



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

Appeal Reference: EA/2020/0344P

**Determined, by consent, on written evidence and submissions
Considered on the papers on 2 September 2021.**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Alison Lowton
and
Ms Naomi Matthews

Between

Rob Waugh

Appellant

And

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is partially allowed..

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 378 and a closed bundle.

INTRODUCTION

4. On 28 December 2019 the Appellant requested the following information from Sheffield City Council (the Council):-

I would be grateful if you would provide the following:

The contract for the interim chief executive.

Correspondence between the council and the interim chief executive relating to the appointment;

The costs information relating to any advertising of the post and/or any head-hunting process undertaken to secure an interim chief executive. This should include identifying which monies were paid to which companies or organisations involved.

The number of people interviewed for the position and when.

5. On 17 February 2020 the Council responded to the Appellant, provided some of the contract, but refused to provide the remainder, applying section 43(2) FOIA (commercial interests), and s40 FOIA (personal information) to the withheld parts of the contract. The Council also said that it had had no correspondence with the interim chief executive relating to the appointment. It explained that there were no costs associated with advertising / head-hunting, and that two people had been interviewed.

6. The Appellant asked for an internal review and on 17 March 2020 the Council provided its internal review outcome, and maintained its original position to withhold the information under the exemptions cited.
7. The Appellant contacted the Commissioner on 19 March 2020 to complain about the way his request for information had been handled. During the Commissioner's subsequent investigation, the Council disclosed more of the contract to the Appellant. The Appellant did not challenge the application of s40 FOIA to personal information, but did question whether the Council did hold any information was held in respect of head-hunting / advertising costs and the application of section 43 to the withheld information in the contract.

THE STATUTORY FRAMEWORK

8. As stated above, the relevant exemption relied on by the Council 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).

9. 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 Thoroton 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.

10. S43(2) FOIA is a qualified exemption and, even if it is applicable, the public interest in disclosure or withholding the information must also be considered.

THE DECISION NOTICE

11. The Commissioner’s decision notice is dated 20 November 2020. She sets out the Council’s explanation of the background to the request as follows:-

In October 2019, John Mothersole announced he would be retiring from his role of Chief Executive of Sheffield City Council, after 11 years in the post. The council undertook a procurement exercise with executive recruitment agencies, appointing Odgers Interim to provide an Interim Chief Executive. On 4 December 2019, the council announced that Charlie Adan had been appointed Interim Chief Executive until a permanent Chief Executive was appointed

...

IRG Advisors LLP is a limited liability partnership registered in England and Wales ...which provides executive search services from offices in the UK. ... The company trades as Odgers Berndtson, Berwick Partners, Berwick Talent Solutions, Odgers Interim and Odgers Connect. Our contract for an Interim Chief Executive is with Odgers Interim, which is a separate and distinct legal entity whose specialism is in the provision of interim management services to businesses across a wide range of sectors and specialities.

12. The Commissioner further explains that:-

16...During the Commissioner's investigation the Council located an email chain which it initially considered fell within the scope of the request. This was disclosed to the complainant, with a redaction applied citing section 43 of the FOIA. The Commissioner queried whether it was actually a part of the contract itself and the Council responded saying:

“On review we agree that the email chain ... referred to in your correspondence is not within the scope of this request ... The email was part of standard post-contract discussions about the terms of the council's preferred candidate ... and was not the contract or correspondence between the council and the interim chief executive”.

17. The Commissioner has therefore not further considered disclosure of this email as it falls outside the scope of the request.

