



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

EA/2014/0169

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50515385

Dated: 22 May 2014

Appellant: ANDREW ROWSON

Respondent: THE INFORMATION COMMISSIONER

Date of hearing: 20 November 2014

Date of Decision: 15 December 2014

**Before
Annabel Pilling (Judge)
Henry Fitzhugh
Rosalind Tatam**

Subject matter:

FOIA – Qualified exemptions – prejudice commercial interests section 43(2)

Representation:

For the Appellant: Andrew Rowson

For the Respondent: Richard Bailey

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice of 22 May 2014.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 22 May 2014.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to Cambridgeshire County Council (the 'Council') for information relating to a contract for an overpayments recovery service and any relevant invoices.
3. The Council confirmed that it held information within the scope of the request. It provides some information but withheld the remainder on the basis of the exemptions in FOIA, namely, section 31(1)(a) (law enforcement), section 43(1) (trade secret) and section 43(2) (prejudice to commercial interests).
4. The Appellant complained to the Commissioner who investigated the way the request had been dealt with by the Council. The Commissioner concluded that the Council had correctly applied section 31 and was entitled to withhold that information. In respect of section 43, the Commissioner concluded that this had been incorrectly applied by the Council to some of the withheld information. He attached a Confidential Annex to the Decision Notice, which was not seen by the Appellant, and which set out in tabular form the relevant items which had been withheld, the exemption which had been applied by the Council and the Commissioner decision whether the exemption was engaged or not. Some items (names of staff) were found to be outside the scope of the request. The Commissioner directed that within 35 calendar days the Council disclose the information in respect of which he had concluded that the exemptions claimed were not engaged.
5. There were three items on the Annex in respect of which the Commissioner concluded that section 43(2) was engaged and the Council was entitled to

refuse the request.

6. This Appeal is concerned solely with pricing structure from the contract requested and we refer to this as the 'disputed information'.

Background

7. The Council issued an invitation to tender for its Accounts Payable and Overpayments Recovery Service in early 2013. Having completed the tender evaluation, the Council awarded the contract to the highest scoring bidder based upon the Council's award criteria which was the Audit Partnership Limited ('APL'). The Appellant's company, Data Diligence Limited, was an unsuccessful bidder. Feedback was provided to the Appellant on 5 April 2013; his company had been ranked third out of a total of six tenders. While his company's score under "price" was the same as APL, its score under "quality" was the lowest of all the six tenders.

The request for information and response

8. On 14 August 2013 the Appellant made the following request to the Council:

"Please could you send me a copy of the signed contract between CCC/LGSS¹ and the Audit Partnership Ltd in April 2013 for the latter's overpayment recovery service. I would also like to see copies of any invoices this company has submitted to CCC/LGSS to date."

9. The Council notified the Appellant on 12 September 2013 that the contract contained information which may prejudice the commercial or financial interests of the company concerned and that it was extending the time for responding to the request in order to consider the public interest balancing test. The Appellant replied on the same day expressing dissatisfaction and explaining why he does not consider that the exemption provided in section 43 applies.

10. The Council issued a refusal notice on 24 September 2013. It denied holding any information falling within the second part of the request, namely invoices submitted. In respect of the request for the signed contract, it provided some

¹ LGSS is a public sector shared services venture, wholly owned by Cambridgeshire and Northamptonshire county councils.

information but withheld the remainder relying on the exemptions in sections 31(1)(a), 43(1) and 43(2) of FOIA.

11. Because the Appellant had expressed dissatisfaction with the way his request was being handled, the Council treated this as a request for a review and informed the Appellant on 24 September 2013 that its review was complete; the Appellant could apply to the Commissioner if he remained dissatisfied.

The appeal to the Tribunal

12. The Appellant appeals against the Commissioner's decision in respect of the pricing structure from the contract requested. We have therefore limited our consideration of this case to this specific issue, and not considered the Commissioner's decision in respect of the other two items which he concluded was exempt by virtue of section 43(2), nor considered whether the Commissioner was correct to conclude that sections 31(1)(a) or 43(1) did not apply to the items in respect of which it had been claimed by the Council.
13. The Tribunal was provided in advance of the hearing with an agreed bundle of material. We were also provided with a closed bundle which was not seen by the Appellant and which contained the Confidential Annex to the Decision Notice and the pricing structure (referred to as the pricing schedule).
14. We reminded ourselves of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
15. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said inter alia at paragraphs 68-74 that:
 - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
 - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that

this is what they have done.

- iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

16. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

- i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
- ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.
- iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.
- iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.
- v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

17. The closed bundle contained the disputed information and the Confidential Annex from the Commissioner's Decision Notice with an extract from Appendix 1 provided by the Council relating to the disputed information. There was nothing additional in the closed bundle and it was necessary for the Tribunal to see the disputed information in order to reach our decision. To have disclosed it to the Appellant would have defeated the purpose of the Appeal.

18. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.

The Issues for the Tribunal

19. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

20. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions.

21. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

22. The exemption provided for in section 43(2) FOIA is a qualified exemption.

23. Section 43(2) provides as follows:

“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).”

24. The Appellant challenges the findings of the Commissioner on the following grounds:

- i) That the Commissioner erred in concluding that the exemption under section 43(2) is engaged in respect of the disputed information (that is, the pricing schedule).
- ii) That if the exemption is engaged, the Commissioner erred in concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Is section 43(2) engaged?

25. The Council does not claim that disclosure would prejudice or would be likely to prejudice its own commercial interests. The Commissioner was not

satisfied that the Council had demonstrated that disclosure would prejudice APL's clients and so the focus has only been whether disclosure would be likely to prejudice the commercial interests of APL.

26. We agree with the Commissioner in respect of the three stages to consider when approaching the application of section 43(2) of FOIA:

- i) the commercial interests need to be identified
- ii) there is an evidential burden on the public authority to show that some causal relationship exists between the potential disclosure and the prejudice to the identified commercial interests and that the prejudice is real, actual or of substance;
- iii) the likelihood of the prejudice occurring has to be analysed.

27. In his grounds of appeal the Appellant does not appear to dispute the Commissioner's conclusion that the disputed information relates to a commercial interest. His later submissions however suggest that as APL did not claim commercial confidentiality at the time of the tender, the disputed information cannot now be regarded as commercially sensitive.

28. This submission appears to result from the Appellant's confusion in respect of which exemption is being relied upon by the Council. While the claiming of confidentiality may assist the decision whether disclosure would be likely to prejudice commercial interests, it is not of itself a necessary requirement and its absence does not automatically mean that section 43(2) of FOIA will not apply.

29. The Appellant submits that as APL has not presented any reasoned arguments, that disclosure would not cause the effects claimed by the Council and found by the Commissioner.

30. Although we have not been given any information from APL directly, we are aware of what it told the Council with respect to this disputed information:

"As you are probably aware cost recovery is a very competitive market and we believe that our fee rate is unique and confidential to each client. This could potentially be damaging to our other client contracts and relationships. This information is also commercially sensitive and making this information public could result in some providers issuing unrealistic fee rates that are not

sustainable, which could potentially damage the entire market due to the nature of the contingency based charging mechanism.”

31. We accept that this was what APL told the Council and the Council communicated to the Commissioner. We have no reason to doubt the prejudice as explained by APL. As the fee is unique and confidential to each client we accept that disclosure of the fee agreed with the Council would be likely to cause a strain in the relationship between APL and other, existing clients.

32. The Appellant submits that he could calculate the pricing structure if he had any invoice submitted to the Council by APL. His argument is that it therefore follows that the disputed information will be in the public domain and cannot be regarded as commercially confidential.

33. We are not persuaded by the Appellant's argument that the disputed information is already in the public domain because it could be deduced in this way. Firstly, the invoices would not automatically be in the public domain. Secondly, it may be that there are industry norms from which the Appellant could make an educated guess from the data contained in any invoices issued, but this would not necessarily provide the full picture of the pricing schedule.

34. We are not persuaded that the disputed information is commercially confidential by its very nature but we are satisfied that the commercial interests of APL would be likely to be prejudiced if the disputed information were to be disclosed.

35. We are satisfied that the exemption in section 43(2) FOIA is engaged.

Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

36. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information.

37. The following principles, drawn from relevant case law, are material to the correct approach to the weighing of competing public interest factors; they do not form a rigid code or comprehensive set of rules but are helpful guidelines of the matters that we should properly take into account when considering the public interest test.

