First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0244

Heard at Fleetbank House, London on 8 March 2018

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Marion Saunders
Mr Mike Jones

Between

Burton Joyce Parish Council

Appellant

And

The Information Commissioner

Respondent

The Appellant's case was presented by Mr Steve Cluff

The Information Commissioner was represented by Michael Armitage of Counsel

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against the Commissioner's decision notice dated 8 August 2017 in which she held that the exemption in section 43 FOIA (which relates to prejudice to commercial interests) could not be relied upon by Burton Joyce Parish Council (the Appellant), in its response to a request for information from a Mr Tony Madge concerning a 3G artificial pitch at the Poplars Sports Ground in the Appellant's area, owned and managed by the Appellant. The Commissioner required the Appellant to disclose the information to Mr Madge (the complainant), and the Appellant appealed that decision.

PRELIMINARY MATTERS

2. Although the Appellant's appeal notice referred to both the exception in s43(1) and (2) FOIA, at the hearing, Mr Cluff, representing the Appellant accepted that s43(1) FOIA (which relates to trade secrets) was not applicable and we need only consider the exemption referred to in s43(2) FOIA. We are of the view that the Appellant was correct to make that concession.

3. In addition, and as pointed out by the Commissioner, some of the information that the Appellant seeks to withhold has already been disclosed in the open documents. Thus, projected income and costs figures relating to the proposed development of the Poplars 3G pitch can be seen at O/2/96 in the open bundle have been disclosed. The Appellant confirmed that it no longer sought to withhold this information.

4. The Appellant has also sought to withhold all of a Partnership and Service Level Agreement (the Agreement) between the Appellant and a local football club, Burton Joyce FC (the Club), and the disclosure or otherwise of that document is also considered in this decision.

BACKGROUND AND DECISION MAKING PROCESS

5. On 29 April 2016 the complainant made a request for information from the Appellant. The request was as follows:-

To support our consideration of the BJPC decisions on the development of the Poplars and access to facilities we would be grateful if you could provide the following information:-

1. *The business case for the 3G pitch and the application made to the Football Foundation*
2. *The basic and enhanced proposals presented to BJPC (referred to in the minutes)*
3. *The non-recurrent and recurrent benefits for the 3G pitch development for 14/15, 15/16 and 16/17 this ought to be in the business case or the proposals submitted to BJPC together with details of costs pressures (n/r and r) that have resulted from the fencing of the Poplars.*
4. *Details of Phases 2 and 3 of the development of sporting facilities in Burton Joyce*
5. *A copy of the Partnership Agreement between BJPC and BJJFC referred to in minutes) and other clubs.*

6. The Appellant responded on 8 June 2016 providing some information but withholding the remainder on the basis that it was commercially sensitive. Following an internal review the Appellant upheld its original decision, on 17 October 2016, stating that the exemption in s43 FOIA was relied upon.

7. The complainant made a complaint to the Commissioner on 15 December 2016 expressing concern about the Appellant's decision to redact financial information from the business plan (namely predicted and estimated income expenditure from the 3G pitch between 2014 and 2020) and to withhold the Agreement between the Appellant and the Club.

8. The Appellant's case against disclosure as recorded in the Commissioner's Decision Notice (DN) can be summarised as follows:-

   (a) The Appellant would be seriously affected by disclosure of the information, as would the residents, sports users and the Club. Disclosure would have a prejudicial effect on the operations of the Poplars facility.

   (b) More specifically, disclosure would be prejudicial due to commercial competition within the locality, as there are two other 3G pitches within 1.5 miles of the Poplars, and a larger scale facility, ten minutes drive away.

(c) These competitors would benefit from an itemised list of customers, prices charged to them and frequency of use. Customers could be enticed away and the Appellant, as a small parish council, is especially concerned about losing the business of the Club which accounts for 75% of the income.

(d) The withheld information contains variable rates charged to different customers for different slots, although the Appellant accepted that there is information concerning booking rates and terms in the minutes of the relevant Poplars Sports Grounds committee for October, November and December 2015.

(e) The Appellant said it had disclosed the end totals within the projected income and costs tables in the business case, together with the headings which indicate that the withheld information consists of club and team numbers, pitch costs and number of weeks.

(f) The Appellant claimed that the risk of losing business to a competitor was high, and the risk to the viability of the original supplier was severe, and that there was no lawful right to see the information.

(g) All this leads to a prejudicial effect on the operations of the Poplars to the significant detriment of the Appellant and the village as whole.

(h) The information is also enclosed in the Agreement with BJFC and so the same arguments apply to this information.

(i) The Appellant confirmed that the Club also objected to disclosure, which the Club thinks would be a breach of confidence, would affect the viability of the Poplars and lead to increased competition from other clubs for the use of the facilities. Other (non-football) clubs consulted by the Appellant also objected to disclosure.