13. It will be seen later in this decision that this conclusion will be of some relevance to the appeal in this matter.

14. The Commissioner goes on to say that:-

18. When discussing the case with the complainant, the Commissioner confirmed with him that day rates and monetary figures are not actually included in the contract, it is only the profit margins being withheld. He did not accept that this could be the case and insisted that any related information subsequent to the contract which included these details would be caught within the scope of the request. He also suggested that there may be a further contract which includes the rates and additional Terms and Conditions which had not been provided. However, the request clearly stipulates disclosure of the contract itself

which is what the Commissioner has considered. The Council has also confirmed:

“The contract provided is the only contract. It secures Odgers Interim as the contract provider, it does not include a breakdown or details of any monetary fees. There is a reference to Odgers Interim’s organisational fee. The fee is expressed as a percentage of their candidate’s day rate. This is referred to in the contract as a “margin of X%” (where X is the information withheld.) The day rate was agreed separately by the Council when it accepted the candidate put forward by Odgers Interim for the Interim Chief Executive role. There are no further Terms and Conditions”.

19....The Commissioner can also confirm that the contract under consideration is the only contract which exists. It secures Odgers as the service provider and does not include a breakdown or details of any monetary fees. There are no further Terms and Conditions supplementary to the contract.

15. The Council also explained to the Commissioner why it did not hold costs information relating to advertising of the post and/or any head-hunting process, as requested by the Appellant, as follows:-

Neither ‘headhunting’ nor ‘advertising’ costs are incurred when using an executive search agency to secure a pool of candidates for consideration. ... The council had determined at the outset a recruitment company would be appointed to provide a shortlist from whom an appointment would be made. No advertising costs would be incurred because the recruitment company holds the names and CVs of candidates, the so-called ‘talent pool’, which they supply for consideration. There is likewise no distinct or separate ‘headhunting’ cost. Once Odgers Interim was contracted to supply an acceptable candidate, the council has started receiving invoices for the cost of the service (i.e., an Interim Chief Executive) which Odgers Interim provides”.

16. The Commissioner concluded that this was ‘a convincing explanation as to why the requested information is not held’.

17. In relation to s43(2) FOIA, the Commissioner explained that:-

This exemption has been applied to a small amount of information. This is specifically two figures from Schedule 2 of the contract, which shows a ‘reduction’ in respect of its standard organisational fee which the recruitment consultants have granted to the Council. There is no actual ‘monetary’ figure, it is two percentage figures related to the company’s profit margins.

18. In relation to the applicability of the exemption the Commissioner recorded that the Council had explained as follows:-

To reveal certain information relating to the commercial elements of the contract would prejudice our organisation in future pitches for work with other clients for similar works. This is because it would reveal to competitors our pricing strategy and not just the amount being paid to the interim manager handling the assignment.

...

Whilst it might be appropriate for the Council to say that it has spent £ x on the service (where x is a total including all elements (VAT, expenses and so forth) breaking this down to the amounts paid to the individual and the margin to the provider would reveal to a competitor what we charge. This would not be in the interests of future procurements and whilst providing transparency it is also likely to lead to degradation in levels of service. This is because the service ends up being price driven at the expense of quality.

...

By protecting third party commercial interests, and not revealing such information, buyers can make informed decisions on a level playing field as opposed to prices being artificially lowered on the basis of other tenderers knowing the pricing policy of their competitors”.

19. The Council also argued that disclosing Odger Interim’s margin on the contract and the fact that it had accepted a discount would be likely to prejudice Odgers Interim’s commercial interests. The margin is the fee the company takes from the contract for its costs and profits. It would likely give insights into its business to its competitors. If the discount were disclosed another client could demand the same or more. That would prejudice Odgers Interim’s ability to make revenue.
20. The Commissioner accepted the withheld information is relevant to the applicable interests within the commercial interests exemption. The Commissioner accepted that the Council had provided reasonable arguments to suggest that there is a causal relationship between disclosure of the withheld information and the prejudice envisioned which is real, actual or of substance in respect of the consultant’s own commercial interests. The Commissioner also accepted that that disclosure may result in reputational damage to the Council’s procurement processes which may affect its ability to attract future bidders.

21. The Commissioner was satisfied that disclosure would be likely to prejudice these commercial interests, and thus, that section 43 FOIA was engaged.