- (i) The “default setting” in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld.
- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (iii) The balance of public interest factors must be assessed “*in all the circumstances of the case*” (section 2(2)(b) of FOIA). This will involve a consideration of both direct and indirect consequences of disclosure.
- (iv) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- (v) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect.
- (vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance.
- (vii) If disclosure of the disputed information would be likely to prejudice a company’s commercial interests, this would generally be a factor to be taken into account for maintaining the exemption.
- (viii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their

importance as these considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances.

- (ix) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority.
- (x) The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public.

Public interest in favour of maintaining the exemption

38. The Commissioner submits that if we have concluded that disclosure of the disputed information would be likely to prejudice APL’s commercial interests, that it would not be in the public interest that companies, such as APL, entering into contracts with public authorities should be commercially prejudiced in this way as a result.

39. We consider that we must be careful not to elevate the qualified exemption in section 43(2) of FOIA into an absolute exemption. Parliament clearly envisaged situations in which the public interest will be for information to be disclosed despite the fact that the commercial interests of the public authority, or a third party, would be prejudiced.

40. However, we consider that there would have to be some clearly identified factors in favour of disclosing the disputed information in such cases in order to outweigh the very strong public interest in ensuring that public authorities have as wide a selection of companies willing to do business with them as possible. To disclose commercially sensitive information because the private company is doing business with a public authority when that information would not be available otherwise, may well limit the pool of such companies and thus limit the ability of a public authority to operate as effectively. This would be contrary to the public interest.

Public interest in favour of disclosure

41. There is public interest in transparency and accountability in the process of deciding upon public sector contracts to ensure that the process was conducted fairly and that the contract represents good value for the public.
42. It is important in this case to distinguish between the public interest and the Appellant's private business interest. There are mechanisms in place to provide checks and balances to the activities of a public authority; it is not for the public to analyse tender bids and reach a decision in respect of whether APL had provided the "best bid". It is not part of our remit to explore the feedback the Appellant was given by the Council. Feedback was given, this made it clear that the Appellant had not been beaten on price but by the better track record of APL, which encompassed a variety of considerations.
43. The Appellant suggests that the Council may have deliberately selected a service provided which did not offer the best value for money and that if that were the case disclosure of the disputed information would be in the public interest. He also suggests that there is substantial evidence that local authorities may not always strive to maximise the recovery of duplicate payments and other supplier overpayments, with the result that council nationally are failing to recover "hundreds of millions of pounds."
44. There is great public interest in public authorities' recovery of overpayments generally. However, we do not consider that there is any specific public interest in disclosure of this disputed information, limited as it is to one pricing schedule from one successful tender from one company to one public authority. It is not a factor giving weight to the public interest in the disclosure of the disputed information.
45. It may be that the Appellant is correct to submit that the Audit Commission's National Fraud Initiative is poor, but this is not for us to judge. There is no evidential or inferential basis upon which to conclude that disclosure of this information would inform the public in any way about this operation.
46. The passage of time may mean that this information loses its sensitivity but we are not persuaded that this is relevant in this case. The public interest is to be judged is the time when disclosure was refused by the public authority, that is, 24 September 2013 a matter of only months after the tender process had been completed.

Balance of the public interest

47. Weighing up the factors we consider apply in this case, we have given significant weight to very strong public interest in ensuring that public authorities have as wide a selection of companies willing to do business with them as possible. While there are general factors in favour of disclosure of this disputed information, there are no specific public interest factors, as opposed to the private interests of the Appellant.

48. We therefore conclude that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Council was entitled to withhold the disputed information under section 43(2) of FOIA.

49. For these reasons we refuse the appeal and uphold the Commissioner's Decision Notice. Our decision is unanimous.

Other matters

50. The Confidential Annex to the Commissioner's Decision Notice was provided in a redacted form to the Appellant. If there had been an oral hearing of this Appeal we would have explored the reasons for these redactions as part of our duty to review the closed material. Some of the redactions appear to us to be parts of the information available during the tender process and about which the Appellant would have known. We would expect the Commissioner to review these redactions despite our refusing this Appeal.

Annabel Pilling
Tribunal Judge

15 December 2014