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Judgment: approved by the Court for handing down | *Delivered:* **31.05.2011**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPEAL FROM THE INFORMATION TRIBUNAL

KEITH ANDERSON

Appellant;

and

THE INFORMATION COMMISSIONER

Respondent.

WEIR J

The Nature of the Proceedings

[1] This is an appeal by the appellant brought under Section 59 of the Freedom of Information Act 2000 ("the Act") against the decision of the Information Tribunal dismissing an appeal against a decision notice issued by the Information Commissioner rejecting a complaint that the Parades Commission had wrongfully withheld certain information requested of it by the appellant. Section 59 of the Act affords any party to an appeal to the Tribunal the right to appeal from its decision on a point of law to this court.

The Factual Background

[2] The appellant has since December 2005 been the Master of the South Fermanagh Loyalist Flute Band ("the Band"). Applications were made to the Parades Commission for the holding of two public processions to take place in Enniskillen on 23 September 2005. One procession was declared to be for the purpose of the "Public expression of traditional loyalist flute band culture in the form of a street parade and competition" while the purpose of the second procession was declared to be that of "Feeder parade for main event later in the evening". The processions were approved and so far as the Band was concerned appeared to pass off successfully and peacefully. This

impression was confirmed by the local Chief Inspector of Police who on 27 September 2005 wrote to the appellant's then Master saying:

> "I wish to express my thanks to you and your marshals for the professional manner in which you conducted the parade on Friday night. I have been advised that the parade commenced on time and passed off without incident … We look forward to working with you in the planning of next year's event."

[3] However on 28 October 2005 the Secretary to the Parades Commission wrote to the Master saying that:

> "Some of the information received by the Commission in relation to the above parade, of which you were the organiser, suggests that there were breaches of the Commission's code of conduct at this parade."

The letter contained brief details of allegations of boorish and inconsiderate behaviour by members of certain bands which had taken part in the parades. The letter identified the nature of the behaviour and the locations at which it was said to have occurred. The Master was invited to comment on these allegations of bad behaviour. On 28 December 2005 the present appellant, who had by then succeeded to the post of Master replied saying, inter alia, "Please send me all information which the Parades Commission holds concerning the above Parade so that we can deal properly with the allegations made. This is a request under [the Act]."

The Secretary to the Parades Commission replied on 24 January 2006 providing some information but declining to provide the remainder and relying upon Sections 36 and 41 of the Act in support of that refusal. The Secretary referred also to Rule 3.3 of the Procedural Rules of the Parades Commission produced in compliance with Section 4 of the Public Processions (NI) Act 1998 which requires the Parades Commission to issue Procedural Rules explaining how it will exercise its functions. Rule 3.3 provides as follows:

> "**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."

I observe in passing that this sub-rule seems oddly situated in the scheme of the Procedural Rules as it appears to apply not merely to the preceding sub-rule 3.3 and 3.2 but also to evidence acquired under Procedural Rule 2 and in this respect the layout of the rules might have been more clearly designed so as to make it clear that the confidentiality provision is intended to apply to all information and evidence provided to the Commission. However, no point was taken in relation to this on the hearing of the appeal before me and nothing turns upon it for present purposes.

[4] The appellant was dissatisfied with the refusal to disclose all the information held by the Parades Commission relating to the processions and wrote again on 21 April 2006 challenging the decision not to disclose the information and asking for an internal review of the decision. In his letter Mr Anderson said:

> "I am not interested in knowing the names of those who made the allegations against the public procession I organised. I am only interested in knowing all the details of the allegations made against the procession so that my rights and the rights of those who took part in that procession may be upheld in the future without unreasonable and unlawful restrictions."

[5] On 28 July 2006 the Parades Commission wrote again to the appellant informing him that there had been an internal review by an independent complaints panel of the Parades Commission's decision to withhold certain pieces of information and that the panel had upheld its decision. The letter directed the appellant to his right to make a complaint to the Information Commissioner if he remained dissatisfied with the decision of the Parades Commission.

