



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

**Case No. EA/2016/0008**

**ON APPEAL/APPLICATION FROM:**

**Information Commissioner's  
Decision Notice No: FS50592105  
Dated: 9th. December, 2015**

**Appellant:** John Eustace (“JE”)

**Respondent:** The Information Commissioner (“the ICO”)

**Heard at:** Oxford SS&SC Tribunal

**Date:** 6<sup>th</sup> April 2016

**Date of decision:** 12<sup>th</sup>. April, 2016

David Farrer Q.C.

Judge

and

Henry Fitzhugh

and

Michael Hake

Tribunal Members

**Attendances:**

For the Appellant: The Appellant appeared in person.

For the Respondent: The ICO did not appear but made written submissions.

Subject matter: Freedom of Information Act, 2000 (FOIA) S.43(2)

Whether disclosure of the requested information would be likely to prejudice the commercial interests of the public authority or its contractor. If so, whether, on the balance of probabilities, withholding the information was proved to be in the public interest.

**DECISION OF THE FIRST-TIER TRIBUNAL**

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that disclosure would not be likely to prejudice the commercial interests either of the public authority or of its contractor and that, if, contrary to that finding, they might be so prejudiced, the public interest in disclosure outweighs the public interest in protecting such interests. The Tribunal therefore allows the appeal and orders Southampton City Council to disclose to the Appellant the requested information, as defined in § 19, within thirty – five days of the date of this Decision.

Dated this 12th. day of April, 2016

David Farrer Q.C.

Judge

Signed on original

## Abbreviations

In addition to those indicated above, the following abbreviations are used in this Decision –

FOIA	The Freedom of Information Act, 2000
EIR	The Environmental Information Regulations, 2004
CCUK	Clear Channel UK Ltd.

Relevant legislation *FOIA s.43(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). *s.2(2)(b)* (which requires the Tribunal to consider the public interest in maintaining that exemption, if it is engaged).

### Authorities referred to in the Decision

R (Lord) v Secretary of State for the Home Office [2003]  
EWHC 2073 (Admin.)  
John Connor Press Associates v ICO UKIT EA/2006/0005

## REASONS FOR DECISION

### The Background

1. Bus shelters are part of what is known as “ street furniture” . They are generally owned by the local authority (“ the LA” ), subject to any sale for commercial purposes. They are an obvious vehicle for advertising, since passengers often have to wait for buses and they are widely visible to passing traffic.
2. For many years now LAs have entered into contracts with one or other of two large media owners, CCUK (and the predecessor with which it merged) and JC Decaux<sup>1</sup>, under which those companies purchased the advertising space on the shelters for a substantial period, often up to twenty years. Until quite recently, such sites would display hard - copy posters which were replaced or covered by new advertising upon expiry of the period of display purchased by the advertiser.
3. Within the last five years, the scope for such advertising has been transformed by the development of digital panels, which can be programmed to show multiple advertisements in succession and at predetermined intervals and can switch to a new series at the metaphorical touch of a button. The commercial advantages to the media owner are obvious. Space on the shelter can be sold to multiple advertisers for a single period with images of a higher quality, whilst the maintenance costs are greatly reduced, since the switch to fresh advertisements is now remotely controlled. Yet many, if not most LAs with such bus shelter contracts are receiving and will for some years continue to receive streams of revenue negotiated well before this change took place.

### The Request

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<sup>1</sup> A third company, Primesight, operates in this market but, on the evidence before the Tribunal, on a much smaller scale than those named in the text.

4. As part of a wide – ranging survey of such local authority contracts and the extent to which LAs were exploiting the commercial possibilities of this form of advertising, JE made five requests for information to Southampton City Council (“ the Council” ) in an email dated 2<sup>nd</sup>. June, 2015. Four related respectively to the nature and length of its contract with (in this case) CCUK, the number of shelters owned by CCUK and the Council, the timing of payments by CCUK and the question whether and to what extent the Council obtained discounts on any advertising which it purchased. These requests were all answered.

5. The remaining request posed the question –

“ What are the financial benefits to the Council annually and over the life of the contract?”

The answers consist of two figures supplied by the Council in a letter to the ICO dated 19<sup>th</sup>. October, 2015, of which a suitably redacted copy was in the open evidence before the Tribunal (see OB p.82).

6. In a very full and informative response which included a “ Public Interest Test Decision Notice” dated 23<sup>rd</sup>. July, 2015, the Council indicated reliance on the exemption provided by s.43 of FOIA (commercial interests) and set out its reasoning and its identification of the public interests for and against disclosure which led to the refusal. It maintained that stance in communicating in some detail the result of an internal review on 3<sup>rd</sup>. August, 2015. The arguments set out in these documents will be considered later in this decision.

