NCN: [2024] UKFTT 77 (GRC)

Case References: EA-2023-0253

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP
Heard on: 18 January 2023
Decision given on: 26 January 2024
Promulgated on: 26 January 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER STEPHEN SHAW
TRIBUNAL MEMBER MARION SAUNDERS

Between

JESSICA LEARMOND-CRIQUI

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) UK SPACE AGENCY

Respondents

Representation:
For the Appellant: In person
For the First Respondent: Did not appear
For the Second Respondent: Mr Waller (Counsel)

Decision: The appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice of 3 May 2023 which held that the UK Space Agency ('UKSA') was entitled to rely on section 43(2) (commercial interests) of the Freedom of Information Act 2000 (FOIA) to withhold the requested information. The Commissioner did not require UKSA to take any steps.

Factual background

2. The United States Government Accountability Office (GAO) produced a report to Congress in September 2022 entitled 'Large Constellations of Satellites, Mitigating Environmental and Other Effects' (The GAO report). The introduction to that report explains why they did this study (p 483):

> "Enabled by declines in the costs of satellites and rocket launches, commercial enterprises are deploying large constellations of satellites into low Earth orbit. Satellites provide important data and services, such as communications, internet access, Earth observation, and technologies like GPS that provide positioning, navigation, and timing. However, the launch, operation, and disposal of an increasing number of satellites could cause or increase several potential effects.
>
> This report discusses (1) the potential environmental or other effects of large constellations of satellites; (2) the current or emerging technologies and approaches to evaluate or mitigate these effects, along with challenges to developing or implementing these technologies and approaches; and (3) policy options that might help address these challenges."

3. The GAO report covers the following potential effects:

> "• **Increase in orbital debris**. Debris in space can damage or destroy satellites, affecting commercial services, scientific observation, and national security. Better characterizing debris, increasing adherence to operational guidelines, and removing debris are among the possible mitigations, but achieving these is challenging.
>
> • **Emissions into the upper atmosphere**. Rocket launches and satellite re-entries produce particles and gases that can affect atmospheric temperatures and deplete the ozone layer. Limiting use of rocket engines that produce certain harmful emissions could mitigate the effects. However, the size and significance of these effects are poorly understood

due to a lack of observational data, and it is not yet clear if mitigation is warranted.

• **Disruption of astronomy**. Satellites can reflect sunlight and transmit radio signals that obstruct observations of natural phenomena. Satellite operators and astronomers are beginning to explore ways of mitigating these effects with technologies to darken satellites, and with tools to help astronomers avoid or filter out light reflections or radio transmissions. However, the efficacy of these techniques remains in question, and astronomers need more data about the satellites to improve mitigations."

4. The following factual background is taken largely from UKSA's response and its communications with the Commissioner, but the tribunal accepts it as an accurate summary of the background facts.

5. OneWeb is a global communications company with a network powered by a constellation of 648 low earth orbit (LEO) satellites. OneWeb's ambition is to provide high-speed broadband access for governments, businesses, and communities around the world.

6. In May 2020, OneWeb filed for US bankruptcy as it failed to secure adequate investment from investors. Following discussions with HM Treasury, an investment of up to $500 million in equity was being considered by UK government to co-finance the purchase of OneWeb from US Chapter 11 bankruptcy proceedings. The Government announced in July 2020 that it would invest in OneWeb.

7. The Department for Business, Energy and Industrial Strategy ("BEIS") was asked to make and manage the investment in OneWeb because (at the time) it led on space policy and had the delivery mechanisms to enable the investment. However, the discussions between the Government and OneWeb were led by the Treasury ("HMT"). BEIS has since been split, and the newly formed Department for Science, Innovation and Technology ("DSIT") now has responsibility for this area of policy.

8. The National Security Strategic Investment Fund (NSSIF) sought professional financial advice on the company's prospects on the Government's behalf.

9. The then Secretary of State for BEIS asked UKSA to commission an independent technical assessment for OneWeb. The independent technical assessment for OneWeb ('the Report') was created by the Aerospace Corporation.

10. The Aerospace Corporation is a not-for profit corporation that operates a space research and development centre, based in the US and in the UK. The Aerospace Corporation employs technical experts across a variety of

disciplines across space-related science and engineering, and its opinions on matters in its subject area carry considerable weight.