9. The Commissioner's reasoning in the Decision Notice (DN) dated 8 August 2017 in which she directed disclosure of the redacted information is as follows:-

(a) The degree of information already available from disclosed and existing sources weakens the argument that disclosure would prejudice the Appellant's commercial interests.

(b) It was the Club that initially approached the Appellant with the plan to extend the Poplars, and also undertook to move up from FA Chartered Standard Status to FA Community Standard Status to enhance the application for funding, and this showed the level of commitment of the Club to the Poplars and the 3G pitch, and made it unlikely that the Club would be enticed away by competitors.

(c) In addition the business plan made it clear that the Club's use of the facilities is based on much more than the charges for pitch hire (eg the year round accessibility of the Poplars facilities, which are superior to other venues in the vicinity).

(d) Indeed, the chairman of the Club has said he is concerned about other clubs offering more to use the facilities, and it is clear that the Club has no intention of going elsewhere.

(e) Therefore, the Commissioner did not accept that disclosure of the information would prejudice the commercial interests of the Applicant, and therefore the section 43 FOIA is not engaged with respect to the Appellant's own interests.

(f) The Commissioner was also of the view that the closeness of the relationship between the Appellant and the Club meant that the Appellant was unlikely to renege on its agreement with the Club and therefore it was not likely that disclosure of the information would cause prejudice to the commercial interests of the Club.

10. On that basis the Commissioner required the Appellant to disclose the withheld information to the complainant.

11. The Appellant filed an appeal on 19 October 2017.

12. The grounds of appeal essentially disputed the Commissioner's conclusion that the disclosure of the information would not enable other providers to entice the Club away from the Poplars 3G pitch. It was disputed that the Club made up 75% (it is said to be closer to 44%) of the business at the pitch, and even if that were the case then disclosure would still mean providing details of the other 25% of the business to third parties, and this business was especially important in the summer. The decision of the Commissioner was

said to be a 'poacher's charter' that would mean the Appellant would be unable to refuse disclosure to competitors in the future, which would lead to a move of business elsewhere to other pitches against the best interests of local residents, and so the public interest test had also been wrongly applied. It was queried whether the Appellant was required to disclose details of agreements with other clubs.

13. The response of the Commissioner is dated 11 December 2017. The response said that, upon reflection, the Commissioner also required the Appellant to provider a copy of the Partnership Agreement with the Club, as this had not been covered in the DN, and had not been provided to the Commissioner as part of the investigation (even though it formed part of the request from the complainant).

14. The other points made by the Commissioner were:-

(a) The Appellant itself had described the withheld information as 'best guesses and reasonable estimates' in correspondence with the Commissioner and it was hard to see how such figures could assist competitors to entice BJFC away, and therefore the DN did not comprise a poacher's charter.

(b) The Appellant had not addressed the fact that much of the information was publicly available in minutes of meetings.

(c) It was the Appellant which had said in correspondence with the Commissioner on 9 May 2017 that 'our main customer [would be] enticed to move away (accounting for nearly 75%...of our Poplars income [)]'. The rival figure of 44% related to a projection for 2019 and the Commissioner was required to look at the question of prejudice at time of the request.

(d) The exact proportion of the business was not material to the Commissioner's decision in any event, which was based on a lack of evidence that the Club would be enticed away as a result of disclosure.

(e) In relation to the absence of prejudice to the Club, the main point was that there was no reason to think that the Appellant would renege on the agreement with the Club, and in any event the disclosure of the information would not make a difference if the Appellant wanted to approach another club who might pay a higher price.

(f) The Commissioner had not applied the public interest test because she had concluded that the exemption in s43(2) FOIA was not engaged, but if the public interest test needed to be applied then the fact that the information is mostly available elsewhere and only comprises predictions in any event, would be important matters to place in the balance.

(g) As it was only the Club with which the Appellant has a Partnership Agreement, then the contractual arrangements with other clubs were not relevant to the request.

15. Both parties addressed the issue of the Agreement in (open) skeleton arguments for the hearing. The Appellant said that the Agreement contained details of preferential terms available to the Club, which would be divisive and detrimental if disclosed; and details of a generous donation made by the Club, which would lead to negative consequences for the Appellant and the Club if they were disclosed (although what these might be was not set out).

16. In her skeleton argument the Commissioner expressed her view that the whole of the Agreement should be disclosed without prejudicing the commercial interests of the Appellant or the Club, as it was a three page document which is largely pitched at a high level of generality.

WITNESS EVIDENCE

17. Mr Cluff made a witness statement in this appeal (as well as presenting the appeal on behalf of the Appellant). He was Chairman and councillor of the Appellant council until his retirement on 9 January 2017, and had been Chair of the Poplars Sports Committee. He explained that since 1997 the Appellant council had owned and operated the Poplar Sports Ground. He was responsible for developing the plan to add the 3G pitch to the Poplars, and was the author of the business plan which was subject of the FOI request in this case.