The Decision Notice (“ the DN” )

7. JE complained to the ICO on 4<sup>th</sup>. August, 2015 and submitted a fully – argued letter on 25<sup>th</sup>. August, 2015. Its content largely foreshadowed the submissions made on appeal to the Tribunal.
8. The Council, in its response of 19<sup>th</sup>. October, 2015 to the ICO' s investigation, provided the figures requested, identified both itself and CCUK as parties whose commercial interests were at stake in the event of disclosure, gave a similar full account of its case as in responding to JE and attached a letter containing CCUK' s response to the request.
9. The DN found that the s.43(2) exemption was engaged. The requested figures related to a commercial contract and the commercial interests of both the Council and CCUK were at stake. The ICO recited the submissions of both bodies as to the likely prejudice to their interests. As to each he concluded that disclosure of the figures requested, together with the financial assumptions underpinning the pricing document annexed to the contract would place it as a disadvantage in future negotiations, whether, in the case of the Council, when seeking best value for taxpayers in pricing future contracts for other advertising and similar activities, or, as to CCUK, in competing with other tenders for bus shelter advertising contracts in what was described as a highly competitive market.
10. He referred to the many other similar requests made to other LAs, some of which had elicited the requested figures, whilst some had been refused. He had received a number of identical complaints, which were under investigation. Each required individual assessment as the length, nature and starting date of contracts varied.
11. The ICO concluded that s.43(2) was engaged. He attached " significant weight" to the fact that the Southampton - CCUK contract had been running for only four years or so, with the result that the pricing figures remained relevant to current

tendering. He did not consider that the requested information, together with the financial arrangements, were likely to have been significantly affected by changes in market conditions. In other cases the contract had been in existence for many years by the date of the request.

12. In applying the public interest test required by FOIA s.2(2)(b), the ICO acknowledged the substantial public interests in disclosure, namely accountability and transparency in matters relating to public funds, promoting public understanding of council finances and promoting competition for public sector contracts. These were, however, outweighed by the probable undermining of the LA' s bargaining position in future negotiations hence its ability to obtain value for money and of the ability of a company, here CCUK, to compete on equal terms with competitors apprised of the price it had paid in this case.

### The Appeal

13. JE appealed to the Tribunal on 6<sup>th</sup>. January, 2016. His grounds were concise: the DN was flawed and its findings inconsistent with other DNs in comparable cases (the references of which he quoted).
14. The ICO' s Response set out the basis of his opposition to this appeal. As to the probability of prejudice to commercial interests, he indicated that he relied on the less stringent test, namely that prejudice would be likely to result from disclosure, which means that there is no more than a real and significant likelihood. Whether prejudice would, in fact, result would depend on the exact circumstances of future negotiations and the nature of future contracts which were not foreseeable at the



date of the request. He cited *R (Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin.)* and *John Connor Press Associates v ICO UKIT EA/2006/0005* in support of those propositions.

15. He further spelt out the disadvantages in future contract negotiations, which, he accepted, would result from disclosure, both for the Council and CCUK. As to the Council, it was exploring opportunities for further contracts selling outdoor advertising space. Disclosure would forearm counterparties with valuable information as to the price that the Council was prepared to accept for a similar contract. He endorsed the claim that market conditions had not significantly changed since the CCUK contract was signed. CCUK would be likely to suffer prejudice in two ways –

(i) Competitors for future LA contracts would hold information as to CCUK' s earlier bid, whilst CCUK had no corresponding information as to any of theirs.

(ii) In a similar fashion it would weaken CCUK' s bargaining position in any future negotiations with potential contract partners.

16. He reiterated the arguments as to the balance of public interests, which he had accepted in the DN.

17. Having said little in his initial Grounds of Appeal, JE submitted what was, in the Tribunal' s opinion, a very telling Reply to those submissions, the thrust of which was further developed in his oral argument at the hearing. The ICO submitted a second brief Response, observing that the Reply contained evidence and argument not before the ICO when the DN was issued and inviting the Tribunal to test them at the hearing. It did.

## The reasons for the Tribunal' s Decision

18. Although the issue was at no stage raised by either party, we state our finding that the information requested was not " environmental information" as defined in any of categories (a) to (f) in Regulation 2 of the EIR but simple factual financial information relating to the Council' s revenues. If the request had fallen within Regulation 2, we should inevitably have reached the same conclusion when applying Regulation 12(5) (commercial confidentiality) and 12(2) (the presumption in favour of disclosure) as in the application of s.43(2) of FOIA.
19. The first significant question is the scope of the disputed request. It seems that the ICO, at least in the DN, treated the request as embracing, not just the bald revenue figures, annual and for the life of the contract, but the " financial assumptions" on which they depend. The Tribunal, fortified by JE' s confirmation of its interpretation, reads it as a simple request for the two figures for the financial benefits to the Council, that is the net profits " annually and over the life of the contract" . Those figures are clearly set out in the letter to the ICO of 19<sup>th</sup> October, 2015. The absence of the factual assumptions could reduce both the commercial sensitivity of the figures and their value to the service of the public interest. Whatever its effect, there is no reason to construe the request more widely.
20. It is plainly right that the ICO should approach each complaint by JE against a refusal from a different LA as a separate matter requiring individual and independent assessment. The facts will vary from case to case. However, if there is no clear material distinction to be drawn between the circumstances of this case and of another or others, then the willingness of another or other LAs to disclose the requested information may have some bearing on the question of likely