[6] On 30 December 2006 the appellant wrote to the Information Commissioner complaining about the continuing decision of the Parades Commission to withhold the information, asserting that Procedural Rule 3.3 "which makes all evidence received by the Parades Commission confidential, is in breach of the European Convention on Human Rights and cannot be invoked to justify withholding information that may be used for imposing restrictions on the right to freedom of peaceful assembly of others nor … to refuse disclosure of information that must be communicated by the Parades Commission to the public procession organiser under the Act". The letter further challenged the reliance by the Parades Commission upon the provisions of Section 36 and Section 41 of the Act in justification of their decision. Mr Anderson concluded by requesting the Information Commissioner to decide that the Parades Commission should make available

to him all the information it held in relation to the public processions in question. There then followed some correspondence complaining about the way in which the office of the Information Commissioner was dealing with the complaint but on 16 August 2007 a decision notice under Section 50 of the Act was issued which concluded that the information which the Parades Commission had withheld from the appellant was exempt from disclosure by virtue of Section 41(1):

> "**41 – Information provided in confidence**
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> (1) Information is exempt information if:
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> (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."

[7] The Commissioner dealt with the issue of the applicability of the Section 41 exemption between paragraphs 25 and 31 of his Decision Notice as follows:

> "25. In considering whether or not the exemption is engaged, the Commissioner must first determine whether the information was obtained by the public authority from another person (not necessarily an individual, person in this sense means a legal person). Having had sight of the withheld information the Commissioner is satisfied that the information was in fact provided by another person.
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> 26. Having satisfied the first limb of the exemption under 41, the Commissioner must then decide whether or not disclosure of the information would give rise to an actionable breach of confidence. The Commissioner considers that for a breach of confidence to be actionable it must meet the established tests in *Coco v Clark*. The requirements are that the information must have the necessary quality of confidence; it must be imparted in circumstances

giving rise to an obligation of confidence; and there is an unauthorised use of that information.

27. The Commissioner is satisfied that the withheld information was inaccessible to the public at large at the date of the request. Having had sight of the information in question, the Commissioner is also satisfied that it has the necessary quality of confidence, as it relates to allegations made about a public procession. The Commissioner considers that, given the nature of the information, there was an expectation on the part of the confider(s) that the information was to be held in confidence and that the identity of the confider(s) was to be protected. The Commissioner is further satisfied that the information was imparted in circumstances giving rise to an obligation of confidence. Although not a prerequisite in every case, the Commissioner has considered the issue of detriment which may be required for a breach of confidence to be actionable. The Commissioner is satisfied that in this case damage could be caused by the release of the information.

28. Although Section 41 is an absolute exemption, so in itself not subject to the public interest test, the Commissioner recognises that in certain circumstances the public interest may override any duty of confidence. Where there is an overriding public interest in any particular case in disclosing the information the courts have accepted that no duty of confidence is owed. The Commissioner must therefore consider whether there was an overriding public interest at the time of the Complainant's request which favoured disclosure of the information.

29. The Commissioner recognises that there is a strong public interest in the public being informed about the alleged conduct of contentious parades in Northern Ireland. However the nature and source(s) of the allegations were not in the public domain at the time of the request.

> 30. The Commissioner is also mindful of the public interest in ensuring that people are not discouraged from expressing opinions to regulatory bodies by the possibility of the information they provide being made public. When information relating to such concerns is provided to a public authority in confidence, there is a legitimate expectation that this confidence will be protected by that authority. Without this expectation, people may be less willing to express their concerns to such regulatory bodies. In this particular case, the Commissioner is of the view that disclosure of the withheld information would hamper the ability of the Parades Commission to collect information about parades from interested parties and official monitors.
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> 31. For the reasons set out above, the Commissioner is satisfied that there is no overriding public interest in disclosure of the information requested, therefore the information withheld by the Parades Commission … is exempt by virtue of the Section 41 exemption."

[8] The Commissioner dealt with the Parades Commission's reliance upon Section 36(2)(b) in support of withholding the information as follows:

> "32. The Commissioner notes that the Parades Commission sought to rely on Section 36(2)(b) in relation to the withheld information. As the Commissioner is satisfied that the information is exempt by virtue of Section 41 he is not required to make a decision relating to the Parades Commission's application of the other exemption in this case."