18. The first main point Mr Cluff makes in his witness statement is that the redacted information gives details of potential users, rates and volumes which, together with the Club's usage and rates, the Appellant wishes to protect. He fears that if this information is disclosed now, then there will be no defence to disclosing 'every following year's customer base' and that this is a poacher's

charter. Loss of business could lead to failing to meet the Football Foundation criteria and thus the Commissioner's decision 'could put the whole venture at risk'.

19. Mr Cluff's other main point is that the Commissioner has overemphasised the relationship between the Appellant and the Club. Although the relationship is currently good, both he and the current Chairman of the Club, Mr Towers, are about to step down, and the good relationship cannot be guaranteed for the future. Mr Cluff raises the possibility, at some point in the future, either that the Club could be outbid for the slots it has at the Poplars in the future, or that the Club could be enticed away to another 3G pitch that is being constructed nearby. In addition, the Club has preferential rates which other users might resent if they are disclosed. Discount rates are occasionally offered to others.

20. Mr Cluff says that the withheld Agreement contains preferential rates for the Club which both parties want to keep private, as publication could be 'divisive and detrimental to other users'.

21. In his oral evidence, Mr Cluff emphasised, in particular, his fears for the future if this particular disclosure is made. Mr Cluff was taken to various minutes of meetings which are publicly available, and which occurred before the request for disclosure was made, including the following:-

    (a) Minutes of the Poplar Sports Ground Committee on 13 October 2015 (chaired by Mr Cluff) which set out the promotional fees for the 3G pitch and set out the recommended offer to be made to the Club in comparison with other users.

    (b) Minutes of the same committee dated 24 November 2015, again chaired by Mr Cluff, where the Club's 'exclusive' arrangement was set out, and the 'published rates for the public' were also detailed.

    (c) Minutes of the same committee dated 9 February 2016, again chaired by Mr Cluff, where further rates for a number of identified users were set out.

22. Mr Cluff accepted that this information was available and suggested that it had been naïve to include it in public minutes, and that this was something which would not happen now.

23. In relation to the Agreement, Mr Cluff described it as an agreement which was not legally binding and which did not contain any mention of particular levels of fees. He said there was no other agreement between the Club and the Appellant and the main reason for not disclosing the document was that the Club did not want it to be disclosed, and the Appellant did not want to cause upset with the Club.

24. Mr Towers also made a statement for the appeal. He is concerned that disclosure of the pricing structure in relation to the Club will encourage other clubs to offer more money than the Club pays, but possibly less than they would otherwise have to pay, leading to loss for both the Club and the Appellant. Release of pricing information would also damage the relationship between the Club and the Appellant. The Agreement also contains commercially sensitive information. He indicated that the Club could consider moving in the future if there was a suitable facility that better met the needs of the Club.

25. In oral evidence Mr Towers was concerned about damage to the relationship between the Club and the Appellant if the Agreement is disclosed. He also said that the Agreement was not legally binding. He confirmed that at the time of the request there were no equivalent facilities that would have met the Club's needs, and the Club likes the Poplars and had invested time and money in developing it. The Club had concerns about other users offering to pay more if the rates paid by the Club were known.

26. The bundle included statements from witnesses who did not attend. Mr Dunning from the Football Foundation who had provided a grant to the Appellant. He said he thought it sensible and reasonable that negotiated prices should remain confidential. It is not clear if he was aware that a lot of the information had been disclosed already. He states that it is his understanding that if the Appellant complies with this request, then it would be under a duty to comply with all further requests. We explain why this is not the position later in this judgment.

27. Mr List, who is the grounds and amenities manager for the Appellant has provided a statement in which he says he handles the bookings for the Poplars. He says that the Agreement sets (amongst other things) rates that give preference to the Club, whereas in fact no rates are set out in the Agreement. He also suggests that the relationship with the Club would be damaged if it knew that the Appellant was charging less to fill some slots than the Club was

being charged. Neither Mr Cluff nor Mr Towers gave evidence that supported this.

LEGAL FRAMEWORK

28. As stated above, the relevant exemption relied on by the Appellant is in section 43 FOIA which, materially, reads as follows:-

> **43.— Commercial interests.**
> (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).

29. As mentioned at the start of this judgment, the Appellant no longer relies on s43 FOIA, and so s43(2) FOIA is the only relevant exemption to consider. In relation to the test for prejudice in s43(2) FOIA, in *Hogan v Information Commissioner* (EA/2005/0026, 17 October 2006) it was stated as follows:-

> 28. The application of the 'prejudice' test should be considered as involving a number of steps.
>
> 29 First, there is a need to identify the applicable interest(s) within the relevant exemption…
>
> 30 Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a *de minimis* threshold which must be met. ..
>
> 31 When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use.
>
> 32…

33 …

34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), where a comparable approach was taken to the construction of similar words in Data Protection Act 1998. Mr. Justice Munby stated that 'likely': "*connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.*"

35 On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests (considered later in this decision). In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.

