



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0129

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50657134

Dated: 01 June 2017

Date of Hearing: 08 May 2018 at Birmingham Civil Justice Centre

Before

JUDGE ROBERT GOOD

TRIBUNAL MEMBERS

MR NARENDRA MAKNJI AND MRS JEAN NELSON

Between

ANDREW KERR

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

MINISTRY OF DEFENCE

Second Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA) - Section 43(2) (Commercial Interests)

Representation: For the Appellant: Elizabeth Kelsey (Counsel)

For the Second Respondent: Andrew Deakin (Counsel)

CORRECTED DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. The appellant, Mr Andrew Kerr, is a Director of Englands Safety Ltd. He requested information concerning a procurement conducted by the Ministry of Defence (MoD) for a contract for the manufacture and supply of body armour (SSP/00135).
2. On 7 July 2016 Mr Kerr made a request for information concerning the procurement process. This was not specifically identified as a request under FOIA, but was treated as such by the MoD. The request could have been dealt with under the Defence and Security Public Contracts Regulations 2011 (DSPCR). The procurement was conducted under these Regulations.
3. The MoD refused the request, relying on S.43(2) FOIA, on the grounds that the information requested was commercially sensitive. Following an unsuccessful review Mr Kerr applied to the Information Commissioner. She investigated and decided on 1 June 2017 that the information requested was exempt from disclosure because it was commercially sensitive.
4. In his appeal, Mr Kerr states (p18) that European Law requirements, including the Veloss decision, established that Mr Kerr was entitled to this information even during the currency of the selection process and that the Information Commissioner had failed to apply the 'public interest' test correctly.

5. The MoD was joined in the appeal as the second Respondent. The Information Commissioner had indicated that no-one representing the Commissioner would be attending the hearing. The appeal was first listed in January but had to be adjourned. It was agreed that this appeal and two other appeals (EA/2017/0246 and EA/2017/0247) would be heard together on 8 and 9 May 2018. The MoD is not a party to appeal EA/2017/0247.
6. This appeal was heard first and was concluded on 8 May 2018. The decision was reserved. Appeal EA/2017/0246 was withdrawn on 5 May 2018 and EA/2017/0247 was heard on 9 May 2018.

Preliminary and Procedural Issues

7. It was agreed that the appeal papers consisted of an Open Bundle (Pages 1-513), a Closed (1) Bundle, (documents which can be disclosed to Mr Kerr but not to the public in general), a Closed (2) Bundle – (documents which can only be disclosed to the Tribunal, the Information Commissioner and the MoD). In addition, there is a submission by Mr Kerr, included in the open documents and a witness statement with exhibits which was all placed with the Closed (1) bundle.
8. The need for different categories of closed documents has arisen because Mr Kerr, as a bidder in the procurement, was provided with documents which were not available to the public at large. The Tribunal was unable to discern from Mr Kerr's statement and exhibits, which should be placed in the Open part and which in Closed (1). Accordingly, a decision was made to place the statement in its entirety in Closed (1).
9. There was an application from Ms Kelsey to place Mr Kerr's statement in the Open part. There was an application from Mr Deakin that the unredacted

version of Mr Kerr's statement should be within 'Closed 1'. In addition, he applied to strike out four paragraphs of this statement.

10. The Tribunal decided none of the paragraphs of Mr Kerr's statement should be struck out. The application was based on the argument that the four paragraphs were irrelevant, contained hearsay opinion, were wrong in law and in one paragraph stated unfair criticism of an individual. The Tribunal gives appropriate weight to evidence and submissions can deal with these issues. The information has been disclosed. It remains in the 'Closed 1' bundle. The statement is a mixture of evidence and submission but this is not sufficient reason to strike out these paragraphs.

11. It was agreed, in order for the hearing to proceed, that the Tribunal would conduct the hearing excluding members of the public. This was agreed on the basis that in fact the only attenders were the parties, witnesses from the MoD and observers from the MoD. It was agreed that, in the event of anyone attending the hearing, proceedings would cease and this issue would then have to be resolved before the hearing could continue. This way of proceeding would enable Mr Kerr's statement to be considered without the necessity of a decision as to whether all or parts needed to be within 'Closed 1'.

12. It was also agreed that Counsel would inform the Tribunal which parts of the statement and exhibits should be open and which parts should be in 'Closed 1'. It was agreed that this information could be given to the Tribunal after the hearing had concluded. In the event, no member of public attended.

13. There was a 'Closed 2' hearing, when Mr Kerr and his legal team were excluded. The report back from that hearing was that: there was no previous iteration of the tender specification in the 'Closed 2' bundle; there is no technical advice in the 'Closed 2' bundle; the 'Closed 2' bundle contains minutes, markings and pricings. The Tribunal considered Ms Kelsey's request

that the documents in the 'Closed 2' bundle be disaggregated and elements within these documents could be separated and made available to Mr Kerr. The Tribunal decided that this was not a practical option given the nature of the information contained.

14. Some concern had previously been raised about duplication, but it was agreed that the appeal should proceed with the documents as set out above.