11. The Report provides details of OneWeb's business structure and assesses its technology and operational planning.

12. On 17 September 2020 the appellant made a request to UKSA for:

    (i) a copy of the 'technical report' referred to in a letter dated 26 June 2020 from the Acting Permanent Secretary and Accounting Office to the Secretary of State for Business, Energy and Industrial Strategy (BEIS), and
    (ii) any reports considering the health impact of using electromagnetic radiation/radiofrequency radiation from satellites on humans, animals, pollinators and trees.

13. UKSA replied on 14 October 2020 stating that:

    (i) it was withholding the financial model under sections 41 and 42(3), and
    (ii) it was unable to comment on the second part of the request as it was outside of UKSA's remit, and not part of the astronomy community's assessment of interference issues.

The request

14. The appellant made the request which is the subject of this appeal on 29 November 2022. The full text of the letter is as follows:

> I made the request below on the site whodotheyknow (*sic*): [*hyperlink to request of 14 October 2020*]
>
> You will see that I requested the technical report referred to in Sam Beckett's letter which is referred to in the report. The response from the Space Agency addressed the Financial Model rather than the technical report. I have just noticed this and would be grateful for your urgent response regarding the technical report. I expressed my request at the time of the original request as below:
>
> > "Re the request for a direction below, the UK Space Agency (UKSA) was asked to procure a separate independent technical assessment into the purchase of OneWeb by the government.
> >
> > The letter below states:

> "It highlights the substantial technical and operational hurdles that OneWeb would need to overcome in order to become a viable and profitable business." [*link provided*]
>
> This request is for a copy of the technical report referred to in the letter above."

I do not understand why when I asked for the technical report, the Space Agency responded with a response relating to the Financial Model.

The reference to the technical report in Sam Beckett's letter is at the top of page 2 of the letter in the link above.

I would be grateful for your swift response that you will release the Technical Report to me within the timeframe required for FOIs.

15. UKSA initially responded on 30 November 2022, stating that they were treating it as a new request. The appellant objected to this and asked UKSA to treat it as an ongoing request from the original one in 2020 and to respond to the original request.

16. UKSA responded further stating that they would ordinarily treat her letter as a request for an internal review of the response in 2020 but given the significant amount of time that had elapsed, they were treating it as a new request.

17. The UKSA responded substantively on 23 December 2022. They confirmed that they held the requested information but withheld it under section 43(2) (commercial interests).

18. The appellant applied for an internal review by email dated 23 December 2023. That letter is headed 'request for technical report prepared by the UK Space Agency relating to the purchase of OneWeb'. There is no reference in that letter to the second part of the 2020 request.

19. The UKSA upheld its position on internal review. In that internal review it dealt only with the request for the Report.

Complaint to the Commissioner

20. The appellant complained to the Commissioner on 27 February 2023. One of the boxes which the appellant filled in is headed 'What specific aspect of the handling of or final response to your FOI/EIR request are you dissatisfied with?' In that box the appellant wrote:

> "I asked for a Technical Report as set out in the attached correspondence. My request was denied. I asked for an internal review on 23 December

> 2022 which is more than 20 working days ago. No response has been received. I sent a chaser tonight on 27.2.23 but do not expect to receive a response. I would be grateful if my complaint can be followed up. Many thanks."

21. The appellant wrote again to the Commissioner on 15 March 2023 after receiving the internal review response. She stated:

> "The UK Space Agency has now responded denying my request. Can you now take my complaint forward please. Do see their response attached."

22. The Commissioner wrote to the appellant on 16 March 2023 referring to the 'UKSA's handling of your request for information dated 29 November 2022' and stated that the focus of the investigation would be 'to determine whether the UKSA handled your request in accordance with the legislation'. The Commissioner invited the appellant to 'specify which sections of the UKSA's response you wish to challenge and why. Please also let us know which sections, if any, you accept. If there are matters other than these that you believe should be addressed, please let us know.'

