribunal relating to the contents of the closed bundle) that the Charity Commission had disclosed in redacted form, an email which appears in the closed bundle. The redactions to the disclosed document related to s40 FOIA (personal data) only. It made reference to the actual hourly rate charged to the Trust by Barclays. We are satisfied that the hourly has therefore already been disclosed to the world at large without restriction under FOIA. From the date and context of the letter we are also satisfied that it is apparent that this is the current rate¹⁶ applicable in 2011.

The redacted material

Item i)

22. An email from Barclays to the Charity Commission in which the redacted information is:

- a) a table showing the various hourly rates charged by Barclays staff based upon their different grades and
- b)** a sentence discussing the actual hourly rate charged and referencing one of the hourly rates referred to in the table.

23. We are satisfied that the table of hourly rates (including the reference to one of these in the following sentence) does have the necessary quality of confidence. We accept the arguments from Barclays that this is private commercial information that is not

available to the public. The hourly rates were current at the date of the request and would not be disclosed to clients either as a quote for taking on work or in the billing material setting out the work done.

24. The Appellant argues that there is no evidence that the information is correct because it has not been checked by the Charity Commission, and that consequently it is not commercially sensitive. From the context of the information as provided and the correspondence from Barclays, the Tribunal is satisfied on a balance of probabilities that the information was correct at the relevant time and consequently commercially sensitive.
25. However, we are satisfied that the remainder of the information redacted under s41 FOIA from this document cannot be withheld under this exemption. The actual hourly rate has been disclosed under FOIA and we rely upon the analysis of the withheld material as set out in the confidential annex.

Item ii)

26. A letter to a member of the public from Barclays concerning Barclays' role as a professional trustee of the Trust. A sentence has been redacted which includes the actual hourly rate and some other material relating to its applicability. In concluding that this information does not have the necessary quality of confidence to enable the material to be withheld under s41 FOIA the Tribunal repeats its findings in relation to item i) on this point. We also accept the evidence of Mr Nuttall that the rate was provided by Barclays and referred to in public at a press conference in July 2010 in Bury. The Charity Commission argues that the Appellant has provided no documentation to support this assertion however we note:
- a) That the specific assertion in relation to the press conference appears not to have been put to Barclays.
 - b) There is reference to the hourly rate in Counsel's opinion¹⁷ which appears to be derived from an email from Barclays to a member of the public on 21st December 2009¹⁸.

¹⁶ See Confidential Schedule

¹⁷ Obtained on behalf of certain individuals who have signified their willingness to serve as trustees dated July 2011

¹⁸ Paragraph 64 Counsel's opinion

- c) This information was contained in a letter to the Charity Commission from a member of the public in June 2011 (predating the information request).

27. The Tribunal has to be satisfied on a balance of probabilities. Barclays have told the Charity Commission that they “do not believe that [they were] the source of this information to Mr Nuttall”¹⁹ and “we do not believe that we have provided this information other than to the Commission”²⁰. They are not a party to this hearing but there was nothing to prevent the Charity Commission from putting specific matters to them based on material that became apparent through the Tribunal process. There is consequently a conflict between Barclays’ assertion that they are not the source of this information and the fact that Mr Nuttall and other members of the public have this information. There is no evidence that it came from the Charity Commission prior to the submission of his information request. The Tribunal notes that the hourly rate concerned is not part of Barclays normal fee structure and is a concession which relates to this charity only, we do not consider that this information could have been gleaned from any other involvement Mr Nuttall or his constituents may have had with Barclays. For these reasons we accept Mr Nuttall’s evidence. The Information Commissioner argues that there is a difference between disclosure to a limited number of individuals and the world at large. The Tribunal notes that there is no evidence that this information has been restricted in any way, it has been disclosed to an individual from a group who are part of a campaign and its use in Counsel’s opinion and at a press conference support this.

Item iii)

28. A Spreadsheet (attached to (i) above) showing the breakdown of the time spent and the rates charged by Barclays as a professional trustee for the Charity. This was redacted in full because analysis would enable the hourly rate to be determined. No arguments have been advanced as to any sensitivity pertaining to the work done and the time spent, beyond the fact that the actual hourly rate can be determined from this.
29. The Appellant argues that it appears from the totals that an inordinate amount of time has been spent on routine administration in the consideration of the appeals to achieve so little at such significant cost. He argues that the time spent could have been

¹⁹ From Charity Commissions’ email 18.06.12 P195 OB

²⁰ Email from Barclays 15.6.12 P200 OB

disclosed without breaching confidentiality. The Tribunal observes that in light of the total sum charged having been disclosed, the time spent would have enabled a calculation to obtain the actual hourly rate being charged. However, the Tribunal is satisfied that this schedule was over-redacted even on the Charity Commission's case. The column describing the different heads of work done could nevertheless have been disclosed as no hourly rate can be determined from this. The Tribunal also considers that the figure for "appeals per stage in 2010" without the time spent figure cannot lead to the hourly rate but would inform the volume of work done in the context of the already disclosed total figure.

