Neutral citation number: [2022] UKFTT 522 (GRC)

Case Reference: EA 2022 0062

First-tier Tribunal
General Regulatory Chamber
Information Rights decision notice IC-101515-Q5F7

Heard by: CVP – Remote Hearing

Heard on: 1 August 2023
Decision given on: 7 September 2023

Before

TRIBUNAL JUDGE CHRISTOPHER HUGHES
TRIBUNAL MEMBER NAOMI MATTHEWS
TRIBUNAL MEMBER PIETER DE WAAL

Between

UNITED VOICES OF THE WORLD

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Mr Petros Elia (General Secretary, United Voices of the World)
For the Respondent: did not appear

PROCEDURAL MATTERS

Due to difficulties over the listing of this case, Counsel originally instructed by the Union was unable to attend and the Union had been unable to arrange a substitute. In all the circumstances of the case Mr Elia indicated that he was content for the tribunal to decide the case on the papers. After consideration of this issue the tribunal determined that it was proportionate and in the interests of justice to proceed on that basis. Mr Elia then withdrew.

Cases

Information Commissioner v Malnick and the Advisory Committee on Business Appointments: [2018] UKUT 72 (AAC)
Coco v A N Clark (Engineers) Ltd. [1969] RPC 41
AG v Guardian newspapers (N0 2) 1990 1 AC 109
Djalo v Secretary of State for Justice ET 2207876/2020

Decision: The appeal is Allowed

REASONS

1. On 11 November 2020 Mr Richard O'Keefe (who was then a caseworker at Southwark Law Centre) acting on behalf of a member of the United Voices of the World ("the Union") made an information request to the Ministry of Justice ("MoJ"):-

   "Please provide me with any costings received by the Ministry of Justice/the Secretary of State for Justice from OCS Group UK Ltd for improving the pay of cleaners employed by OCS Group UK Ltd and deployed to 102 Petty France, London, SW1H 9AJ, between February 2018 and April 2018 inclusive."

2. On 4 December 2020 the MoJ confirmed that the information was held, but refused to supply it relying on s43(2) FOIA (commercial interests).

   "This subsection of the FOIA allows a public body to withhold information where to release such information would prejudice, or would be likely to prejudice the commercial interests of a third party, in this case OCS Group UK Ltd and/or MoJ.

   The term 'commercial interests' is not defined in the FOIA. However, we have followed the Information Commissioner's guidance on the application of section 43 of the FOIA, which explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity, such as the purchase and sale of goods or services. Their underlying aim may be to make a profit, however, it could also be to cover costs or to simply remain solvent."

3. The letter set out the MoJ's consideration of where the balance of public interest lay between disclosing and withholding the information. On internal review the MoJ maintained its stance and Southwark Law Centre sought the assistance of the Information Commissioner ("the Commissioner") on 20 April 2021. In complaining to the Commissioner Mr O'Keefe explained how he thought the MoJ had erred in determining where the public interest in disclosing the information lay:-

   "Our principle complaint about this determination is that crucial public interest considerations were not taken into account when assessing whether the commercially sensitive material ought to be disclosed. The MoJ summarises the public interests in favour of disclosure as (i) general transparency and (ii) facilitate confidence in public decision-making. These are generic points that would not have much weight in the balance. But there is a major

additional factor: disclosure would allow assessment of the equality implications of decisions regarding the terms and conditions of (predominantly BAME) outsourced workers."

4. The case was accepted on 19 May 2021 and the Commissioner's investigation began on 22 November 2021. During the Commissioner's investigation the MoJ additionally relied on: the three limbs of s. 36(2) (s. 36(2)(b)(i) (inhibition of free and frank provision of advice) and (ii) (inhibition of free and frank exchange of views for the purposes of deliberation) and s.36(2)(c) FOIA (prejudice to the effective conduct of public affairs)); s. 41 (information provided in confidence); and s. 43(1) (trade secrets).

5. In the decision notice of 14 February 2022 the Commissioner explained that following a tendering process a contract was awarded to OCS following a competitive bidding involving several contractors:

   "8. Following commencement of the contract in 2018, any existing staff transferred under TUPE (Transfer of Undertakings (Protection of Employment)) regulations to OCS with their existing terms and conditions. As part of the transfer and mobilisation process, the application of the Living Wage Foundation's Real Living Wage and London Living Wage arose and the MOJ asked OCS to provide a cost impact assessment. After due consideration this was not taken any further."