[9] The notice of decision informed the appellant of his right to appeal against the decision notice to the Information Tribunal and he duly did so in a very full notice of appeal dated 18 September 2007 and signed on his behalf by Mr Axel Schmidt described as "representative for the appellant." The Information Tribunal subsequently made an order on 18 December 2007 joining the Parades Commission and Ulster Human Rights Watch as parties to the appeal. The latter made a written submission to the Information Tribunal dated 20 December 2007 which supported the appeal.

[10] The Information Tribunal determined the appeal on the papers and issued its decision on 29 April 2008 upholding the Decision Notice. It identified the principal issues on the appeal raised by the appellant as:

- Is the information confidential in nature or is it in the public domain?
- Was it imparted under an obligation of confidence?
- Does Article 11 [of the ECHR] 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?

[11] The Information Tribunal dealt with these issues between paragraphs 20 and 33 of its Decision as follows:

> "20. We have seen the reports. They were sent by monitors to the Commission, the only matter which we need 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.
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> 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.
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> 22. However it is said that Rule 3(3) violates Article 11 (and Article 10). The argument is put in 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 [his band] 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. As the Information Commissioner 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 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 (sic), 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) (para 37)*:

> ". . . States may be required under Article 11 to take positive measures in order to protect a lawful demonstration against counter-demonstrations…."

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 possible 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 issues of parades is of such political significance that maximum transparency is essential and 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 band] 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 serious 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.

35. Since we have reached the conclusion set out above we do not consider the application of Section 36".

The appeal to this court

[12] On 8 May 2008 the appellant by his representative, Mr Schmidt, lodged a notice of appeal under Section 59 of the Act which contained seven so-called "grounds of appeal". I took the view at the outset of the hearing that these did not isolate with sufficient precision the point or points of law which the appellant wished to raise on the appeal. Mr Schmidt acknowledged that this was so and described them as being more his observations on the Information Tribunal decision than points of law. At my request he prepared a handwritten note of the three "points of law" which he wished to advance as follows:

> "Article 11:
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> The Information Tribunal failed to acknowledge that Article 11 was engaged in this case. There is a breach of Article 11 because of failure to respect the right by not giving access to information during the decision-making process, that may be used to impose restrictions on the right to freedom of peaceful assembly. The right to freedom of peaceful assembly must be secured during the decision-making process.
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> Absence of an actionable breach of confidence:
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> The Information Tribunal failed to adequately apply the three elements that are needed to be considered from a legal point of view, particularly the first one, that the information did not have the necessary quality of confidence. The information requested was public and in the public domain and cannot be exempt under Section 41 of the Act.
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> Public interest:
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> The Information Tribunal failed to establish that the public interest in disclosing the information outweighs the public interest in keeping it confidential. The provider of information can be adequately protected in redacting the personal identities."

[13] The appeal before me then proceeded on the basis of these three identified points with the agreement of counsel on behalf of the Information Commissioner, Ms Clement, who is to be complimented on the collaborative and non-adversarial way in which she approached the hearing on behalf of the respondent as well as for the clarity and economy of her well-focussed submissions. I say this moreover because it emerged at the outset of the hearing that Mr Anderson has significant eyesight problems which would have prevented him from effectively presenting his own case even with assistance and Mr Schmidt, whom I therefore allowed the procedural leeway needed to allow him to present the case on Mr Anderson's behalf, while clearly possessed of legal knowledge and qualifications and of a forthright and engaging manner, was equally plainly not an experienced advocate in these courts.

The competing submissions on the three points of law

Article 11 of the ECR

[14] The appellant's submission was that the failure to provide all the information sought by the appellant in relation to the complaints of bad behaviour at the 2005 parades constituted an unacceptable interference with the right to freedom of peaceful assembly. The argument was that if the band did not have all the information that it sought it could not respond adequately to the allegations of bad behaviour made in respect of the parades and that as a result adverse decisions might be made by the Parades Commission when it came to consider applications for similar parades in the future. On behalf of the respondent it was submitted that not alone was there no breach of Article 11 but that in fact Article 11 was not even engaged because there had demonstrably been no interference with the ability of the appellant to hold any such subsequent parades as they had in fact taken place with permission sought and obtained from the Parades Commission in each of the years succeeding the 2005 parades that had given rise to the present dispute. The appellant's contention that Article 11 imposes a positive obligation giving a right to the information sought is not supported by any domestic or Strasbourg jurisprudence and no error of law in the decision of the Information Tribunal on this point has been evidenced, much less established.