30. The Tribunal accepts that the hourly rate can be determined from the schedule, however, as this has already been disclosed under FOIA the Tribunal is satisfied that none of the withheld schedule has the necessary quality of confidence such that it should be withheld under s41FOIA.

Item iv)

31. Is a letter dated 17th March 2011 to a member of the public from Barclays from which information provided by Coutts to Barclays has been redacted. The Tribunal is satisfied that the redacted information does not have the necessary quality of confidence to enable s41 FOIA to be relied upon successfully.
32. The Tribunal notes that this has been communicated to a member of the public without caveat or restriction. The Information Commissioner argues that dissemination to a limited number of people does not stop information from being considered to be confidential, and is not the same as information in the public domain. Whilst we agree with the general principle, we note that it has to be applied to the facts of the case. The information was disclosed in un-redacted form to a member of the public in the context that concerns were being raised by members of the public about the comparative rates charged. There is no evidence that Coutts were asked for or gave their permission for the information to be communicated. The inference that the Tribunal draws is that the information was not considered confidential by Barclays at the time that it was communicated to the member of the public. Additionally the Tribunal considers that much of the information is generic or self evident. The Tribunal is of the view that this information would not provide an advantage to a competitor or be detrimental to Coutts in their relationships with existing or future

clients²¹. We also consider that to be apparent from the fact that Coutts were prepared to provide this information to Barclays in the first place who could be viewed as a “competitor” in that they operate in similar fields.

There must be an unauthorised use of the information to the detriment of the confider.

33. In light of its findings above, the Tribunal only considers this question in relation to the table of Barclays’ hourly rates and reference to a figure from it as set out in item i). Barclays has confirmed that they would not authorise a disclosure. The Tribunal considers here what if any detriment would flow from the unauthorised use of the information (in this case disclosure under FOIA).
34. Barclays told the Charity Commission that the disclosure of the information relating to hourly rates would put it at a commercial disadvantage with competitors who would not be required to disclose this information. They argue that they are in competition with other banks for similar types of work and that this information would allow competitors to undercut them. The Tribunal observes that this type of information would also enable clients (existing and future) to challenge the fee structure.
35. Mr Nuttall points to the move away from professional trustees who work for large institutions in the administration of large charitable trusts and argues that Barclays have not in recent times won and are not seeking to win additional business in this category. The Tribunal notes that the rates are current, we repeat paragraph 23 above and are satisfied that this information is of a private commercial nature and is not available to the public. We note that it is applicable to all the work done by that department which is not limited to charitable trusts.

Is there a public interest defence such as to render a breach of confidence un-actionable

36. S41 FOIA is an absolute exemption²² however, it is still necessary to consider the public interest in determining whether any breach of confidence is actionable. This differs from the public interest test as set out in s2(2)(b) FOIA where if the balance of public interest is equal the information must be disclosed. For a defence to breach of action to succeed the public interest must be positively in favour of disclosure.

²¹ See closed schedule

²² Pursuant to s2(3)(G) FOIA

37. The Information Commissioner and Charity Commission acknowledge the public interest in transparency and accountability however, they maintain that the public interest is met by the publication of accountancy and financial information as required by statute, and the information provided in redacted form. The Information Commissioner did not give particular weight to the complainant's arguments based on allegations of wrongdoing in relation to the administration of the Trust because they were not upheld by the Charity Commission.
38. The Information Commissioner and Charity Commission maintain that the public interest is clearly in favour of maintaining the confidentiality of the information relying upon:
- a) the public interest in preserving the principle of confidentiality
 - b) The public interest in ensuring that the relationship between the Charity Commission and Barclays is not undermined to ensure voluntary compliance in future,
 - c) The public interest in protecting Barclays from the detriment as set out above.
39. The Appellant argues that
- a) disclosure is necessary to challenge the fees charged by the professional trustees especially if this is impacting upon the amounts available for charitable purposes.
 - b) there is a public interest in a charity obtaining good value for money again with a view to ensuring the maximum amount available to use for charitable purposes.
 - c) There is a public interest in the public having sufficient information to enable them to pursue legal remedies to challenge the way that a charity is being run.
40. He has provided an analysis of the running costs over the years and the depletion of capital in this regard compared to the amount of money available to be disbursed to charitable causes. He has also provided Counsel's opinion setting out a Barrister's views as to the way that the trust has been administered and the potential legal remedies available. He considers that there is a strong public interest in the public having sufficient information to enable them to challenge the way that a charity is administered.