DISCUSSION AND DECISION

30. In essence, the assessment we have to make in this case is whether the disclosure of the financial information redacted and/or the Agreement gives rise to a real and significant risk (as defined in *Hogan* and other cases) of prejudice to the commercial interests of the Appellant and/or the Club.

31. In relation to the financial information, it seems to us that there is no such real and significant risk of prejudice, for the following reasons.

32. First, it needs to be remembered that the Tribunal is considering the effect of disclosure specifically sought at the date of the request, 29 April 2016. Neither the Commissioner nor the Tribunal is considering what would be the effect of disclosure today, and neither the Commissioner nor the Tribunal can consider whether any request for disclosure in the future is likely to be successful or not. This latter point appeared to be a major concern of the Appellant, who described the Commissioner's decision as a 'poacher's charter' on a number of

occasions. We are anxious to be clear that any request for disclosure in the future will have to considered in the light of all the circumstances at the time (which may well be different), and the decision on this appeal does not create a precedent which means that the Appellant will automatically be compelled to disclose information in the future.

33. Second, an important factor in our judgment is the fact that the majority of the information has been disclosed already in publicly available minutes as described above and accepted by Mr Cluff. This makes it clear that preferential rates are to be given to the Club, sets out the details, and also sets out the rates to be charged to other users. Mr Cluff made it clear that he did not think the information should have been published, and would not be in the future, but he was the chair of these meetings, and the fact is that the information was made available even before this request for information was made.

34. Third, in the light of this, especially, there was an air of unreality about the evidence of both Mr Cluff and Mr Tower. It seems clear to us that the relationship between the Appellant and the Club is a good one which both parties want to continue, and that was the position in April 2016 as well. Whether there is disclosure of the income projection figures or not, both parties have invested a lot of time and money in the relationship and the evidence of both Mr Cluff and Mr Tower is that they want it to continue. It seems to us that this is the case whether the level of business provided by the Club is 75% or 44%.

35. Fourth, there was no other facility in April 2016 that could have provided for the Club's needs, and there is still not (although there may be one in the future). There is no evidence that other clubs were interested in outbidding the Club for preferential use in April 2016 or since despite the availability of the financial information in the minutes. We cannot see how a breakdown of trust between the Club and the Appellant can come about through disclosure of information which is legally required to be disclosed.

36. Fifth, in any event, as Mr Cluff made clear in correspondence to the Commissioner, the disclosure sought amounts to projections and best guesses. As the Commissioner submitted, it is hard to see how the disclosure of projections for the period 2015-2020 in April 2016 could have provided any hypothetical competitor with crucial information with which to prejudice the commercial interests of either the Club or the Appellant.

37. Finally, we take into account the fact that any competitor seeking to entice the non- Club business from the Poplars would only have to undertake very basic research (by asking users for example) to find out who was using the Poplars at what time and how much they were paying.

38. In relation to the Agreement we accept the submission of the Commissioner that this is a three-page document which contains material at a high level of generality. It does contain information that makes it clear that the Club will get some preferential treatment but this information was available from the minutes in any event. We are not of the view that disclosure would harm the commercial interests of the Appellant or the Club, and the fact that the Club would prefer there not to be disclosure is not enough to bring the issue within the scope of the exemption.

39. For all these reasons, we find that although the information sought relates to the commercial interests of the Appellant and the Club, the evidence falls a long way short of establishing that there is a real and significant risk of prejudice to the commercial interests of the Appellant or the Club.

40. It is clear that both Mr Cluff and Mr Towers have worked hard and successfully to transform the Poplars from a facility which was a drain on the coffers of the parish council into a top-rate facility for the community which at least covers its costs. We understand why they are cautious about disclosing information, but unless the exemptions under FOIA are made out, then the law requires the withheld information to be made available.

Public interest

41. In the light of those findings we do not need to continue to consider the application of the public interest test.

42. However, if we had concluded that there was a real and significant risk of prejudice we would take into account the following which would have pointed very firmly towards disclosure in the public interest:-

    (a) That the prejudice would have been of a very low level given the nature of the information sought and the fact that there had been previous publication of most of it;
    (b) The public interest in the public being aware of the financial dealings of the Appellant and any potential risks to the public purse if, for example, the predictions and estimates proved to be mistaken.

43. For the reasons stated this appeal is dismissed and we direct that disclosure of the withheld material is made to the complainant.

44. Our decision is unanimous

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 April 2018.

Promulgated: 30 April 2018.