15. Mr Deakin made an application to rely on S.26 FOIA as an additional ground, with an additional statement. This was opposed by Ms Kelsey on the grounds that this application has been made too late, that the Appellant is unable to deal with these arguments at this hearing.

16. The application is very late and Ms Kelsey's submission has considerable merit. It is not clear why it has not been raised earlier given the significance of a S.26 exemption but because of that significance the Tribunal is reluctant to refuse permission even at this late stage. It was agreed that this hearing would proceed excluding S.26 arguments, but with the agreement that if the Tribunal was minded to order disclosure under S.43(2), it would hold a further hearing to consider S.26.

17. Ms Kelsey submitted a written skeleton argument and a copy of the First-tier Tribunal decision EA/2005/0005.

18. In the appeal papers there is reference to an exemption under S.44. This procurement was conducted under DSPCR. Regulation 10 is set out a paragraph 32 of the Information Commissioner's response (p32). In that response it is suggested that S.44 is a potential additional exemption. This has not been pursued and the Tribunal decided to consider only S.43(2) exemption.

19. The same response also raises the concerns expressed by Mr Kerr that the tender process was conducted in an unfair manner. The response states that such concerns would need to be raised under the DSPCR in other proceedings, but makes the observation that these considerations may be relevant in any public interest balancing exercise conducted by the Tribunal. The response suggests that these concerns should be rejected as a preliminary issue.

20. The Tribunal's view was that the hearing should proceed, without considering this preliminary issue, which might have had the effect of limiting the evidence at the substantive hearing. The Tribunal considered that it was preferable for it to consider all the evidence and submissions and then attribute appropriate weight to that evidence.

21. The scope of the appeal is limited to withheld information. In its initial response, the MoD stated that it held some of the information requested. This statement was elaborated on in their response to the Information Commissioner dated 17/02/2017 where the MoD stated "The thickness of the plates was never measured because it was not a requirement of the competition and this information is not held by the MoD" (p76). This issue of information not held is not part of the appeal and has not been considered by the Tribunal.

22. The Tribunal also observed that the initial request was not made under FOIA. The DSPCR have provisions for the disclosure of information. The request would have been refused under these Regulations because the procurement process was still ongoing at the date of request. The contract was awarded on 14 December 2016. However, the MoD decided to treat Mr Kerr's request as being made under FOIA and refused it under S.43(2).

23. Mr Kerr gave evidence. Anna-Marie Barrow and Richard Marwood gave evidence on behalf of the MoD.

Request, decision notice and appeal

24. On 7 July 2016 Mr Kerr made a request for information in the following terms:

“May I request to be supplied with the marking for the down selection of all competitors together with costing? May I also be supplied with the thickness of each competitor’s plate for each level.”

25. In reply the MoD, on 9 August 2016, said that it held some of the information but considered that information to be exempt from disclosure under S.43(2). The MoD maintained this position in an internal review.

26. Mr Kerr applied to the Information Commissioner on 25 November 2016 under S.50 FOIA, who then conducted an investigation.

27. The Information Commissioner issued her decision on 1 June 2017. In relation to the scope of the case, she set out that information about the thickness of plate was not held and that her decision considered the circumstances at the date of request for this information.

28. The Commissioner decided that the withheld information was subject to the exemption on the grounds of commercial interests in part relying on the fact that the tender process was still underway and that the companies concerned has all stated that they regarded the disclosure of the information contained in their respective tenders would prejudice their commercial interests. These comments are set out at p.76.

29. The Commissioner’s view was that this information came within the scope of S.43(2) and that the disclosure of the information would provide a company’s

competitors with an unfair advantage, and in addition would have an adverse impact on the commercial interests of the MoD (p7), and that there was more than a hypothetical risk of prejudice occurring.

30. In terms of the public interest test, the Commissioner accepts that there is a “weighty public interest in the MoD being transparent about decisions upon which contracts are awarded” (p9). However, she concluded this is outweighed by the public interest in preventing companies’ commercial interests from being harmed by submitting bids for public sector contracts. She also found there was a very strong public interest in “ensuring that the government’s own commercial interests are not undermined”(p10). A relevant factor in this exercise was that the tender process was still ongoing at the relevant time.

31. Mr Kerr appealed to the Tribunal on 26 June 2017. In his grounds of appeal he states that case T-667/11 Veloss International SV v European Parliament (‘Veloss’) was binding on the Commissioner and that required disclosure of the price information. In addition he stated that the MoD were in breach of Article 55 European Union (Award of Public Authority Contracts) Regulations 2016 and other European Union legislation requiring good administration and the provision of reasons for a decision.

32. Mr Kerr also argued that the Commissioner was wrong in the exercise of the Public Interest Test.

Reasons and Conclusions

33. Mr Kerr, in his correspondence and evidence, expresses his strong belief that his company’s product is superior to that of his competitors and that the product has been unfairly marked down. Part of this belief comes from past

experiences. These are not relevant to this request but are relevant, in part, to the reasons why Mr Kerr holds such strong beliefs.