6. The Commissioner considered and approved the submissions of the MoJ:

   "41. In relation to the subsections of section 36(2)(b), the MOJ stated that:
   "There is a specific public interest in preserving the confidentiality of service providers' discussions and views on this topic, and not inhibiting the free and frank exchange of views between MOJ and providers on this issue."
   And,
   "Under Section 36(2)(b)(i) and (ii) in order to ensure the highest quality discussions and decisions are made, MOJ and OCS (the contract provider) needs [sic] to be able to express their views freely and fully, in confidence."

   42. With regard to its section 36(2)(c) submissions, the MOJ said it:
   "…considers that delivering an effective service requires the government departments to have a "safe space" to express their views on this topic. It may be the case that suggested recommendations are not always actioned due to certain reasons, and the public disclosure of such information may cause the public to lose confidence in such government departments. Further, if the requested information were to be disclosed, they could be taken out of context and it could damage the validity of the views of the respective government department and lead to loss of confidence in such government department, and the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure would prejudice the effective conduct of their public affairs and services provided. The disruption caused would be the effort and time defending and in debating options that have already been considered or a position which is now out of date as National Minimum and Real Living and London Living Wages have all changed annually since this data was produced so is also out of date and not representative of the current financial position".

43. The MOJ submitted other arguments it deemed to be confidential so they have not been replicated here. However, the Commissioner has taken them into account when balancing the public interest."

7. The Commissioner concluded:

"that sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged. Having considered the associated public interest tests the Commissioner finds that the public interest favoured all three limbs of the section 36 exemption. As he has found that the MOJ was entitled to rely on sections 36(2)(b)(i) and (ii) and section 36(2)(c), he has not deemed it necessary to consider the MOJ's reliance on the other cited exemptions."

8. In weighing the public interest the Commissioner noted the argument advanced with respect to the Equality Act but considered:

"there are other routes to pursue potential discrimination claims which therefore reduces the public interest in disclosure of this information through FOIA.

47. The Commissioner notes that the Qualified Person's Opinion is that disclosure of the requested information 'would' prejudice the free and frank provision of advice and exchange of views for the purpose of deliberation, and the effective conduct of public affairs. As set out above, this higher threshold carries more weight in the public interest balancing exercise.

48. The Commissioner accepts the MOJ's stance that disclosure would also prejudice the effective conduct of public services by suppliers, civil servants from commercial, human resources and financial functions, relating to public spending. The Commissioner agrees that in order to ensure an effective service can be provided to the public, it is important that there is a "safe space" for government officers of the MOJ to have a robust confidential, deliberation process, on the pay issue. A loss of confidentiality, caused by disclosure, would prejudice the public service MOJ provides, by affecting the range of options considered on how to provide an effective public service. The information requested relates to a decision-making process, which is applicable to several government departments, therefore the Commissioner recognises the need to protect the process both for MOJ and other government services to ensure they are not prejudiced.

49. The Commissioner accepts that the MOJ's safe space arguments were especially relevant at the time of the request and internal review. He is mindful of the need for the MOJ to be able to protect the complete views of those organisations partaking in the pay review process, particularly given the sensitivities surrounding pay.

50. On balance the greater public interest is, in the view of the Commissioner, held in preserving the ability of the MOJ to effectively conduct its public affairs."

9. The Union appealed to the Tribunal on 14 February 2022. In that appeal it argued that what was sought by the request was costings to increase the pay of OCS staff at 102 Petty France to the London Living Wage (bundle page 26, paragraph 9):

"It was not correspondence regarding such costings, either internally within the MoJ or between the MoJ and their contractor, and it is difficult to see how the costings themselves would evidence sensitive or problematic deliberations about Ms Djalo's pay. That was in error of law or based on error of fact."

10. The Union further argued errors of law with respect to the test for reasonableness of the Qualified Person's Opinion (relevant to the exemptions in s.36(2) FOIA), with the suggestion that the possible availability of other means to pursue a discrimination claim was irrelevant to the right to information under FOIA, and an error of fact with respect to the involvement of the MoJ with the Civil Service Trades Unions on this issue or any engagement with Ms Djalo's Union.

