



Freedom of Information Act 2000 (FOIA)

Appeal determined on written submissions

Decision Promulgated 29th April, 2008

BEFORE

INFORMATION TRIBUNAL

DEPUTY CHAIRMAN

D.J. Farrer Q.C.

and

LAY MEMBERS

Tony Stoller and Malcolm Clarke

Between

MR K ANDERSON

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

THE PARADES COMMISSION

First Additional Party

-and-

ULSTER HUMAN RIGHTS WATCH

Second Additional Party

Our Decision

1 This appeal is dismissed. The Decision Notice is upheld.

The reasons for our decision

2 Ulster has a long tradition of marches and parades. The First Additional Party (“The Parades Commission “) was established by statute in 1998 to regulate parades in Ulster. It is empowered to issue determinations in respect of such events and to place restrictions upon them. It has monitors who observe the conduct of parades and receives information from members of the public. It is required by statute to issue a Code of Conduct (“the Code”) by which the conduct of parades will be judged. and Procedural Rules governing the exercise of its functions

3 Rule 3.3 provides :

“ All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision ”.

4 On 23rd. September, 2005 the South Fermanagh Loyalist Flute Band (“SFLFB”) held two parades in Enniskillen, one a “feeder” to the principal event. The requisite notice had been served. They were not expected, nor did they prove to be contentious, let alone unruly or violent parades. On the contrary, it was reported that they were well received by the local population and a source of pleasure to many. The Northern Ireland Police Service sent a letter commending the conduct of the parades and a favourable report was received from the Community Safety Group (N.I.) which observes such occasions.

5 It was, no doubt, a most unpleasant surprise, therefore, when a letter was received from the Secretary of the Parades Commission, dated 28th. October, 2005, informing the SFLFB of reports received from monitors¹ of offensive behaviour during the parades targeted at Roman Catholic churches. It made very clear that the Commission had formed no view as to the accuracy of such reports and invited a response.

6 These reports were of especial concern to the SFLFB because behaviour of the kind alleged would undoubtedly violate the Commission's Code of Conduct and could therefore result in restrictions on the conduct of future parades. The Parades Commission must take into account compliance with the Code in deciding whether it is necessary to impose conditions.

The Request

7 The appellant ("Mr. Anderson"), the band leader, on behalf of the SFLFB, by letter of 28th. December, 2005, requested "*all information which the Parades Commission holds concerning the above parade so that we can deal properly with the allegations made.*" He indicated that this was a request under FOIA 2000 and made clear that he was not seeking the identities of the monitors, simply the content of their reports.

8 Dr. Michael Boyle, a Director of the Commission, replied by letter on 24th. January, 2006. He identified four documents as constituting the requested information, two of which proved relevant to the Information Commissioner's ("IC`s") decision, namely two monitor`s reports, one relating to the feeder and one to the main parade. He refused the Request as to those reports, placing reliance on sections. 36 and 41 of FOIA. He cited Rule 3(3) of the Procedural Rules in support of his contention that s.41 provided an exemption from the duty to provide the information sought. After some delay, largely before the request for a review, the

¹ Monitors are appointed by the Commission to observe conduct on parades and report back.

Independent Complaints Panel of the Commission conducted an internal review and upheld that decision.

The complaint to the Commissioner

- 9 Mr. Anderson made a very carefully drafted complaint to the IC, dated 30th. December, 2006. He argued that the refusal of his Request amounted to a violation of Article 11 of the European Convention on Human Rights (“ECHR”), that is to say the right to peaceful assembly. Rule 3(3) breached, he contended, Article 11. Disclosure of the information requested to the parades organiser, Mr. Anderson, would not amount to disclosure to the public.
- 10 Various exchanges between Mr. Anderson and the IC followed, culminating in a complaint against the IC concerning the conduct of his investigation, in particular the view attributed to the Senior Complaints Officer of the value of the information sought. We need say no more about that. We have seen the requested material and can, so far as necessary, form our own view of it.

