



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

Case No. EA/2015/0092

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50543323
Dated: 19 March 2015**

Appellant: Huntingdonshire District Council

Respondent: The Information Commissioner

On the papers

Date of decision: 11th December 2015

Date of promulgation: 14th December 2015

**Before
CHRIS RYAN
(Judge)
and**

**ALISON LOWTON
STEVE SHAW**

**Subject matter: FOIA Qualified exemptions
- Commercial interests/trade secrets s.43**

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. We have decided that the Information Commissioner was correct in deciding, in the Decision Notice from which this appeal emanates, that Huntingdonshire District Council (“the Council”) had not been justified in refusing to disclose certain information on the basis that section 43(2) of the Freedom of Information Act 2000 (“FOIA”) rendered it exempt from the Council’s obligations of disclosure under FOIA section 1.

Background

2. In January 2014 the Council approved a new pay model for its 692 permanent employees, to take effect on 1 April 2014. The model had been created following a job evaluation review of all staff posts using the Inbucon Job Evaluation Scheme, a methodology developed, as its name suggests, by a company called Inbucon (“the Inbucon Scheme”). The final form of the pay structure had been established after consultations with staff and negotiations with the Council’s Staff Council.
3. The Inbucon Scheme had been designed to measure the size of each job relative to others by identifying the main elements of the role performed and then establishing the appropriate rank order of jobs. This was designed to lead, in each case, to a grade being attributed to the job, which would then be used to determine where an individual’s salary should fall within the appropriate salary scale. The process for evaluating each job involved the consideration of the six factors set out in the first column in the table below, based on the criteria set out in the second:

Factor	‘Focus’
Factor 1: Knowledge, Skills and Experience	Level of knowledge, skills and experience Extent and range of application of knowledge, skills and

	experience
Factor 2: Problem Solving	Analytical complexity Initiative and creativity
Factor 3: Decision Making	Level of advice and discretion Impact
Factor 4: Operational Responsibility	Size of responsibility Role Type
Factor 5: Communication	Significance External demands
Factor 6: Working Conditions	Physical and mental effort Environmental conditions

4. The score attributed to each factor was based on information about the duties, tasks and responsibilities involved in each job. That information had been provided by each employee and his/her manager setting out in a Job Evaluation Report a self-evaluation of the job in question, based on certain defined criteria (or “descriptors”).
5. Each element of information provided by the employee was then considered, balancing the two features of the “Focus” identified in the table above, against a specific scale of numerical scores. This resulted in a number being attributed to it. The resulting numbers for each of the six factors were then added to provide an overall grading for the job in question.
6. That much is public knowledge. However Inbucon considers that the law on the right of confidentiality entitles it to protect from disclosure the “descriptors” which the Inbucon Scheme uses to score each factor (which are not included in the Request) and the range of scores attributable to each of the identified factors.
7. The expected outcome of the pay review, as reported to the Council’s Cabinet, was that 42.55% of staff would experience either a neutral impact or an increase in salary. The Council itself was expected to achieve savings rising to £324,000 in 2018/19, although the impact in the short term of provisions designed to protect those suffering a reduction in pay, would lead to additional costs of £184,000 in 2014/15.
8. An appeal process was put in place for any members of staff unhappy with the impact of the job evaluation process on their own salary.
9. The Council acknowledged at the time that it had no option but to introduce new pay arrangements, as its then current model (which had been introduced in the 1980s) was not financially sustainable and was inequitable under equality laws, leaving the Council at risk of equal pay claims.

The Request for Information and the Council's refusal to comply with it

10. On 27 February 2014 an individual wrote to the Council in the following terms:

"I am formally submitting to you a freedom of information request in relation to the single status review of pay and grading at Huntingdon District Council.

The information that I am requesting which is outlined below, is so that [Council employees may] prepare for their appeals and seek to challenge the proposed outcome, and (2) so that [they] can be reassured that [the Council] has met all its requirements under equal pay to produce a transparent and fair system for pay determination going forward, in accordance with National Joint Council recommendations and also of those produce by the EOC and its successor body the Equality and Human Rights Commission.

The information I seek therefore is the JE score for each job that exists in the authority be it full-time, part-time, temporary or zero hours, a list of the factors and the scores on a factor by factor basis for each of the roles in the organisation regardless of their contractual status ..."

11. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

"... in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

12. As the case was subsequently considered by the Information Commissioner before the decision noted dated 19th March 2015, from which this appeal emanates ("the Decision Notice"), the exemptions relied on by the Council as justification for having refused disclosure were that disclosure would prejudice Inbucon's commercial interests. In this it relied on FOIA section 43 which reads:

"(1) Information is exempt information if it constitutes a trade secret.

(2) 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)."

Despite the fact that the Council referred in correspondence to Inbucon's "trade secrets" being at risk in the event of disclosure of the requested information it chose to rely on subsection (2) of section 43, and not subsection (1).