11. In respect of the exemption in s.36(2)(b) FOIA, the Union challenged the likelihood of inhibition:

"16. At para 28 of the Decision Notice the Respondent contended that "The likelihood and severity of any inhibition will be considered further in the public interest test". In that connection it found at paras 48 – 49 that "it is important that there is a "safe space" for government officers of the MOJ to have a robust confidential, deliberation process on the pay issue".
17. In the absence of any information about the content of such deliberation and any related sensitivities, the Appellant contends that there was no sensitivity, or not such sensitivity as the Respondent found, and this led the Respondent into error in its public interest analysis."

12. In resisting the appeal the MoJ argued in respect of s.43(2) FOIA:

"For section 43(2) to be engaged, it must be shown that disclosure "would, or would be likely to, prejudice the commercial interests" of any person, including the public authority that holds the information. In the present case, disclosure of the Disputed Information would or would be likely to prejudice the commercial interests of both OCS and the MoJ."

13. With respect to s43(1) the MoJ said:

"The MoJ understands from OCS that the Disputed Information, was calculated using a bespoke costs model that was developed and is used exclusively by OCS, and that this amounts to a trade secret. The MoJ also understands that disclosure of the Disputed Information could enable competitors to reverse engineer in such a way as to reveal that trade secret. On that basis, s. 43(1) is engaged."

14. The MoJ also argued for confidentiality (s.41 FOIA):

"The test does not function in the same way as the public interest test under s. 2(2)(b). The burden is reversed: the test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence."

The Employment dispute underlying the request for information

15. The background to the request appears to be that in 2020 Ms Djalo (who was represented by the Union and was the original Appellant in these FOI proceedings) also began proceedings in the Employment Tribunal against the Secretary of State for Justice. The nature of her claim was set out in the first paragraph of the decision in that case:-

"The Claimant is employed by OCS Limited ("OCS"), a private company in the business of providing facilities management services to sites in the UK and internationally. One of the sites in question is the Ministry of Justice premises at 102 Petty France, London. The Claimant works as a cleaner at that site. It is common ground that she began work as a cleaner with Lancaster Office Cleaning Company Limited in 2009, initially on a part-time basis. She transferred under the TUPE Regulations eventually to OCS, for whom she now works full-time. Her particulars of claim describe her as Black African and a national of Guinea-Bissau. She claims that the Respondent has indirectly discriminated against her because of race, contrary to section 19 Equality Act 2010 ("EqA")."

16. After working for Lancaster Office Cleaning, she was transferred under TUPE to Amey (another contractor) and following a further tendering exercise her employment was transferred to OCS at the start of 2018. A preliminary hearing in the Employment Tribunal case was held on 8-10 August 2022 during the course of which an order for disclosure was made against the MoJ. Ms Djalo's claim against the MoJ was grounded in the Equality Act 2010 and the legal relations between her employer and the MoJ :

"The Claimant contends that she is a contract worker and the Respondent her principal within the meaning of the Equality Act 2010, and contends that the Respondent's arrangements for the pay and terms and conditions of both their own staff and of their outsourced staff, the latter being determined directly by the terms of the Respondent's service contract with the Claimant's employer, and indirectly by other of those terms including price…"

17. On 25 October 2022 the claim was struck out as having no reasonable prospect of success on the basis that the circumstances of her employment did not meet the legal requirements to establish her claim. In dismissing the claim the judge noted:-

"*36. My understanding is that the Claimant's minimum entitlement according to these factors, and no more, is still in fact what she receives. The London Living Wage – a higher rate than the National Minimum Wage - is paid at some of the sites in the Contract's scope (e.g. the Old Admiralty Building) but not others such as 102 Petty France. That is not the same thing as saying that it is the Respondent who has designated sites as LLW sites or not. As I have found above, OCS "inherited" the pay rates from Amey, and they from Lancaster. OCS had no choice about whether to pay LLW rates at those designated sites; TUPE (and not the Respondent) requires it so to do. OCS is not required by TUPE or by the Respondent to pay the LLW at sites which are not designated as such.*

37. These contrasting pay rates were a highly relevant factor in [redacted name]'s claim. The pay and conditions of those working at the Petty France site has led to industrial action in 2016, 2017, August 2018 and January 2019."