prejudice to commercial interests in this case, whether those of the LA or the media owner.(The LA may be expected to consult the media owner in framing its response and to present that party' s objections, if any, to disclosure, as the Council very properly did.) Whether such other responses are relevant to this question on this appeal depends on whether the fact that the Southampton – CCUK contract was concluded only four or so years ago distinguishes it from possible comparators. This was the decisive discriminant relied on in the DN.

21. In his Reply and his oral submissions, JE set out to refute the argument that the age of the contract and the supposedly unchanged market conditions distinguished this case from others in which many LAs freely provided comparable information, as exemplified by letters exhibited by JE.
  
22. He pointed to the significant change in the profitability of bus shelter advertising brought about by the " digital revolution" . He quoted the CEO of CCUK on the dramatic increase in revenue from digital advertising in the past five years. This had begun around the time that the Southampton – CCUK contract came into effect, evidently based on assumptions relating to static advertising. Nationally, digital " Out - of - Home" (OOH) advertising represented 21.6% of all OOH advertising in 2015. This was evidently reflected in a growth in turnover over the period 2010 – 2014 of 18% for CCUK and 30% for Decaux, a rate which easily exceeded those of earlier years and which was expected to rise further in 2015. The continuing opportunities for increased profit, subject to appropriate investment are obvious. They will not be reflected in the income of LAs committed to long – term contracts or those which negotiate contracts in the future unaware of the financial consequences of the development of digital advertising.

23. We have no doubt as to the accuracy and the significance of this carefully researched evidence. The linchpin of the claim that market conditions were unchanged is removed. Market conditions have changed, we find, to a marked degree. The figures for a 2010/2011 contract have very little relevance to negotiations for digital advertising sites in 2016. The response of other LAs is a material consideration when assessing prejudice to the commercial interests at stake here.
24. A second important factor is the limited scope of the financial information sought, as indicated at §19. Disclosure says little or nothing as to how these figures emerged. They were calculated on the basis of the " Pricing Document" (not disclosed to JE) which the Tribunal has seen, as completed by CCUK, in the closed bundle. It contains a series of forecasts by CCUK as to costs and revenues, without which, we conclude, a future competitor to CCUK or a contractor seeking a contract with the Council could gain little advantage over either CCUK or the Council, as the case may be. Arrangements for selling advertising space on bus shelters are complicated by the need to provide both for the revenue derived from the sale of advertising and the costs of physical maintenance of the shelters, together with the provision of further shelters within the contract period. These matters could be dealt with in a single or multiple contracts. Such features make it all the more difficult for a competitor to draw reliable inferences as to the details of pricing from the net figures.
25. Furthermore, we were informed by JE that there are generally only two potential buyers in the market for OOH advertising space, namely CCUK and Decaux. Due to their extensive experience in this form of OOH advertising, they both have major advantages as to pricing information over any potential new player seeking to compete for contracts. Each has a clear picture of the pricing methods of the other. Neither appears anxious to " chase" the contracts of the other. We accept this evidence as more likely than not to be correct.

26. As to the Council, it is currently bound by a long – term contract as regards bus shelter advertising. If it has other space – selling opportunities in the future, it will negotiate, if aware of the changes in market conditions, on the basis that digital advertising has transformed the opportunities for revenue growth since the CCUK contract was signed. It will require a revenue stream that reflects the increase in profitability which digital installations will produce. Any prospective media owner will know that the pricing of a pre – digital contract is past history. That will be the case whether or not the Council offers only a shorter – term contract as urged by the OFT in 2011.
27. As to the possible impact of disclosure on any review provided for in the contract with CCUK, we have not seen the terms of any such provision. Nevertheless, it is hard to see how disclosure of the requested data to the world at large could prejudice either party' s interests since both are fully apprised of the existing pricing arrangements and a review does not involve any third party intervention.
28. We find, therefore, that, applying the test in *Lord*, neither the Council nor CCUK is likely to suffer prejudice to its commercial interests.
29. That finding effectively determines this appeal but it is clearly appropriate to state our conclusions as to the balance of the public interest, so as to assist the ICO if he is minded to test whether that judgment is correct.
30. Any finding on this issue must proceed on the assumption that the s.43(2) exemption is engaged, a proposition which we have rejected. So, for this purpose, we ignore the finding at paragraph 28 and suppose that there is a real likelihood, falling short of more probable than not, that prejudice to the commercial interests of one or both contracting parties could result from disclosure. We acknowledge

an element of artificiality in this approach but do not consider that it invalidates any finding as to where the public interest lies.