The Decision Notice

- 11 The IC found a breach of FOIA s. 17(3) in respect of the Commission `s reliance on FOIA s.36. That finding does not require review.
- 12 More importantly, he ruled that the reports were exempt by virtue of s.41. As to an actionable breach of confidence, he concluded that the three tests laid down by Megarry J. in *Coco v Clarke [1969] RPC 41* were satisfied. In reaching that conclusion, he referred to Rule 3(3) and the expectation to which it gave rise. In so far as the public interest was relevant (s.41 is an absolute exemption), he ruled that there was no overriding public interest in disclosure. He therefore upheld the Commission `s refusal in reliance on s.41. He referred to Mr. Anderson `s reliance on Article 11 but did not deal

with it explicitly. He took no decision on s.36, since the refusal based on s.41 was upheld. Mr. Anderson appealed.

The Appeal

- 13 The Notice of Appeal set out the grounds very fully and very clearly. They were evidently drafted by Mr. Anderson `s professional representative, Mr. Axel Schmidt.
- 14 The Parades Commission and Ulster Human Rights Watch (“UHRW”) were joined, the latter on its own application. Both additional parties lodged Replies, the Commission largely adopting the case for the IC. UHRW, supporting the appeal, developed the Article 11 argument and further relied on Article 10 (freedom of expression). Whilst grateful for that further submission, we think that identical considerations apply to both Articles in the context of this appeal and we shall not deal with them separately.

The law

- 15 Section 41 of FOIA, so far as relevant, provides:

“Information provided in confidence

(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.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

16 Article 11 of the ECHR reads :

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for protection of the rights and freedoms of others....”

17 *Coco v Clarke* (see above) sets out the accepted tests for an actionable breach of confidence at p.6 :

“In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”

18 The requirement of detriment is not hard to satisfy, if indeed it remains a necessary ingredient of the tort – see *Bluck v Information Commissioner* (EA/2006/0090, at paragraph 15.

The Issues

19 A number of matters are raised by Mr. Anderson in his Notice of Appeal and subsequent submissions. The principal issues are evidently :

- Is the information confidential in nature or is it in the public domain ?
- Was it imparted under an obligation of confidence ?
- Does Article 11 in some way remove that obligation ?
- Would a breach of confidence be detrimental to the informants ?
- Were the reports so plainly unfounded and malicious that the obligation can be discounted ?
- If the ingredients identified in *Coco v Clark* are established, is the public interest in disclosure so powerful, nevertheless, that the obligation of confidence should be overridden ?

Our Decision

20 We have seen the reports. They were sent by monitors to the Commission, the only matter which we needed to ascertain. They were plainly confidential in nature and would have been even if Rule 3(3) did not exist. That they related to acts allegedly performed in public is immaterial. If a man is stabbed to death in the street, a telephone tip – off to the police naming the killer is no less confidential because of the site of the crime.

21 Subject to the argument on Article 11, to which we next turn, it would be hard to conceive of information more plainly imparted under an obligation of confidence than reports to the Parades Commission presented by people

believing themselves to be protected by Rule 3(3). Had there been no Rule 3(3), we should almost certainly have come to the same conclusion on obvious inferences to be drawn from the circumstances.

22 However, it is said that Rule 3(3) violates Article 11 (and Article 10). The argument is put this way : Article 11(1) guarantees the right to peaceful assembly and association, subject to restrictions where justified by Article 11(2). A finding by the Parades Commission that the 2005 parades were conducted in breach of the Code could result in restrictions on that right. It is therefore essential to Mr. Anderson `s enjoyment of that right that the SFLFB have access to the adverse reports so as to prepare their response properly. Any obstacle to such access erected by a public authority represents a violation of his Article 11 right. Accordingly, Rule 3(3) breaches that right. That being so, this information cannot properly be regarded as imparted subject to an obligation of confidence.

