



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

**Appeal Reference: EA/2018/0029
EA/2018/0042**

Heard at Fleetbank House, London on 13 September 2018

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Dr Malcolm Clarke
Mr David Wilkinson

Between

University of Bedfordshire

Appellant

And

The Information Commissioner

Respondent

The Appellant was represented by Mr Dolan

The Information Commissioner was not represented

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against two Commissioner's decision notices dated 23 January 2018 (the first DN) and 14 February 2018 (the second DN) in which she held that the exemption in section 43 FOIA (which relates to prejudice to commercial interests) could not be relied upon by the University of Bedfordshire (the Appellant), in its response to requests for information from a Mr Alan Kittle (the complainant) about future tendering of photography at graduation ceremonies and the tendering of other services by the Appellant. In addition, in the first DN the Commissioner found that the exemption in s22(1) FOIA could not be relied upon by the Appellant in the photography case.

BACKGROUND AND DECISION MAKING PROCESS

2. On 20 October 2017 the complainant made a request for information from the Appellant. The request was as follows:-
 1. Does your university use a private company to take photographs at Graduation Ceremonies and or university events? We only require a yes or no response. We are not looking for the name of the company or any commercially sensitive information.
 2. If so, can you please advise when the current contract will expire?
 3. Can you please advise when you expect to re-tender the contract?
3. On 13 October 2017 the complainant also made a request for information from the Appellant. The request was as follows:-
 - Part 1**
 1. Does your university currently use a private company to undertake any of the following services:

- Public Relations
- Social Media Communications
- Internal Stakeholder Communications.

2. If yes, can you please confirm:

- The services contracted out
- When the current contract was last let
- When the contract expires
- Whether the current contract has options to extend its length
- When you expect to retender the contract,

3. If no (to question 1 above), are you considering letting such a contract in the future and if so, do you have an approximate timetable for engaging the market.

Part 2

4. Have you used a private company to help you with any other marketing or public information campaigns in the past 2 years.

5. If so could you please provide a brief overview of what those campaigns were about and approximately how long your contact with the company was for to support the campaign(s)?

4. In relation to both requests the Appellant refused to provide the information, relying upon s43(2) FOIA (other than to reply in the affirmative to the first part of the 20 October 2017 request). In relation to the 20 October 2017 request, the Appellant also relied upon s22(1) FOIA.

5. Following an internal review in both cases the Appellant upheld its original decisions. The complainant complained to the Commissioner in both cases expressing concern at the Appellant's decision to rely on s43(2) FOIA and s22(1) FOIA.

6. The Appellant's case against disclosure as recorded in the first DN and the second DN can be summarised as follows:-

- (a) The Appellant is concerned that disclosing the requested information would not be treating potential tenderers equally as it is required to do when applying procurement and public contracts legislation and principles;
- (b) Providing the complainant with the requested information would give him an unfair advantage and therefore disclosure would be likely to prejudice the Appellant's commercial interests and those of other potential bidders;
- (c) Early notice of a potential tender would be contrary to procurement legislation where a Prior Information Notice should be issued to give all parties an equal chance of preparing for a bid. The complainant would have additional time to prepare a bid. Publication to the world would also be outwith procurement legislation;
- (d) It is understood that the complainant is a firm of professional bid consultants and tender writers, and this information had been taken into account by the Appellant in deciding to withhold the information.

7. The Commissioner's reasoning in the first DN (and then adopted in second DN) in which she rejected the Appellant's arguments can be summarised as follows:-

- (a) The information request should be considered as applicant blind, and the issue should be whether the information can be disclosed to the world at large;
- (b) Disclosure would not be likely to prejudice the commercial interest of the Appellant or other contractors who may want to bid for

future tenders. The date when a current contract expires and is likely to be re-tendered simply enables those who have that date to schedule in to a work diary these potential timings, and to look out for the Prior Information Notice when it is issued.

(c) Disclosure would not give anybody any prior knowledge of the of what the tender would be or what it is likely to contain, such that they would be able to prepare a bid on advance.

(d) It is noted that other public authorities have provided similar information to the complainant, and the NHS London Procurement Partnership 'actively published this type of information and it is the type of information the Commissioner would expect to be disclosed at the very least for public sector contracts'.