31. We find that the public interest in disclosure is very strong and that we are entitled to consider it in the wider context of the collection of information nationwide to assess whether LAs could improve their earnings from this type of contract.
  
32. It is common ground that LAs, faced with a severe cut in support from central government, have an urgent need to exploit to the maximum every commercial opportunity available to them. Put shortly, JE' s case is that they are failing to get value for money in the OOH market, particularly as regards bus shelters, which are an asset common to almost all of them, the need for which is increasing. He had evidence from nearly 50% of the 280+ LAs, which the OFT had canvassed and estimated that they were currently losing out on about £25,000,000 from this source of revenue. We emphasise that we do not rely on that figure as more than a pointer to a substantial scope for increases in revenue. We were, however, impressed with JE' s detailed and sophisticated familiarity with this market.
  
33. JE' s case is that LAs are failing to realize the potential for increasing income from this activity. He produced abundant evidence from their responses, some of which were exhibited, to show a very wide and not clearly explicable divergence in the returns that they have obtained from the two major media owners. Of course, the inquiry could take no account of the unknown terms of the relevant contracts, hence how the net incomes arose. However, that does not alter the importance of the answer to a question directed to " financial benefit" , which must be the net profit to the LA after deduction of its liabilities under the contract. That is the figure that matters to any commercial concern. The comparison between one LA and another will not be statistically perfect but it may well give a general indication of a possible disparity in exploitation of the asset. It has much

more significance when applied to this purpose than for undermining the negotiating position of LA or contractor, as discussed above. Moreover, these figures enable members of the public to make at least a rough assessment of the performance of their own LA in developing this revenue stream.

34. In assessing the public interest, it is not necessary for us to decide whether JE is right in asserting that LAs are missing substantial opportunities to increase commercial income. It suffices that he presents a substantial case to answer, one which merits public exposure and debate.
  
35. There are limits to the precision of the conclusions to be drawn from a comparison of the figures requested in this case, as disclosed by different LAs. Nevertheless, we judge that a wide range of answers from LAs engaged in bus shelter contracts with media owners would provoke a legitimate public debate as to whether and, if so, to what extent LAs were failing to take advantage of the expanding possibilities provided by digital panels. Such a debate has an obvious value to the public interest. We note that neither the Council nor CCUK made any reference to this apparently critical development in their direct or indirect responses to JE' s request until after his Reply. As to the Council, that may indicate a lack of
  
36. awareness of the impact of digital advertising on CCUK' s potential earnings. If it was aware of that impact, some reference to it might have been expected in the context of its assertion that market conditions had not changed since the contract with CCUK was signed. The fact that the contract has 15+ years to run does not affect the importance of such awareness, since, we are told by the Council, there is provision for periodic reviews of the contract. That has no obvious bearing on commercial sensitivity since CCUK know the full pricing details already but should affect the Councils position on a review of the results of the performance of the contract.

37. The public interest in withholding the requested information is closely related to the issue of prejudice to commercial interests. As stated above, we approach an assessment of the public interest in maintaining the exemption on the assumption that the information may be price - sensitive to a degree that merits consideration.
38. It is said that disclosure may impair the Council' s and, in comparable cases, other LAs ability to obtain value for money in future negotiations for similar agreements. If so, that is undoubtedly a matter which affects the public interest. However, the extent to which that might occur seems to the Tribunal far from clear, even on the premise that the exemption is engaged. Much would depend on the similarity and proximity of any negotiations to the signing of the existing agreement.
39. The public interest in CCUK' s ability to compete fairly with Decaux or, less probably, Primesight, depends on the extent to which competition among media companies currently promotes higher revenue streams for LAs. On the evidence before us we are far from sure that there is such competition or that potential competition has that effect. Clearly, the Tribunal does not presume to make an unequivocal finding on the matter on the material available but a significant degree of uncertainty weakens the public interest argument for withholding the information.
40. The Tribunal finds that, if the competing public interests require to be considered, the interest in disclosure easily outweighs the interest in maintaining the exemption.
41. For these reasons we allow this appeal.
42. This is a unanimous decision.



43. We wish to record the Tribunal' s appreciation of the very full and helpful responses given by the Council, both to JE and to the ICO. Those responsible evidently gave very careful and painstaking thought to the handling of this request.

David Farrer Q.C.

Tribunal Judge

12th. April, 2016

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