22. In relation to the public interest balance, the Commissioner concluded as follows, in deciding that the balance was in favour of maintaining the exemption:-

60. The Commissioner has considered the public interest arguments both in favour of disclosure and of maintaining the section 43(2) exemption. She notes the importance of transparency and accountability with regard to the expenditure of public authorities. However, she considers that the public interest in the recruitment consultant being able to provide a service in a competitive field without fear of revealing its profit margins to its competitors, outweighs the public interest in the disclosure of the percentage figures. Such disclosure could mean that it loses its competitive edge and may not win future business.

61. Furthermore, as the exact monetary figures are not held within the contract, there is a reduced public interest in knowing what percentage discount the Council has negotiated as this would not actually disclose the monies directly affecting the public purse. However, were monetary figures to be disclosed in a future, related request, then it would be possible to identify the specific profits made by the recruitment consultant, thereby placing it at a significant disadvantage.

THE APPEAL AND RESPONSE

23. The Appellant's appeal is dated 30 November 2020. At the start he states that:-

So, essentially this appeal is likely to boil down to whether:

- i) Sheffield Council has a recorded agreement to pay Odgers Interim set amounts based on a day rate based on the number of days the interim chief executive worked or some other agreed rate of payment and;
- ii) If there is such a recorded agreement whether this constitutes a contract in the general meaning and normally understood meaning of the word

I state at the outset I am not interested in Odgers profit margins, which appears to be the redacted information in the only document provided in response to the FOI request. The issue here is the amount the council has agreed to pay and the agreement it has in place to make those payments.

24. The Commissioner's response to the appeal, now states that the email that she had referred to in the decision notice as not being part of the contract was 'in law, part of the contract and as such fell within the scope of the Appellant's request'.
25. The Commissioner noted that the Appellant had said he was not interested in Odger Interim's profit margins (see above) and that the Appellant had not disputed that the Council did not hold the information which it said it did not have (also see above).
26. The Tribunal notes here that the relevant email is now included in a redacted format in the open bundle for this hearing. It is dated 27 November 2019 and is from Odgers Interim to the Council. It confirms the name of the Interim CEO with a start date and duration. It includes a day rate, but the actual amount has been redacted. To this is to be added ENI/Levy costs, but the actual amount of these is redacted. The Tribunal has access to the unredacted email in the closed bundle.
27. The Commissioner argues that 'it will be apparent from the unredacted contract (including the email)', that if all the information is disclosed then it will be possible to work out the exact amount of Odger Interim's margin. She explains that Odger Interim is paid on the basis of a candidate day rate, plus the pass-through costs of Employers' National Insurance Contributions and the Apprenticeship Levy, and Odger Interim's commission margin.
28. The Commissioner says that, if for example, the Interim CEO's day rate were published then a person could work out the appropriate rate of national insurance and other deductions and then calculate Odger Interim's margin once those sums had been deducted from the overall amount paid to Odger Interim.
29. In response to this the Appellant says as follows in his final submissions:-
 - 9) The 'Day Rate' referenced in the emailed contractual agreement does not include any obvious reference to a commission payment to Odgers and the small area redacted appears to relate to a one amount only...
 - 10) If Odgers' fee is included in the day rate it is difficult to see how the commission payment could be identified.

11) If the commission payment cannot be identified in the day rate, it is submitted there cannot be prejudice that is real, actual or of substance. The figure would not disclose the commission paid to Odgers.

...

14) Contrary to the Commissioner's submission ... it is submitted it is not possible to identify the commission paid to Odgers from the invoice payments published on the council's website.

15) The invoice payments... do not identify what period of time they represent. The amounts differ significantly and without any clarification of the number of days they represent it would not be possible to work out any commission payment should a specific day rate figure paid to the chief executive be disclosed.