18. In relation to the appeal before this tribunal, on 13 September 2022 the MoJ's solicitors wrote to the parties and to the tribunal:

In light of the 13 September deadline for bundles provided for by those directions, we write to inform the Tribunal that the MoJ is in correspondence with the other parties following a recent significant development which has changed my client's approach to these proceedings. The whole of the information subject to the FOIA request has been disclosed to a Claimant in separate Employment Tribunal proceedings brought against the Secretary of State for Justice. The Claimant in those proceedings is a member of OCS's staff. The disclosure was made as a result of the Secretary of State for Justice's ongoing duty of disclosure in those proceedings and followed a specific disclosure application from the Claimant. The Claimant in the Employment Tribunal proceedings is represented by the Appellant in these proceedings.

19. On 21 September 2022 the Union wrote:

"Whilst we appreciate that the Respondents' position is that the disclosure of the information sought in separate proceedings renders this claim academic, for several reasons we are currently of the view that the matter should proceed and raises very important points of principle. However, as a grassroots union, we have no desire to waste resources or public money on pursuing an unnecessary claim. We therefore would greatly appreciate further time to make an informed decision on this matter."

20. On 1 November 2022 the representative of the Union wrote:-

"However, we cannot see that the disclosure of the documents pursuant to an entirely different obligation in the employment tribunal has any bearing on this appeal concerning whether the Respondent was correct to dismiss the Claimant's complaint as to their information rights under the FOIA."

21. By a direction of 13 April 2023 the MoJ and OCS at their request ceased to be parties to the proceedings.

Consideration

22. The starting point for any consideration of possible exemptions to withhold information under FOIA is an examination of the request for information and an examination of the information which the public authority considers falls within the request.

23. In this case the Union and its members working for OCS at the headquarters of the MoJ had been told by OCS that in 2018 the MoJ asked it for costings for raising the pay of cleaning staff from the Minimum Wage to the Living Wage. In November 2020 the UNION asked the MoJ for: "*any costings received by the Ministry of Justice… from OCS … for improving the pay of cleaners employed by OCS ..deployed to 102 Petty France, between February 2018 and April 2018 inclusive."* At the time of the request any such costings were more than two and a half years old. It may also be noted that at

the time of the award of the contract to OCS there was an obligation on the MoJ to publish the value of the contract.

24. On 4 December 2020 the MoJ confirmed that it held information and refused to supply it relying on prejudice to commercial interests. There is a ten page document in the closed bundle identified as the withheld information. The first page is a short introductory note dated 7 February 2018 entitled:

OCS MoJ Contract
Indicative proposal for increasing wages to UK Living Wage

25. To assist the MoJ the note sets out the parameters of the exercise; calculating the cost of moving cleaning staff from £7.50 an hour to £8.75 an hour (outside London) or £10.20 an hour in London "along with the associated impact on national insurance, pension etc". This document then identifies some of the complexities of the calculation. It concludes with a comment on the methodology:

"It should be made clear that this exercise is purely indicative in terms of the likely increase in cost, and would need to be fully worked through the financial models to provide a final cost, taking into account any variances with the actual hours worked…"

26. The next 9 pages start with confirmation that it is an indicative estimate. It then provides the estimate for the life of the contract (five years), a list of "*pricing assumptions*" and then a list of "*conditions of estimate*". There are then 8 pages listing the various sites and the cost associated with a transition to the UK Living Wage at each site. The first site is 102 Queen Ann's Gate.

27. Having examined the withheld information it is then necessary to consider the identified exemptions. Although the Decision Notice only deals with s36, the MoJ in its original analysis relied on other exemptions and continued to do so until it withdrew from the proceedings. In formulating its reasoning with respect to s.36 it also relied on arguments derived from the other exemptions. Accordingly, before coming to the arguments accepted by the Commissioner in respect of the exemptions in s.36 it is necessary to evaluate the reasoning by which the MoJ was led to those exemptions and the grounds underlying the assertion that its reliance on them is robust.