34. His concerns go wider. In particular, he believes that as part of the tendering process the existence of a crack detection system should have been a relevant factor and that a product's failure at testing should preclude further involvement of that company's product.

35. The Tribunal is in no position to comment on this. The issue in this hearing concerns only the proper application of S43(2). This is a qualified exemption so the Tribunal also considers the public interest test.

36. Mr Kerr sought the information because of his views about the procurement process. The DSPCR provides both a process of disclosure and challenge. Mr Kerr sought information in order to gather evidence so he could make a challenge in High Court under DSPCR. The Tribunal is limited to considering the FOIA.

37. Mr Kerr's company is one of those tendering under this procurement. His evidence was that the information sought would not provide any commercial advantage to competitors or prejudice their commercial interests. He also clarified that his request for the marking down included the notes and background material to this exercise. Mr Kerr stated that most companies provide information on dimension and weight of the body armour but not price.

38. The evidence from Ms Barrow and Mr Marwood is that this specialist area is very competitive, that the MoD is only one of a number of potential purchasers of these products. Neither Ms Barrow nor Mr Marwood are technical experts in this area and Ms Barrow accepted that her example of the ability to deduce information from disclosures was an illustrative, hypothetical example (p502).

Their view, from their own experience of procurement was that disclosure during the tender process would prejudice the commercial interests of the participants. This, in their view, was supported by the actual views expressed by the participants.

39. Their evidence was also that, in relation to this type of procurement, the commercial interests of the MoD would also be prejudiced because disclosure would damage the reputation of the MoD built up over time and would make bidders reluctant to tender or reveal the level of information they were currently willing to share because of the MoD's reputation for the handling of commercially sensitive information.
40. Ms Kelsey submitted that the value of Ms Barrow and Mr Marwood's evidence was limited because neither was an expert in this area were therefore not in a position to say that disclosure of this information would pose a real and significant risk of prejudice to the companies involved in the procurement exercise.
41. The Tribunal has to consider the particular information sought. This is "the marking for the down selection of all competitors together with costing". This includes the notes relating to the conclusions of the markings for the down selection. The Tribunal also has to consider the market and the product and the timing of the request.
42. The Tribunal accepts that the market for body armour is competitive and that the MoD is only one of a significant number of purchasers. Although, the companies involved were not asked to specify in what way they regarded the tender information as commercially sensitive it is clear that all the companies involved had this view.

43. It was submitted that once the tender had been submitted then, because it could not be changed, disclosure of information would not prejudice their commercial interests. This does not take into account, the need to re-run parts of the tender process as happened in this procurement.
44. The Tribunal accepted that the disclosure of this information during the process would reveal the decision making process and approach of the MoD and would prejudice its commercial interests in its ability to obtain the best contract. It would also undermine trust in the MoD.
45. This is not a hypothetical or fanciful risk of prejudice but a substantial, real and likely risk given the nature of the industry and the fact that the procurement process was ongoing.
46. It is the case that companies tendering for business with the MoD are aware that DSPCR applies and that regime does require information to be given to unsuccessful bidders about the successful bid. However, this is only after the process has completed and it is disclosure to the relevant company not the world at large as is the case with FOIA.
47. The Tribunal did not accept the direct application of the 'Velos' case and the other European legislation referred to by Mr Kerr in his appeal under FOIA. As the Information Commissioner states, these refer to a different regime and the Tribunal is concerned with the correct application of S.43(2) and the public interest test under S. 2(2)(b).
48. Ms Kelsey in her submission argues that the 'Velos' established that pricing information is necessary to enable an unsuccessful tender to understand the procurement decision. This argument does not add anything. DSPCR provides for disclosure after the procurement process is complete and this is in line with the 'Velos' decision. The contract was issued on 14 December 2016

and the Tribunal is concerned with disclosure of information during the currency of the procurement process.

49. The Tribunal is satisfied that the exemption under S.43(2) is established. This is, however, a qualified exemption and the public interest test under S.2(2)(b) has to be considered.
50. The Information Commissioner sets out the public interest in disclosure. There is a public interest in transparency in the awarding of contracts involving public servants and public money, that effective armour is purchased with a contract achieving best value.
51. The issue is whether this interest is outweighed by the public interest in maintaining the exemption. There is a public interest in having a fair competition. This could be prejudiced by the release of information during the process which could affect that process.
52. There is also a public interest in ensuring that the MoD's reputation is such that it is able to achieve successful and effective procurement so the best possible equipment is submitted for evaluation. This process could be prejudiced by manufacturers and suppliers being discouraged from applying because they do not trust the confidentiality of the process.
53. There is a regulatory scheme governing the procurement process which includes the process of disclosure of information. The scheme also provides a mechanism for challenging decisions. There is a public interest in maintaining that system and not undermining it. The Tribunal's view is that the public interest, as outlined above, in maintaining the exemption outweighs the public interest in disclosure.

54. The Tribunal accepts the Information Commissioner's opinion that disclosure is exempt under S.43(2) FOIA. The Tribunal unanimously upholds the Commissioner's decision and dismisses the appeal.

Signed

R Good

Judge of the First-tier Tribunal

Date: 10 May 2018