DISCUSSION

30. The Tribunal agrees with the Council and the Commissioner that the withholding of the parts of the contract that deal with Odger Interim's reduction and its profit margin are covered by the exemption in s43(2) FOIA, essentially for the reasons given to the Commissioner by the Council and then accepted by the Commissioner in the decision notice.
31. Thus, we accept that that disclosing Odger Interim's margin on the contract and the fact that it had accepted a discount would be likely to prejudice Odgers Interim's commercial interests. The margin is the fee the company takes from the contract for its costs and profits. Disclosure would be likely give insights into its business to its competitors. If the discount were disclosed another client could demand the same or more. That would prejudice Odgers Interim's ability to make revenue. We are satisfied that disclosure would be likely to prejudice these commercial interests.
32. In relation to the Council we accept that to reveal certain information relating to the commercial elements of the contract would prejudice the Council in future pitches for work with other clients for similar works. This is because it would reveal to competitors the Council's pricing strategy. We accept that this would not be in the interests of future procurements and for the reasons explained to the Commissioner it is also likely to lead to degradation in levels of service. We are satisfied that disclosure would be likely to prejudice these commercial interests of the Council.
33. We also agree that for this information to which s43(2) FOIA applies, the public interest balance is in favour of withholding the information for the reasons set out

by the Commissioner in paragraph 60 of the decision notice. There is a strong public interest in the openness and transparency of public authorities and their decision-making processes, and disclosure would provide an insight into how the process operated, and the margins achieved by an agency such as Odgers Interim. However, in our view this public interest is outweighed by the need to prevent competitive disadvantage for third parties and to ensure the fairness of future procurement exercises by the Council.

34. That brings us to the email of 27 November 2019. In her Response the Commissioner accepts that the Tribunal should allow the appeal to the extent that it alleges that the Commissioner was wrong to hold in the decision notice that the email did not fall within the scope of the Appellant's request.
35. The Commissioner also says the Tribunal should order that the email be disclosed (if not already done), subject to redactions of (a) all financial information; and (b) all personal data save that of the name of the Interim CEO and the senior officer at the Council.
36. In relation to (a) we do not agree that all the financial information in the email is covered by the s43(2) FOIA exemption. As accepted by the Commissioner the 'day rate' figure to be paid to the Interim CEO is not included in the email. The only 'day rate' figure available in the email is the overall day rate paid to Odger Interim. If the margin percentages from the contract are withheld (as we have decided they should be) there is nothing which can be calculated from the day rate in the email, other than that that is the total daily amount received by Odger Interim for providing an Interim CEO. From that figure it cannot be calculated the actual amount paid to the Interim CEO or Odger Interim's profit margin. As this is the case in our view the disclosure of the day rate figure would not be likely to prejudice the commercial interests of either the Council or Odger Interim.
37. We also note that the email includes a figure for 'ENI/Levy Costs' to be added to the day rate. It does seem to us that disclosure of this figure might enable a person to calculate the actual day rate of the Interim CEO (not available elsewhere, as the Appellant argues), and from there to calculate the profit margin of Odger Interim. Therefore, for the same reasons set out above in relation to the figures withheld from

the main body of the contract, we find that this figure is also covered by the s43(2) FOIA exemption, and that the public interest favours the figure being withheld. We note the limited public interest, in any event, in disclosing this figure when the main information sought by the Appellant is the 'day rate' and where he states in terms that he is not interested in Odger Interim's profit margin.

38. In relation to (b) we note that the redacted version of the email in the open bundle contains, in addition, the personal information of a Odger Interim member of staff (with mobile phone number rightly redacted), and we do not order the redaction of any further personal information pursuant to section 40 FOIA.
39. On that basis, this appeal is partially allowed in that the email of 27 November 2019 is within scope of the Appellant's request, contrary to the Commissioner's finding in the decision notice, and should be disclosed to the Appellant in full, apart from (a) the figure for ENI/Levy Costs; and (b) the mobile phone number of the Odger Interim staff member named in the email.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 September 2021.

Promulgation Date: 29 September 2021.