13. The Council also claimed that, as it had already published to its staff the factors used by it in the job evaluation process, this information was exempt under FOIA section 21. That reads:

"(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

Complaint to the Information Commissioner and his Decision Notice

14. Following an internal review by the Council, which supported the original decision, the requester complained to the Information Commissioner who, having investigated the complaint, issued a Decision Notice on 19 March 2015 requiring the Council to disclose some of the requested information.
15. The Decision Notice recorded the following conclusions reached by the Information Commissioner:
- i. The section 43(2) exemption was engaged, because release of the scores and weightings requested would undermine Inbucon's competitive edge by making it possible to "reverse engineer" the formula of scores which lay at the heart of the Inbucon System but was not disclosed to users.
 - ii. As the exemption provided by section 43 is a qualified exemption it was necessary to consider the public interest balance under FOIA section 2(2)(b) in order to decide whether or not to order disclosure.
 - iii. In all the circumstances the public interest in maintaining the exemption did not outweigh the public interest in disclosure.
 - iv. The Information Commissioner was satisfied that the factors used by the Council as part of the Job Evaluation process had been made available to all members of staff when they were notified of the impact of the process on their individual salaries. Accordingly, the section 21 exemption applied to that part of the requested information.

The Appeal to this Tribunal

16. On 15th April 2015 the Council appealed to this Tribunal. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to

have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

17. The Council asked in its Notice of Appeal that the matter be determined on the papers and without a hearing. We consider that this is an appropriate procedure to adopt and have therefore reached our decision on the basis of written submissions and a bundle of documents provided by the parties. The Tribunal Registrar directed that parts of the bundle containing the withheld information should be submitted on a “closed” basis on the basis that to do otherwise would defeat the purpose of the proceedings. We agree that this was the appropriate procedure to adopt.
18. As the Information Commissioner had decided in the Decision Notice that both section 43 and section 21 were engaged, the Council’s Grounds of Appeal understandably did not address that issue. The Council concentrated on its challenge to the manner in which the public interest balance had been considered in respect of section 43. It acknowledged the importance of transparency in how salary awards are made in the public sector, but argued that the public interest in further disclosure had been overstated in the Decision Notice. It said that, when communicating the outcome of the review to each of its employees, it had provided the Job Evaluation Questions for all posts and a list of posts ranked by score within grades. It had withheld the total scores for posts, on Inbucon’s instructions, but argued that employees would have been able to identify approximate scores from the information which they had been given and would not therefore have been hampered in understanding the process or pursuing an appeal against individual awards. They and their representatives had been fully consulted throughout the process and all relevant statutory rules had been complied with. The Council also pointed out that the decision to implement the Pay Review had been taken in a public meeting and that the official report to the Cabinet to enable it to take that decision had been included in the publicly available agenda pack.
19. The Council also argued that the public interest in maintaining the exemption (protecting commercial interests of private organisations and maintaining intellectual property rights) had been understated by the Information Commissioner. Additionally, the Decision Notice did not demonstrate an appreciation of the likelihood and severity of the legal action which Inbucon could take against the Council or the impact on the morale of staff.
20. Particular elements of the Decision Notice which the Council criticised included the following:
 - a. The Information Commissioner had referred to the criticism that had been aimed at local authorities on the issue of equal pay and the requirements imposed on them by law to carry out appropriate job evaluations and introduce equality of pay. The

Council argued that this should not have been treated as a factor in favour of disclosure given the care with which the Council had carried out the job evaluation process for the express purpose of complying with relevant law and regulation. The outcome, it said, was a much fairer system than had previously been available to staff and the removal of various inequalities that had previously existed.

- b. The Council rejected a criticism, initially made by UNISON but adopted in the Decision Notice, that it would have been possible to use another job evaluation scheme which was more transparent. The scheme adopted, it was said, had been selected after careful appraisal, including staff input, and had been acknowledged to be fully compliant with equalities law and regulation.
- c. The Decision Notice included an acknowledgement that staff may have been disadvantaged in attempting to appeal a pay award by the absence of what the Information Commissioner referred to as "*the weighting used on individual factors in order to reach*" the overall rating for a job. The Council pointed out that it had published a list of all posts ranked by score so that employees could consider their completed Job Evaluation Questionnaire in context. The appeal panel was also chaired by an independent person and, in practice, 80% of the appeals heard led to a recommendation that the post should be re-evaluated. The absence of information about the scores applied per factor and per job did not disadvantage those appealing because, first, most appeals sought a re-examination of the evidence provided in respect of each of the six factors and, where appeals were based on a comparison with other posts, the comparators were reviewed by the appeals panel on a factor by factor basis.
- d. In balancing the factors for and against disclosure the Information Commissioner considered that the required trust in a job evaluation process was undermined if employees were not placed in a position to understand how different tasks or roles were assessed. In response the Council argued that its process was to be trusted because the Inbucon System had been tested through Equality Impact Assessments at certain stages of the pay review and a benchmarking exercise had been undertaken by comparing pay for a number of individual posts with a range of other public sector employers. The Council challenged whether a better understanding of the system, by either individual employees or the public as a whole, would be achieved by disclosing the withheld information since anyone considering it would also need to be provided with the descriptors referred to above (which had not been requested) and additional information about past salaries for individual employees and to have been trained in job evaluation processes to provide context. It was already possible to derive from information that was made available the relevant pay grade for a

job, an approximate job evaluation score and a salary range emanating from it.