8. In relation to the request relating to photography contracts, the Appellant also relied upon section 22 and the first DN addresses this issue. The Commissioner was of the view that the exemption could not apply. The Appellant had no intention or settled expectation to publish the information at the time of the request, as it believed that the information was commercially sensitive and therefor exemption from publication. The Appellant has also made submissions which use the word 'if' in relation to the re-letting of contracts, which also demonstrates no definite intention to publish the information.

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

THE APPEAL

10. The Appellant filed appeals on 19 February 2018 and 8 March 2018. The grounds of appeal essentially disputed the Commissioner's conclusion that s43(2) FOIA and s22(2) FOIA were not engaged, and re-iterated the points initially made to the Commissioner.
11. In relation to s43(2) FOIA, the Appellant emphasised the argument that disclosure would prejudice the commercial interests of the Appellant university, the present contractor, and other potential contractors who were not clients of the complainant. Disclosure, says the Appellant, would provide advance notice to the complainant and his clients which prevent the Appellant university from achieving the best price for the contract as a result of what is described as 'unfair competition'. The Appellant argues that the unfairness extends to the present contractor, and in the appeal relating to the second DN argues that disclosure will give access to the complainant to information about present contractors.
12. In any event, the Appellant says, a decision has not been taken whether to retender the photography contract or to extend it under the terms of the current contract.
13. The Appellant argues that although the request should be considered as 'applicant blind' this should be just a starting point and in this case, as the complainant is a professional bid consultant, the identity of the complainant and the unfairness caused because of the commercial advantage that the complainant's clients will enjoy, mean that the nature of the complainant's business 'is plainly of high relevance'. Finally, the Appellant argues that, when considering the public interest, the need to ensure fair competition and for public authorities to achieve the best deal when tendering a contract, together with the need to expend limited resources responding to FOIA requests, weigh against disclosure and there is no countervailing interest in disclosure.

14. In relation to s22(1) FOIA, the Appellant emphasises that if the contract is not extended and if it is retendered then the relevant dates will be published. This 'conditional intention was settled at the time of the information request', and therefore the s22 FOIA exemption applies.

15. The Commissioner's response re-iterated points already made in the first DN and the second DN, but the following points made in relation to s43 FOIA are worthy of mention:-

- (a) It is a fundamental principle of information law that the identity of the requester and its motive in requesting the information is not relevant to the application of the exemption in s43 FOIA;
- (b) Information disclosed under FOIA is disclosed to the world at large, and the application of an exemption is considered on that basis;
- (c) Therefore, competitors would have access to the information in exactly the same way as the requester would have;
- (d) Transparency in relation to the contractual arrangements of public authorities, save in relation to limited categories of commercially sensitive information, is encouraged in accordance with public procurement law;
- (e) The Appellant has not explained how disclosure would provide the complainant with an advantage, or be disadvantageous to the Appellant, or other potential bidders: any residual concerns could be eliminated, for example, by the Appellant publishing the information on its own website;
- (f) The Appellant is not seeking information about the identity of incumbent contractors;

(g) In any event, information that a particular business holds a contract with the Appellant university and the date it expires is not commercially sensitive information: this kind of information will often be published by a public body, and indeed by the contractor itself;

(h) The Appellant has not adduced any evidence from the incumbent contractors or potential bidders to support the argument that they will be disadvantaged by disclosure.

16. In relation to the reliance on s22(1) FOIA, the Commissioner further notes that the Appellant had could have had no settled intention to publish the information requested at the time the request was made (as decisions had yet to be made which might impact on the information); and in any event the Appellant did not indicate that it would plan to disclose the specific information requested. The Appellant had adduced no evidence as to why it would be reasonable to withhold the information until a future date of publication, as required by s22 FOIA.

LEGAL FRAMEWORK

17. As stated above, the main relevant exemption relied on by the Appellant is in section 43(2) FOIA which, materially, reads as follows:-

43.— Commercial interests.

(1) ...

(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).

18. . 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.

19. The Appellant also relies upon section 22 in relation to the appeal of the first DN

22. – Information intended for future publication.