<u>Section 43 exemptions</u>

28. The MoJ contend that disclosure would, or would be likely to, prejudice the commercial interests of the MoJ and OCS (s.43(2) FOIA). In support of this it said:

"The MoJ consulted OCS at the time of the ICO investigation, and OCS confirmed that it considered that: (a) the Disputed Information is confidential and commercially sensitive; and (b) that its disclosure would (i) amount to an actionable breach of confidence, (ii) prejudice its commercial interests, and (iii) reveal its trade secrets."

29. In a footnote the MoJ stated that it *"will update its submissions in light of any further information or representations from OCS"*. Perhaps due to the course of the litigation no further representations were forthcoming.

30. This contention of prejudice to commercial interests is problematic. The cost of the contract is (or should be) in the public domain. The MoJ asked for information as to an incremental cost, which it decided not to incur. The MoJ also relied on its submissions in paragraphs 26, 27 and 33 of its Reply to the appeal (where it addressed the s.36 exemption). The only part relevant to this contract is 27(i):-

    "By undermining the relationship of trust and safe space needed for contract management, and inhibiting contractual discussions, disclosure would prejudice the effective management by the MoJ of the Contract and similar contracts."

31. It appears that OCS had told its staff of the request for costings by MoJ. The staff were aware that the decision of moving to the Living Wage was one for MoJ, not OCS. If the MoJ wanted to adopt this change, then OCS would implement it. If the MoJ did not wish to implement the Living Wage then OCS would not be able to pass the cost on and staff would not get a pay rise. It is clear that staff were aware of the dynamics of the relationship, no doubt this is why OCS had told staff of the request for costings from MoJ.

32. The MoJ chooses to contract for a range of services paid from the public purse. Suppliers will wish to contract with it. If cost negotiations arise in the course of a contract and the MoJ is willing to pay more, it would. But there is no evidence before this tribunal that disclosure of the specific information withheld by the MoJ (more than two and a half years old at the time of the request) would or would be likely to prejudice the commercial interests of either OCS or the MoJ. The s.43(2) exemption is not engaged.

33. The MoJ also relied on s.43(1), asserting that the information constitutes a trade secret. This claim does not bear scrutiny. The withheld information is a series of cost prices relating to different sites. That is not a trade secret. There are also lists of *"pricing assumptions"* and *"conditions of estimates"*. Any competent manager reviewing cost information would expect to be informed of how the costs were arrived at. That is also not a trade secret. The tribunal respectfully endorses the opinion of Gavin Millar in Coppel's Information Rights (5th Edition 2020, 34-054 Trade Secrets):

    "Relevant considerations include the value of the information, the investment made in developing the information, the extent to which it truly is secret, the extent which access to it has been restricted or its secrecy and importance have been emphasised and the extent to which it is separate and distinct from other information which cannot properly be regarded as a trade secret. Technicality is not required, although secret processes of manufacture formulae and designs and so forth may more readily be regarded as trade secrets than information about costs, prices, sales and customers. Technical information may have the appearance of distinctiveness and sophistication but in truth be trite or inseparable from a general stock of skill and knowledge which an employee may take away from with him; in which case it will

not constitute a trade secret. Conversely although it often may not do so, in an appropriate case financial and customer information may constitute a trade secret (eg where one or more of the following apply: dissemination of such information has been restricted; it is of great value; release of it would cause serious harm to the person from whom the information originates)."

34. There is frequently in cases such as this a claim that the basis upon which a contractor prices a contract is a trade secret and that revealing it would be to expose a trade secret. However in this as in other cases, in reality the claim obscures an unwillingness to have information disclosed. The information withheld by the MoJ falls well below any reasonable test for what constitutes a trade secret, and this exemption is also not engaged.

Section 41 exemption

35. The MoJ also relied on s.41(1) FOIA (information supplied in confidence whose disclosure would constitute an actionable breach of confidence), summarising the decision in Coco v A N Clark:-

i. The information has the necessary quality of confidence;
ii. The information was imparted in circumstances importing an obligation of confidence; and
iii. There was an unauthorised use of the information to the detriment of the confider".

36. In *AG v Guardian Newspapers* Lord Goff noted the criteria in *Coco v A N Clark* (and explored the necessity for detriment to found a claim) but identified three significant limitations to the rule, all of which have some bearing on this case:-

To this broad general principle, there are three limiting principles to which I wish to refer. The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. I shall be reverting to this limiting principle at a later stage.