21. The Information Commissioner filed a written Response to the Grounds of Appeal. He started by seeking to reverse the position he had adopted in his Decision Notice in respect of the engagement of the section 43 exemption. He considered that the information provided by the Council (in particular the fact that the descriptors referred to had not been requested) demonstrated that it would not, after all, have been possible to reverse engineer the requested information and thereby deduce the scoring mechanism which Inbucon regarded as confidential. He did, however, concede that Inbucon had asserted that this would be possible.
22. The Response also challenged the Council's claim that it would not only be Inbucon but also the Council itself which would suffer. Its harm was said to arise from the legal action which it considered Inbucon would commence against it if disclosure were made. However, the Information Commissioner expressed scepticism on whether a legal claim could or would be brought. The resulting harm, he said, would be financial in nature, which was distinct from "commercial" for the purposes of FOIA.
23. On the issue of public interest the Response joined issue with the Council's arguments and laid stress on the importance of transparency in respect of job evaluation schemes, which are likely to be controversial and to involve sensitivities that are likely to be exacerbated by any loss of trust in the process.

Our decisions on the issues raised

24. As regards the engagement of the section 43 exemption, we find it rather strange that the Information Commissioner, having had ample opportunity to investigate all relevant facts during his investigation, should then, in responding to an appeal against his decision notice based on his findings of fact, suggest that he was not, after all, convinced that the Council had established its case on the engagement of the exemption. But we consider, in any event, that the core facts of the case demonstrate that disclosure would be accompanied by some degree of risk that a claim could be brought and might succeed and that the risk of such a claim may properly be characterised as a commercial disadvantage. We therefore accept that the exemption was engaged.
25. There is substantial agreement between the parties that it is important to have transparency in job evaluation exercises if they are to merit the employees' trust. We do not think that the importance is materially increased by the suggestion that local authorities as a whole have had a less than satisfactory record in the area of equality. That certainly operated as background to the process run by the Council but it argues

that it acted as a spur to create a process that was fair and based on a sound evidence-gathering process and a well proven methodology. In our view we should address the case in favour of disclosure by looking at the process that was actually operated in this particular case and consider whether the absence from it of the withheld information undermined it to any material degree. The history of equal pay in either the Council or local authorities as a group does not materially assist us in making that determination. Nor are we assisted, to any significant extent, by the various checks and balances that the Council says that it applied in selecting the Inbucon System, consulting on its operation, establishing an appeals process or finalising its new pay structure at a public meeting. Each of those steps points towards a wish on the Council part to undertake a fair and balanced review. But if Inbucon's attitude towards the scoring process embedded in its scheme means that information is withheld from staff, so as to engender a justified mistrust in the evaluation and appeals process, as well as the pay review results emanating from it, then the resulting scheme may still be regarded as flawed.

26. The question we have to determine is whether the withheld information is sufficiently important and central to the process to have that effect. In our view it does because, without seeing the range of scores attributed to job factors across the full range of jobs, an employee will not know the relative contribution any one factor is capable of making to the total score to be applied to any particular job in question. That, it seems to us, reduces the information which an employee and/or his representative should have, at the stage of submitting a completed JEQ and before launching any appeal, in order fully to understand the Inbucon Scheme.
27. Against the public interest in employees having these final, crucial, pieces of the jigsaw must be set the public interest in preserving this element of Inbucon's competitive edge and removing the risk of a legal claim being asserted against the Council. We consider that the risk of legal proceedings being brought and resulting in liability for the Council, although sufficient to engage the exemption, has been overstated by the Council. Any court considering such a case would have, first, to consider the extent of Inbucon's rights in light of other information already in the public domain, (including information that could be obtained without restriction from one or more of Inbucon's competitors) as well as the fact that the Inbucon System was made available to organisations operating in the public sector, where it must have been known that it would become vulnerable to disclosure under FOIA.
28. So far as Inbucon itself is concerned the commercial harm it may suffer must have been anticipated as a risk when it marketed the Inbucon System to the public sector. For this reason and because of the uncertainty, on the evidence provided, as to the level of risk we consider that it does not give rise to a public interest factor, even when

aggregated by the harm the Council may itself suffer, to outweigh the public interest in disclosure.

29. For these reasons we have concluded that the Council was not entitled to refuse to disclose the requested information and that its appeal against the Information Commissioner's decision, as recorded in the Decision Notice, should be rejected.

30. Our decision is unanimous

Judge Ryan

14th December 2015