(1) Information is exempt information if –

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

20. It is clear that for the exemption to apply, it must be held ‘with a view to its publication’, although the public authority does not need to have determined an exact date for publication. At the time of the request, the information must already be held with a view to publication. Thus, it is not open to a public authority to avoid publication by deciding, on receipt of the request, that it will publish the information in the future.

21. The public authority also, for the purposes of s22(1)(c) FOIA, has to show that it is reasonable to withhold the information until the date of future publication. If there is no determined date for publication, then the public authority may find it more difficult to justify non-disclosure pending publication.

22. Both s43(2) and s 22(10) FOIA are non-absolute exemption and, even if one or both are applicable, the public interest in disclosure (or not) must also be considered.

DISCUSSION AND DECISION

23. For the purposes of the tests in *Hogan*, in essence what we have to decide is whether the disclosure of the information requested 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 others.
24. In relation to the information requested, it seems to us that there is no such real and significant risk of prejudice, for the reasons as advanced by the Commissioner in the first and second DNs and in the Response prepared for this hearing.
25. We are unable to see how the 'prejudice' test in s43(2) will be met by disclosure of the information to the Appellant, the existing contractors or would-be bidders. The complainant is not asking for any information about incumbent contractors or the content of the contracts with those contractors. All that the complainant seeks is confirmation that contracts exist for certain services, and details about the timings of the contracts and an indication as to when the contracts will be re-let (if at all). The complainant has not sought any potential details of the contents of any future contracts or the terms upon which they will be let by the Appellant.
26. As the Commissioner says, this is information that many public authorities publish in the interests of transparency and which many firms who have the benefit of the contract will publicise in any event.
27. The Appellant approaches the request from the point of view that to disclose the information to the complainant will give the complainant and its clients an advantage because they will be able to prepare in advance to make bids for future contracts, and this will be to the detriment of the interests of the

Appellant (which it is said, may be prevented from achieving the best price as a result), and other potential bidders (who will not have the advance knowledge that the complainant has had).

28. However, again as the Commissioner says, all the disclosure of this information will enable the complainant and its clients to do, is to diarise when to expect to see the issue of a Prior Information Notice, which will then set out the details of the contract to be let, and nothing more.

29. In the hearing before us, Mr Dolan described this as a marginal advantage for the complainant and its clients. But in our view this submission fails to take into account the principle that disclosure under the FOIA is to the world at large and not just to the requester, and that the motive of the requester is very largely irrelevant to the application of the exemption in s43(2) FOIA. Even if it is right that other potential bidders may not see the information if it is disclosed to the complainant (who may in practice not want to broadcast the contents), it would be simple enough (as the Commissioner states) for the Appellant to publish the information on its website so it would be indeed available to all. As the Commissioner notes, no evidence has been provided from either present or would-be contractors to the effect that their commercial interests would be at risk of prejudice if disclosure is made.

30. For all these reasons, we find that, 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 others.

31. In relation to the exemption claimed under s22 FOIA, we agree with the Commissioner that the test for the application of the exemption is not met, and make the following points:-

- (a) It is our view that the information was not held with a view to publication at the time of the request (s22(1)(b) FOIA). This must be the case because the Appellant states that it had not decided whether to re-let or extend the contracts. In reality, the question of publication only arose once the request was made;
- (b) The Appellant has not explained why it would be reasonable in the circumstances to withhold the information pending publication. Very limited information is sought, and (as set out above) there is no settled intention to publish in any event. It would not be reasonable to expect the complainant to wait to see what the Appellant decides (if and when) about publication.

Public interest

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

33. However, if we had concluded that that there was a real and significant risk of prejudice for the purposes of s43(2) FOIA we would have taken 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;
- (b) The public interest in the public (and all potential contractors) being aware of these contractual details of the Appellant as a public authority.
- (c) The Appellant is wrong to argue that there is pressure on its limited resources when otherwise there would be a legal duty to disclose under the FOIA.

34. For the purposes of s22(1) FOIA if we had decided that the information was held with a view to publish the information in the future at the time the request was made, and that it was reasonable in the circumstances for the information to be withheld pending publication, the reality is that we would have been likely to have found the public interest favoured the continued non-disclosure pending publication.

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

36. Our decision is unanimous

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 11 October 2018.