41. Additionally in his view an MP *“has a duty to represent the interests of his constituents and call to account public authorities where it may be alleged that information that ought to be in the public domain is being unreasonably withheld”*. He considers that the Information Commissioner erred because he did not consider any “special responsibility” of an MP compared to an ordinary member of the public when determining where the public interest lies. Additionally he argues that the way that the Charity Commission have interpreted the law means that as regulator they have abdicated responsibility for overseeing the level of fees charged.
42. Disclosure under FOIA is not just to the individual concerned but to the world at large without restriction and thus disclosure to an MP under FOIA has the same consequence as disclosure to any other member of the public. However, the Tribunal does accept on the facts of this case that the involvement of the local MP indicates that there is considerable public disquiet at local level (as opposed to a request made for a narrow private interest). Additionally because the request is made in relation to the administration of a charity that the public interest includes the interests of all beneficiaries and potential beneficiaries.
43. In relation to the table of Barclays hourly rates the Tribunal notes that the actual hourly fee has been disclosed under FOIA. The totals are public by way of statutory accounting information. Regardless of the matters raised by Mr Nuttall, it is not apparent to the Tribunal how knowledge of the scale of fees which on the facts of this case are not being used in the administration of this Charity would advance Mr Nuttall’s case.
44. We are therefore satisfied that the public interests in withholding the information as advanced by the Information Commissioner outweigh the public interests in transparency and accountability in light of the information already disclosed.

S43 Prejudice to Commercial interests

45. s43(2) FOIA provides that:

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.)

46. The Charity Commission argue that disclosure “would be likely” to prejudice the commercial interests of Barclays.²³ The Tribunal applies the analysis as set out by Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin)²⁴:

“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”

47. In relation to the disputed information that the Tribunal has determined does not have the necessary quality of confidence about it to engage s41 FOIA, we are also not satisfied that its disclosure under FOIA would be likely to prejudice the commercial interests of any person for the same reasons as set out in paragraphs 21-32 above.

48. However, we accept that the table of hourly rates and the figure from that table repeated in that document at item i)²⁵ is private commercial information for the reasons set out in paragraphs 23- 24. Barclays are a commercial organization operating in the service sector providing probate and trust services to both private and charitable trusts. As set out above the withheld fee information is not in the public domain. We consider that the detriment arising from disclosure as identified in paragraphs 33-34 is the prejudice to the commercial interests of Barclays that would be likely to arise from disclosure of this information under FOIA.

49. In determining that this prejudice would be likely to occur, we accept that this information would be of use to competitors and that Barclays are in competition with other organizations for work, and that it is an economic reality that clients would generally prefer to obtain the best value for money.

50. S43 FOIA is subject to the public interest test as set out in 2(2)(b) FOIA. When assessing where the balance of public interest lies we remind ourselves that this is a different test to that conducted in relation to s41 and that the public interest, pursuant to FOIA has a lower threshold for disclosure. However, having considered the

²³ 18.6.12 letter to the Commissioner

²⁴ this was a case relating to the Data Protection Act

²⁵ See paragraph 22 above

matters set out in paragraphs 36-44 above, we take particular account of the fact that competitors of Barclays are not required to disclose their hourly rates thus creating an uneven playing field. We are satisfied that the balance of public interest is in favour of withholding the information.

Conclusion

51. For the reasons set out above and in the confidential annex²⁶, the Tribunal is satisfied that:

- a) s41 and 43 FOIA were properly applied by the Charity Commission in relation to the table of fees and reference to an hourly rate from that table in relation to item i). As regards this information the appeal fails.
- b) in relation to the remainder of the information redacted pursuant to s41 and s43 FOIA in items i-iv the Tribunal allows the appeal and is satisfied that neither s41 nor s43 FOIA were properly applied.

52. The Charity Commission must disclose the withheld information as detailed in 51b above within 35 days of the date of this decision.

Dated this 26th day of February 2013

Fiona Henderson
Tribunal Judge

²⁶ The confidential annex references the information in paragraph 51b) and should remain confidential until after the Charity Commission has made the disclosures provided for in paragraph 51.

Closed Annex. Not to be disclosed to the Appellant or Promulgated until after the disclosure of the withheld information as ordered in the open decision.

IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2012/0188**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

BETWEEN

MR DAVID NUTTALL MP

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE CHARITY COMMISSION

Second Respondent

CLOSED ANNEX

Not to be disclosed to the Appellant or Promulgated until after the disclosure of the withheld information as ordered in the open decision.

