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IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2016/0266**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50632277
Dated: 24 August 2016

Appellant: **Alan Jones**

Respondents: **(1) The Information Commissioner**
(2) ECA International

Determined without a hearing

Before

HH Judge Shanks

and

Pieter de Waal and Henry Fitzhugh

Date of decision: October 17, 2017

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 41 (Information provided in confidence)

Section 43(2) (Commercial interests)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. The Ministry of Defence pays its civilian personnel working overseas a "cost of living addition" (COLA) which is designed to allow them to maintain a standard of living broadly equivalent to that which they would enjoy in the UK. The COLA is a fixed sum paid in addition to salary which varies according to which of three salary bands the relevant employee comes within, whether s/he is single or married and how many children s/he has.

2. The MOD employs ECA International (ECA), the Second Respondent, which is a private sector company which specialises in human resource and remuneration issues arising from expatriate employment, to help fix the amounts paid by way of COLA. ECA say they offer organisations of all sizes an unrivalled portfolio of data, calculation aids, salary management software, reports, guides and surveys to help them structure and manage their international reward programmes. They say they have licensed the intellectual property in their "Materials" on a subscription basis to the MOD for its own business purposes.

3. According to an MOD Defence Business Services document on Civilian Personnel Policy and pay and allowances overseas dated 5 March 2012 which is in our bundle, COLA is " … re-assessed twice a year with new rates published and effective from 1 February and 1 August" (the review dates were apparently changed in 2016 to 1 March and 1 September). It appears that the rates for the period beginning 1 February

2014 were placed on the MOD website but those for the period beginning 1 March 2016 were never published; we are not told about the position on other periods.

4. On 18 May 2015 the Appellant, Mr Jones, made a FOIA request to the MOD seeking "… the calculations, assumptions … and basis for the previous (2014) and current [COLA]". The MOD refused to provide that information and in due course by a decision notice dated 14 March 2016 the Information Commissioner upheld their position in reliance on section 43(2) FOIA on the basis that disclosure would be likely to prejudice ECA's and its own commercial interests. Another constitution of this Tribunal chaired by Brian Kennedy QC rejected Mr Jones's appeal on 4 November 2016.

5. Meanwhile on 18 March 2016 Mr Jones made another FOIA request in the following terms:

> **I note that the [COLA] rates for civilian personnel overseas publication was archived on 1 Sep 15 and is no longer current. Therefore, I would like to be provided with a copy of the latest COLA rates for MOD civilian personnel in Germany, details of how it is applied, e.g., by wage bands, grade etc, the period of review, when it was last reviewed and when it is planned to be reviewed next.**

On 19 April 2016 the MOD responded as follows:

> **The calculation of COLA rates is undertaken on behalf of the MOD by … ECA. The detailed calculations are coved by our contractual arrangement with ECA and cannot therefore be released. COLA rates are reviewed biannually, and from 2016 the review date moved to March and September. Therefore the last review and update was applied on 1 March 2016 and the next … will be applied on 1 September 2016. COLA is based on Salary Bands rather than Grade. The Salary Bands are set by the [MOD], and the current bands are:**
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> **Band 1 £51,858 and above**
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> **Band 2 £31,914 - £51,857**
>
> **Band 3 £31,913 and below.**

6. On 19 April 2016 Mr Jones sought an internal review of the decision, making it clear that he sought the amounts of COLA payable but not details of the ECA "mechanism"

for reaching them and alluding to the fact that the rates for the earlier period had been made available to the public. This appears to have led to an exchange between the MOD and ECA on 25 and 26 April 2016. The MOD sought clarification from ECA that not only the "calculations" but also the results of the calculations, i.e. the MOD rates, were confidential. ECA replied by confirming that the "end result, i.e. the individual COLA figures" were confidential and could not be released. They referred to an excerpt from the relevant contractual provisions: this referred to "Materials" and stated that the MOD could not use or disclose them; it also contained a sentence stating that "For the avoidance of doubt, this restriction shall apply equally to the Materials and any data or tables derived from the Materials".

7. Following the internal review the MOD expressly stated in a letter dated 24 May 2016 that it relied on both section 41 of FOIA (which covers information provided in confidence) and section 43(2) (which covers information whose disclosure may cause commercial prejudice) to withhold the COLA rates for Germany for the relevant period.

8. Mr Jones remained dissatisfied and applied to the Information Commissioner under section 50 FOIA on 4 June 2016. In a decision notice dated 24 August 2016 the Commissioner upheld the MOD's position in relation to section 43(2). Unfortunately she did not consider the applicability of section 41.

9. Meanwhile, on 8 June 2016 Wiggin LLP, a firm of solicitors instructed by ECA wrote to the MOD complaining that notwithstanding the contractual provisions the COLA rates from February 2014 had been available to the public on the MOD website. The letter stated that the website stated that the data had been withdrawn on 1 September 2015 but that in fact it was still available to be viewed on 18 May 2016, although the relevant page apparently said that the information had been removed because it had been published in error. The letter went on to say that on the MOD's assurance that the data had been removed and in light of their honesty in drawing the breach to the attention of ECA no further action would be taken but that this was not be taken as a waiver of any further breach and that all rights were reserved in respect thereof.

The appeal

10. On 19 September 2016 Mr Jones appealed to this Tribunal against the Commissioner's decision notice dated 24 August 2016. On 19 January 2017 ECA was joined as Second Respondent to the appeal and in due course they put in a Response. Although under the Tribunal's directions Mr Jones was allowed to reply to this he did not do so.

11. The parties were all agreed that the appeal could be determined without a hearing and the Tribunal met in July 2017 to consider the appeal "on the papers". Having considered the papers we decided that we required further information from ECA and input from the Commissioner and Mr Jones, in particular in relation to section 41, and we issued directions to this effect on 1 August 2017. Having received this further material we met again on 5 October 2017. We are satisfied that we are now in a position properly to determine the issues without a hearing.