Absence of an actionable breach of confidence

[15] It was submitted on behalf of the appellant that the Information Tribunal had incorrectly applied the three elements of the *Coco v Clark* test for the existence of an actionable breach of confidence. In particular it had erred in relation to the first element because these were public parades whose conduct and activities were by definition in the public domain and therefore any information relating to them could not be invested with the quality of "confidence". In response Ms Clement submitted that this was a fallacious submission – it was perfectly possible for there to be *information* provided in confidence about an *activity* that had occurred in public view – it was the *information* whose quality of confidence or otherwise must be examined and not the *activity* to which the *information* related *(emphasis supplied*). She submitted that the reports were plainly submitted in confidence to the Parades Commission by monitors acting on its behalf and the Information Tribunal had examined the documents sought and so found. There was no error of law in that conclusion.

Public Interest

[16] Mr Schmidt submitted that the Information Tribunal had failed to properly balance the competing public interest in the disclosure of the

information against that of keeping it confidential and to appreciate that any public interest in confidentiality would be sufficiently achieved by the expedient of redacting any names from the documents, a course with which the appellant had always said he would be content. The original documents could and should be provided with the names redacted rather than the summaries of the information contained in them that had been provided. The political significance of parades is such that it is necessary in the public interest to be able to examine the documents in as full a form as possible to ensure that false reports have not been made maliciously and therefore maximum possible disclosure, leaving aside names, should be made. For the Information Tribunal it was contended that the correct test had been adverted to and applied at para. 31 *et seq* of the Information Tribunal's decision – on the one hand it had examined the original documents and found that the disclosure actually made was quite sufficient to enable the band to adequately respond to the allegations whereas on the other hand the Parades Commission would be seriously handicapped if it ceased to receive information because there was no certainty of confidence. No error of law was disclosed.

Examination of the Disputed Documents by this Court

[17] It will be clear from earlier passages in this judgment that the hearing before me proceeded with a degree of informality consonant with the circumstances of the parties' disparate representation. In the course of his submissions Mr Schmidt observed that there had been "a problem of confidence" on his side because they had not seen the documents. Counsel for the Information Tribunal offered to allow the Court to inspect the original documents to see for itself whether the contents of the reports had in fact been substantially disclosed so as to enable the band to respond adequately to the allegations made against it. This offer was made without prejudice to her crucial submission that, this being an appeal confined by statute to points of law, it was not for this Court to substitute any differing view of its own for the finding of fact on this issue made by the Information Tribunal. With Mr Schmidt's agreement I looked at the two documents on the terms upon which they were proffered and was in fact entirely satisfied that their contents had indeed been substantially disclosed and that nothing further contained in them would have added to the substance of the allegations to which the band had been asked to respond and I so informed Mr Schmidt. Had I not been so satisfied then plainly I could not have substituted my own view.

Consideration and Decision

[18] I begin by reminding myself that, notwithstanding the rather relaxed and informal manner in which the hearing of this appeal proceeded, the only question for my decision is whether there is any error of law in the decision of the Information Tribunal upholding the Decision Notice of the Information Commissioner. I have set out at [10] above the principal issues identified by the

Information Tribunal as arising on the appeal to it from the Information Commissioner's decision and no issue was taken on the appeal before me as to the adequacy of this analysis. Some are issues of fact as to which the decisions of the Information Tribunal cannot be challenged here unless the conclusions reached are so plainly unsupportable on the facts as to constitute an error of law. I am satisfied that there is no basis for any such finding by me. The only area of serious challenge by the appellant was the conclusion that because the parades took place in public so any information relating to them provided to the Parades Commission must also be in the public domain. This is plainly a *non sequitur* as the Information Tribunal's example of an informant giving private information to the Police about a stabbing that had occurred in public neatly illustrates. The Information Tribunal's conclusions that the information from the monitors contained in the documents in question was provided in confidence, that their disclosure even with names redacted might cause an informant exposure and possible recrimination, that substantial distress to the monitors might follow and that the Parades Commission would suffer serious handicap if information ceased or it was unable to recruit monitors due to lack of certainty that their reports would treated confidentially leading to an inability to perform its statutory function are all conclusions that it was perfectly competent and reasonable for the Information Tribunal to reach.