1. This annex should be read in conjunction with the Open Decision, but as it makes specific reference to the withheld material that the Tribunal has determined should be disclosed, the Tribunal directs that it should remain confidential and not be disclosed to the Appellant or promulgated until after the disclosure of the withheld information as ordered in the open decision.
2. The Charity Commission confirmed (following an enquiry from the Tribunal relating to the contents of the closed bundle) that: *“...the Commission disclosed the email dated 14 April 2010 to the appellant in redacted form¹ on 14 October 2011 in response to his original FOI request. ... It was included in the closed bundle for completeness because it formed part of the chain of emails at page 1 – 5.”²*
3. The Tribunal notes that this email of 14th October 2011 makes reference to:

¹ p3-4 Closed bundle, Redactions relate to personal data only

² Email to Tribunal dated 11th December responding to a Tribunal enquiry as to the contents of the closed bundle.

“We note that Barclays Wealth has recently reviewed its charging policy and confirmed that it will charge the lesser of 1% of the capital or a fee calculated on a “time spent basis”.

“...we have not seen any rationale for the calculation of the hourly rate to be £130 plus VAT...”

4. We are satisfied that the hourly rate of £130 per hour has therefore already been disclosed to the world at large without restriction under FOIA. From the date and context of the letter we are also satisfied that it is apparent that this is the current rate applicable in 2011. There is no basis for arguing that this information should be redacted on the basis of confidentiality from items i, ii or iii below.

The redacted material

Item i)

5. An email from Barclays to the Charity Commission in which the redacted information is:
 - a) a table showing the hourly rates charged in relation to Barclays Grades and
 - b) *“Notwithstanding the current hourly rates of the various offices dealing with this case over [figure] upwards, **Barclays has discounted those rates to a flat hourly fee of £130 regardless of the seniority of the officer in question and it is intended that this rate will continue for 2010 and 2011**³.”*
6. For the reasons set out in the open decision the Tribunal is satisfied that the table showing the hourly rates and the specific rate repeated from that table should remain withheld. However, we are satisfied that the remainder of the information redacted under s41 FOIA from this document cannot be withheld under this exemption. The hourly rate of £130 has been disclosed. That it is regardless of seniority is implicit in the fact that this is a “flat” rate notwithstanding that it is apparent that the work will be completed by people of different grades. This is also signposted by the preceding largely disclosed sentence of:

³ Redacted information

“Notwithstanding the current hourly rates⁴ of the various offices dealing with this case over [redacted] upwards”

which has also been disclosed.

7. That it is intended to apply for 2010-11 is apparent from the context of the email of October 2011 which is speaking of the hourly rate not the erstwhile hourly rate.

Item ii)

8. A letter to member of the public from Barclays concerning their role as a professional trustee of the Trust. The redacted material is:

“The discounted hourly rate of £130 has been held for the second year and I confirm will be held for 2011 also”

9. The Tribunal repeats its findings in relation to item i) on this point. We also take into consideration the evidence from Mr Nuttall as set out in the open decision⁵ as to the provision of this evidence by Barclays to members of the public and at a press conference.
10. It is therefore apparent from material already publicly available that this rate has been applicable since 2009 and remains applicable in 2011. Consequently we are satisfied that none of the redacted sentence has the necessary quality of confidence to sustain a s41 exemption.

Item iii)

11. A Spreadsheet (attached to (i) above) showing the breakdown of the time spent and the rates charged by Barclays as a professional trustee for the Charity. This was redacted in full because analysis would enable the hourly rate of £130 to be determined. The Tribunal repeats its analysis in relation to the disclosure of the hourly rate in relation to item i above.

Item iv)

⁴ The Tribunal emphasises that this word is plural.

⁵ paragraph 26 et seq open Decision

12. A letter dated 17th March 2011 to a member of the public from Barclays. The redacted information is:

*“we have spoken to a representative of Coutts **who said that they would not be able to administer a trust such as the Foundation for 0.2% of its capital value and that he had no idea where this figure might have come from. Coutts told the trustees that they work on “tailored” charges for charitable trusts and would normally charge a “responsibility fee” plus time costs.** They said that the only published fee scale they have is 1.5% plus VAT (to include investment management), **although we were told that this would not be their preferred method of charging in this situation**”.*

13. In addition to the matters set out in the open decision, the Tribunal considers that much of the information is generic or self evident. That 1.5% plus VAT would not be the preferred method of charging is self evident since the arrangement with Barclays is that the investment management has been separated from the administration of the trust. A responsibility fee plus time costs is a generic and common place method of charging in many commercial situations, that this is tailored to a particular Trust is again not specific to Coutts but normal commercial practice. Indeed Barclays’ current arrangement with the W O Street Trust is itself a tailored charge. The information does not state the hourly rate or provide any information that would provide an advantage to a competitor or be detrimental to Coutts in their relationships with existing or future clients.

Dated this 26th day of February 2013

Fiona Henderson
Tribunal Judge