23 This argument fails, in our opinion for reasons that can be shortly stated.

24 s the IC observes, there is no evidence that any restriction has subsequently been placed on Mr. Anderson `s right to peaceful assembly. Accordingly, it is impossible to see how his Article 11 rights have been engaged, let alone breached.

25 The decision which could engage Mr. Anderson `s Article 11 rights is the decision, if it were ever made, to place restrictions on a future parade. The

engagement of those rights would obviously influence the process of decision – making leading up to the imposition of restrictions. At that stage the question of disclosure of sensitive material might have to be resolved - see *Tweed v Parades Commission of Northern Ireland* [2007] 1 AC 650.

26 The decision to refuse the FOIA Request does nothing of the sort. It may be followed by a decision to place no restrictions whatever on the parades. If restrictions were imposed, it would be necessary to see whether they were justified by Article 11(2) which would bring into play the Article 8 rights to respect for private life and correspondence of those who provided information. Such competing interests are ignored by Mr. Anderson, as advised by Mr. Schmidt.

27 We cannot judge whether the reports were malicious. What happened that day is a matter for the Parades Commission, not the Tribunal. Whether the quality of malice would forfeit the obligation of confidence is a highly debatable question, which the Tribunal does not have to decide.

28 Mr. Anderson relies further on the jurisprudence of the European Court of Human Rights to argue that Article 11 extends to the indirect protection of the right of peaceful assembly. However, the authorities on which he relies go to a quite different, namely the obligation of the state where appropriate to take active measures to prevent violent or unruly counteraction which frustrates the exercise of the right to peaceful assembly. It is neatly

summarised in *Ollinger v Austria* (ECtHR, 29 September 2006) (at para 37):

“... States may be required under Article 11 to take positive measures in order to protect a lawful demonstration against counter-demonstrations (see Plattform “Ärzte für das Leben”, ”

So the police cannot be authorised to stand idly by whilst violent counter – demonstrators break up a peaceful parade..

29 We have no doubt that the IC `s analysis of the position is correct.

30 If detriment to the informant through breach of confidence is required, it is clearly present here. There is an obvious risk that anonymity may not shield the informant from exposure and possibly recrimination. In any event, the effect on a monitor of the breach of a promise to maintain confidence is plainly capable of causing substantial distress.

31 Section 41 provides an absolute exemption. In so far as the public interest is engaged, it could only be where the interest in disclosure is so powerful that the obligation of confidentiality must be set aside. The principle is that confidentiality should be preserved unless clearly outweighed by countervailing factors – see *Derry City Council v Information Commissioner* (EA/2006/0014, 11 December 2006), at para 35(m). That is the reverse of the balancing test where a qualified exemption is engaged.

32 Mr. Anderson argues that the public interest is that Article 11 rights be respected but we have dealt with that point in another context. He also asserts that the issue of parades is of such political significance that maximum transparency is essential and that the likelihood of malicious reports demands disclosure. We think there is little force in the first point and none in the second. We have seen for ourselves that the content of the reports has been substantially disclosed, so that the SFLFB was substantially apprised of what was said and could consult those who participated in the relevant features of the event as to what they say occurred. If they were malicious, their substance has been disclosed with a view to a response.

33 The public interest in protecting providers of information in these circumstances is, on the other hand, very powerful. The Parades Commission would be seriously handicapped if information ceased because there was no certainty of confidence. It could find itself unable to recruit monitors, hence effectively to perform its statutory function.

34 The public interest plainly favours the refusal of information.

Section 36

35 Since we have reached the conclusions set out above, we do not consider the application of s.36.

Conclusion

36 For these reasons, whilst acknowledging the strength of Mr. Anderson `s concerns and the cogency of the case he has advanced, we have no hesitation in dismissing this appeal.

D.J. Farrer Q.C.

Deputy Chairman

29th. April, 2008