[19] What then of the three identified "points of law"? I deal firstly with the submissions that Article 11 was engaged and that there was a breach of it by failing to give access to the documents with names redacted "during the decision-making process." I find that Article 11 was not engaged as there has been no interference with the appellant's Article 11 rights nor in fact has it been shown that there was any "decision making process" in which the documents were employed either at all or in any way detrimental to the appellant. True it is that at the time when the allegations were first brought to the attention of the Band it may reasonably have feared that the reports might result in the prohibition or curtailment of these marches in the following, 2006, year. Had that happened the Band might have considered seeking a judicial review of that adverse decision in which different considerations regarding the disclosure of these documents might have arisen (although I venture to suggest with probably the same practical result in relation to the extent of disclosure). In fact of course there was no such adverse outcome and the 2006 and subsequent parades have as we have seen been permitted. It is pointless to speculate as to how if at all the Parades Commission took account of these reports when determining whether to permit the subsequent parades but they plainly cannot have been determinative against their being permitted. It is obvious that if the Parades Commission has not interfered with the appellant's Article 11 rights then neither has the Information Commission or Information Tribunal.

[20] Assuming however that Article 11 had been engaged, does it provide the claimed right to the disclosure of the withheld information? No ECHR or domestic authority for the proposition that Article 11 (or indeed Article 10)

gives any right to the provision of information *provided in confidence* has been discovered and such authority as exists points firmly in the other direction. (See for example *Leander v Sweden, Guerra and Ors v Italy* and *R. (Howard) v S o S for Health).* I conclude that no such right exists and that accordingly Section 41 of the Act does not require to be read otherwise than as enacted.

[21] Turning to the appellant's second identified point of law, would there have been an actionable breach of confidence had the documents been disclosed? The appellant did not dispute the applicability of the *Coco and Clark* tests but rather contended that they had been incorrectly applied. In particular he made the case that the information did not have the necessary quality of confidence. Unfortunately for the viability of this submission the Information Tribunal had found as a fact that it did and made similar findings in relation to the second and third tests. It also found that in this case damage could be caused if the documents sought were released. I see nothing wrong with the articulated reasoning that lead it to so conclude and, since this is an appeal on points of law, that is fatal to the success of the point. The appellant may not agree with the findings or the reasoning that led to them but both he and I are bound by them. For what it may be worth, I agree with both the reasoning and the conclusions.

[22] I deal finally with the proposition that even if, contrary to the appellant's submission, an actionable duty of confidence attaches to the documents, nevertheless there is such public interest in their disclosure in full that the duty of confidence is overridden. Again the difficulty faced by the appellant is that the Information Tribunal has found as a fact, based upon the reasoning at paras. 31, 32 and 33 of its Decision, that the balance of the public interest favours refusal of the information. Absent any demonstrable flaw in that reasoning there is no appealable point of law. I see no flaw in the reasoning or in the conclusion but rather, though again plainly irrelevant, I agree with both.

[23] That therefore disposes of all the "points of law" identified on behalf of the appellant and therefore of the appeal which accordingly must be dismissed. It is I think most unfortunate that so much persistent energy has been channelled into this argument on behalf of the Band when it has been clear to everyone since the middle of 2006 that the reports in question had had no practical damaging effect upon the band's desire to hold these annual parades. Even though the 2006 parades had been authorised and held, the Band commenced its complaint to the Information Commissioner who said that it had been given all the information needed from the reports to enable them to answer the allegations and so too did the Information Tribunal. Still the band persisted in what had by then long since become a moot. The appeal to this Court, confined as it was by Section 59 of the Act to any identifiable point of law, has not advanced the matter one iota.

I will receive written submissions in relation to costs.