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.

The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

37. The first limitation guided the decision of the second and third respondents to withdraw from this appeal, once (on the MoJ's assertion) the information had been disclosed to the Union in the Employment Tribunal litigation and for practical purposes its discloure was no longer significant for them.

38. The second and third limitations remain of relevance.

39. At the time of the request the information was stale. The actual staff numbers and ages will have changed. Their remuneration will have changed. The limitations of the information at the time when it was produced are explored above, and the relevance of the information would have been even more reduced after more than 30 months. The tribunal is satisfied that at the time of the request the information was effectively commercially useless – it was trivial.

40. In its complaint to the Commissioner, the Union formulated an argument relating to public interest in the terms and conditions on which lowly paid outsourced workers are employed. The Employment Tribunal decision identifies anomalies in the pay of cleaners employed by OCS to clean MoJ buildings, with some receiving the Living Wage and others not. This appears to have led to some industrial action over the years. There is a clear public interest in a wider understanding of the extent of this inequality and its impact on low paid workers, the fact that the MoJ appears to have considered remedying it, and having received the costings decided not to. There is also a clear public interest in understanding the formulation of public policy on the issue. While the withheld information does not give a complete answer, it is relevant to a countervailing public interest which favours disclosure and outweighs the public interest in maintaining confidentiality in respect of the information.

41. There is also no convincing evidence before the tribunal that disclosure of the withheld information would cause detriment.

42. Accordingly the tribunal is not satisfied that disclosure of the withheld information would give rise to an actionable breach of confidence.

Section 36 exemptions

43. The Commissioner formulated the decision notice relying on the provisions of s.36(2)(b) and (c):-

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act— […]
(b) would, or would be likely to, inhibit—
(i) the free and frank provision of advice, or
(ii) the free and frank exchange of views for the purposes of deliberation or
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

44. By a letter of 4 January 2022 to the ICO, the MoJ set out the background to the request made in November 2020.:-

The letter confirmed that, for the purpose of relying on the s.36(2) exemption, the opinion of the Minister (the Qualified Person) was sought in December 2021 and a copy of the submission to the Minister was supplied:-

"… If information were to be disclosed; releasing information relating the potential costs to OCS, of implementing the Real Living Wage; across the Ministry of Justice Estate on a national basis for all relevant services. Several of the buildings covered by the disclosure are occupied by other Government Departments that are managed by the Ministry of Justice Property.
9. The information was requested from OCS following mobilisation of the Ministry of Justice Cluster Facilities Management (FM) Contract which includes other Department Buildings such as Department for Education's Sanctuary Head Quarters which had a Transfer Undertakings Particulars Employment (TUPE) contractual right to London Living Wage, with the Ministry of Justice using the National Minimum Wage.
10. Following full implementation of the contract at the contractual (bid) wage rates, a strike led by United Voices of the World (UVW) trade union was held in August 2018 by 12 cleaners employed by OCS. Amongst the issues they were striking about was the call to be paid the London Living Wage. This followed earlier strike action in 2016 and 2017.
11. Given the industrial action, the topic was the subject of 2 submissions dated 27th July and 16th August 2018, with the issue of whether civil service employers should commit to the Living Wage Foundations Real Living Wage (RLW) and London Living Wage (LLW) rates which was considered by the Civil Service Board in 2019 and rejected.
12. Following this review, across government write-around was conducted. Most department's use the Crown Commercial Services (CCS) Facilities Management framework to source their suppliers. Given the Crown Commercial Services terms do not mandate the LLW or RLW the departments generally follow this approach."

45. The submission explained why it was considered that the exemption was engaged:

"We believe that these subsections of the Section 36 exemption are also engaged by the withheld information, as disclosure of the requested information would inhibit the free and frank provision of advice, and the free and frank exchange of views for the purpose of deliberation and prejudice the effective conduct of public affairs. We recommend that the MoJ should take this opportunity to apply the section 36 exemption as well.