Section 41

12. Section 41 (which provides an absolute exemption from the requirements of FOIA) states:

> **Information is exempt information if-**
>
> **(a) it was obtained by the public authority from any other person … and**
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> **(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.**

In order for the section to apply in this case (a) the relevant COLA rates must have been obtained by the MOD from another person and (b) their disclosure to the public must amount to an actionable breach of confidence. It is a defence to an action for breach of confidence (and therefore a necessary part of the consideration whether the section applies) that there is a countervailing public interest in disclosure which outweighs that in upholding the confidentiality in question.

13. We are not entirely clear on the evidence how the COLA rates we are concerned with were actually arrived at but the MOD stated expressly to Mr Jones on 19 April 2016 that the calculation of the rates was undertaken for the MOD by ECA and ECA have stated categorically in their letter to the Tribunal dated 23 August 2017 that they provided the March 2016 COLA rates to the MOD. On that basis, although we take Mr Jones's point that the production of the figures must have involved some collaboration from the MOD, we are satisfied that the information comprising the rates was obtained by the MOD from another person, namely ECA.

14. According to ECA and their lawyers publication of these rates would amount to an actionable breach of the confidentiality provisions in their contract with the MOD. Although there were somewhat different versions of the relevant provisions to be found in our papers (compare that in the Wiggin letter of 8 June 2016 and that referred to in ECA's email of 26 April 2016), ECA confirmed in their letter dated 23 August 2017 that at the relevant time (i.e. March 2016) their services were provided subject to standard terms and conditions attached to their annual invoice which contained the following:

> **9 … the Subscriber [defined to include any government department using ECA's services] shall not use the Materials [defined as all information provided by ECA to the Subscriber] for any purpose which conflicts with ECA's own commercial purpose, including the provision of the Materials … to any third party outside the … department … For the avoidance of doubt, this restriction shall apply equally to the Materials and any data or tables derived from the Materials**
>
> **…**
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> **The Subscriber shall ensure that all Materials are kept securely and confidentially and shall not be … published by the Subscriber (other than for its own internal business purposes) without ECA's prior written consent …**

On this basis, we are prepared to accept that the disclosure by the MOD of the COLA rates to a third party would have amounted to a breach of the contract between the MOD and ECA which would on the face of it have given rise to an actionable breach of confidence.

15. On the question of whether there would actually have been a viable action for breach of confidence, Mr Jones makes two points. First, he says that the information requested is potentially available to many MOD employees (and therefore not confidential in nature). This is no doubt true but we do not think it would prevent ECA bringing a successful claim for breach of confidence: any information held in confidence by an organisation is necessarily going to be known by some employees and agents of the company and, in practice in this case, the fact that an individual employee will know how much he is receiving by way of COLA is not the same as having a comprehensive list of rates as sought by Mr Jones. Second, Mr Jones relies on the fact that the MOD published the COLA rates for the period from 1 February 2014 on their website. We are satisfied that this was, as the MOD maintain, an error and that EMA have complained about it in the way described above and that it is not therefore relevant.

16. We have also considered whether there might have been an arguable "public interest" defence to an action for breach of confidence by ECA. Although there is clearly a public interest in the public knowing the relevant COLA rates, that public interest is not of a type or strength to outweigh the general public interest in the law upholding obligations of confidence.

17. In the circumstances, although the Commissioner did not consider the point, we are of the view on the material we have seen that the MOD was entitled to rely on section 41 to withhold the information that Mr Jones was requesting.

Section 43(2)

18. The section provides:

> **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).**

This exemption is a qualified one so that, even if it applies, the public authority is only entitled to rely on it to withhold requested information if the public interest in maintaining it outweighs the public interest in disclosure of the information.

19. The Commissioner found that disclosure of the requested information would provide some insight into the methodology used by ECA to calculate COLA rates which would be likely to provide competitors with an advantage. The Commissioner also accepted that the publication of the figures would allow potential or existing customers of ECA simply to adopt the figures which would save them having to use and pay for ECA's services, which would obviously be to ECA's prejudice.

20. Mr Jones states in his notice of appeal that he cannot understand how knowledge of the "rate outcomes" could lead to a competitor understanding ECA's methodology; it is, as he puts it, " … simply a rate based upon pay bands". Although we have not been provided even now with detailed evidence about how exactly a competitor could use the requested information to understand ECA's methodology and know-how to undermine their commercial position, the experience of the Tribunal members leads us to the view that there was at least a real and significant risk of that happening. There was also a clear risk that actual or potential customers would be able to by-pass ECA's services by simply adopting the rates used by the MOD. We therefore consider that the Commissioner was right in her conclusion that section 43(2) applied and that it was necessary to consider the public interest balance.

21. We agree with the Commissioner that the public interest was quite finely balanced. On the one hand, there was a risk of some commercial prejudice caused (as we have found) by a breach of an express contractual confidentiality provision. On the other, there was clearly a public interest in the public knowing the details of what was paid to MOD staff working overseas and being able to see any difference in the treatment of service and civilian personnel (the point which appears to be Mr Jones's particular concern) but the amounts at stake were a relatively small and self-contained part of the pay package and the global figures as to what MOD staff are paid are no doubt available by other means.

22. In the light of our conclusion on section 41, it is not necessary for us to reach a final view on the public interest issue arising under section 43 and we have decided to leave the issue on one side.

Conclusion

23. We therefore dismiss Mr Jones's appeal on the basis that the MOD was entitled to rely on section 41 to withhold the information he was requesting.

24. This is a unanimous decision.

HH Judge Shanks

October 17, 2017

Promulgated – October 18, 2017