14. Applying Section 36(2)(b)(i) and(ii) and 36(2)(c) of the FOIA requires the reasonable opinion of a Qualified Person, which in practice is a Minister for the department. You are required only to be satisfied that disclosure would cause such inhibition and prejudice the effective conduct of public affairs.
…
18. Disclosing the information would, in our opinion likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore all options, when providing advice or giving their views as part of the process of deliberation regarding the Real Living Wage. This information if disclosed would cause reputational damage to the Ministry of Justice, and the other Government Departments occupying

accommodation within the scope of the Ministry of Justice cluster contract by disclosing information that breached the commercial interests and confidentiality of third-party contractors. This breach would lead to a subsequent inhibition of the candour of the discussions and advice, or the exchange of views, between MOJ and x-HMG on the Real Living Wage. That would impair the quality of decision making by the Ministry of Justice and would inhibit future discussions between officials when considering such topics.

19. Disclosing the information would, also in our opinion prejudice, the effective conduct of public affairs and services provided by affecting the "safe space" for government officers of the MoJ to have a robust confidential, deliberation process on the pay issue, which is required to provide an effective public service."

46. The issues for the tribunal are whether the Qualified Person's opinion is reasonable and, if that is so, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. (giving due weight to the Qualified Person's opinion).

47. With reference to the specific claims in the submission to the Minister:

"Disclosing the information would, in our opinion likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore all options, when providing advice or giving their views as part of the process of deliberation regarding the Real Living Wage."

What would be disclosed reveals nothing of advice from officials or views on options. It merely records the price of an option that was not adopted.

"This information if disclosed would cause reputational damage to the Ministry of Justice, and the other Government Departments occupying accommodation within the scope of the Ministry of Justice cluster contract by disclosing information that breached the commercial interests and confidentiality of third-party contractors.

The first point to note, as explored above, is that disclosure of the withheld material would not prejudice the commercial interests of OCS, or give rise to an actionable breach of confidence. The bland assertion of reputational damage is doubtful and not borne out by any substantial evidence.

"*This breach would lead to a subsequent inhibition of the candour of the discussions and advice, or the exchange of views, between MOJ and x-HMG on the Real Living Wage. That would impair the quality of decision making by the Ministry of Justice and would inhibit future discussions between officials when considering such topics."*

The prejudice implied by this hypothesis is speculative and unconvincing. It is difficult to see how disclosure of cost information relating to one third-party cleaning contractor would or would be likely to widely inhibit the candour of internal governmental discussions about the Real Living Wage.

"Disclosing the information would also in our opinion prejudice the effective conduct of public affairs and services provided by affecting the "safe space" for government officers of the MoJ to have a robust confidential, deliberation process on the pay issue, which is required to provide an effective public service."

This is again a generalised assertion. Disclosure of the withheld information in this case would put in the public domain a small amount of data about the outdated and hypothetical costs of a pay rise relating to one contractor, which the MoJ decided not to agree to. There is no plausible reason why this would or would be likely to negatively affect the effective conduct of public affairs or the 'safe space' in which deliberations about pay increases may be held by officials.

48. The Commissioner approved the following argument from the MoJ:

"Further, if the requested information were to be disclosed, they could be taken out of context and it could damage the validity of the views of the respective government department and lead to loss of confidence in such government department, and the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure would prejudice the effective conduct of their public affairs and services provided. The disruption caused would be the effort and time defending and in debating options that have already been considered or a position which is now out of date as National Minimum and Real Living and London Living Wages have all changed annually since this data was produced so is also out of date and not representative of the current financial position".

49. The tribunal considers that the Commissioner has fallen into error. There was no information before the Commissioner supporting the untested assertion that disclosure of the withheld information would or would be likely to damage the validity of the views of the MoJ or damage confidence in the MoJ (or how that damage would manifest itself); or that it would lead to some sort of impact that would disrupt or divert resources. It is also unclear from the decision notice what is meant by 'the views of the respective government department'. As for the Commissioner's reliance on the fact that the withheld information is out of date, the tribunal considers that this is a discretionary factor that the Commissioner should also have considered in favour of disclosure.

Conclusion

50. In this case elaborate arguments have been constructed by the MoJ and accepted by the Commissioner without any critical evaluation of the factual basis of those arguments by either party and by giving overdue weight to the Qualified Person's opinion at face value. The exemptions in s.36(2) are not engaged. The rigorous approach of Lord Goff in the *Spycatcher* litigation has much to recommend it.

Signed Hughes Date: 4 September 2023