23. The appellant replied by letter dated 20 March 2023 with an email entitled 'ICO further grounds for complaint'. That email states:

> "Request for health information Please see the attached (Doc 1). This was my original request in 2020. In the last para, you will see a request for reports relating to health etc:
> …
> The response from the Space Agency at the time was that they could not comment on my request because it was outside of their remit and not part of the astronomy community's assessment of interference issues (I attach only the second page of the letter):
> …
> With respect, this is a rubbish response. The UK Space Agency has a wide remit which is not only to do with the astronomy community's assessment of interference issues. They are rocket scientists. They are acutely aware of the impact of radiation on their satellites – the sun is a radiation generator of course. They know, exactly, the effect of radiation, particularly from 5G, on humans, animals, pollinators and trees. They would have studied such information in detail to be aware of the harm their equipment would be causing to those sensitive to radiation.
> …
> Their response merely sought to fob me off. They would have appropriate reports and I request the ICO to require them to disclose all such reports.
>
> UK Space Agency's denial of request

> Secondly, I do not accept their response. Their competitors have had detailed information about OneWeb as it was a bankrupt company and touting around for a white knight – information was sent to their competitors as shown in the attached document (Doc 2).
>
> I object to the reasons the UK Space Agency states as reasons not to disclose the information requested on the basis that the information is not confidential and that its disclosure will not prejudice the commercial interests of OneWeb as the competitors would have been granted this information also in order to prepare their bids."

24. The Commissioner does not appear to have taken any steps to investigate the additional complaint about the failure to respond to the second part of the 2020 request. It is not dealt with in the Decision Notice.

Decision notice

25. In a decision notice dated 3 May 2023 the Commissioner decided in relation to the failure to provide the Report that section 43(2) was engaged and that the public interest favoured maintaining the exemption.

26. The Commissioner acknowledged that the withheld information contained details of OneWeb's business structure, technology assessment and planning. The Commissioner held that giving competitors an advantage over OneWeb would be likely to result in prejudice to its commercial interests. The Commissioner accepted that the UKSA had demonstrated that there was a causal link between disclosure and harm. The Commissioner found that the exemption was engaged.

27. In balancing the public interest arguments, the Commissioner accepted that disclosure would to some extent help to increase openness and transparency. The public would be better informed about the Government's decision to invest in OneWeb. The Commissioner stated that he was also aware of how topical matters are relating to broadband satellite and the effect of radiation from 5G technology. However, given the level of likelihood that commercial harm would occur should the requested information be disclosed, and the arguments from the UKSA, the Commissioner found that the balance of public interest favoured maintaining the exemption. He did not go on to consider section 41.

Grounds of appeal

28. The Grounds of Appeal are, in essence, that:

28.1. The Commissioner was wrong to conclude that the exemption was engaged; and
28.2. The Commissioner was wrong in his assessment of the public interest balance.
28.3. The Commissioner did not engage with the appellant's request for the disclosure of information relating to effects of radiation, particularly 5G, on humans, animals, pollinators and trees.

The response of UKSA

29. UKSA submits that no challenge appears to be made to the Commissioner's findings that section 43 is engaged and no arguments are advanced to challenge his conclusions on the public interest in withholding the information.

Information relating to effects of radiation

30. In relation to the request for information relating to effects of radiation, it is submitted that the UKSA holds no information and therefore it is irrelevant whether or not the emission of electromagnetic radiation from LEO satellites is harmful.

Section 43(2)

31. It is submitted that the relevant commercial interests that are engaged are the commercial interests of OneWeb, of its investors and of the Government.

32. Given the weight an opinion of the Aerospace Corporation carries within the space sector, and that the Report contains its analysis of commercially sensitive information regarding OneWeb, UKSA submits that the disclosure of the Report would be harmful to the commercial interests of OneWeb, and also those of its investors including HMG.

33. It is submitted that OneWeb would be placed at a competitive disadvantage if its competitors were provided with an independent expert analysis into its business plan, and operational and technical capacity.

34. UKSA submits that the commercial interests of the Government are engaged because of the likelihood that the value of its investment could fall if the Report is published, and because disclosure would likely undermine trust between the Government and OneWeb and any future potential commercial partner.

35. It is submitted that it is more probable than not that prejudice would be caused to the above commercial interests through disclosure. Alternatively, there is a real and significant risk of prejudice.

Public interest balance

36. UKSA submit that there is a significant public interest in ensuring transparency where the expenditure or lending of large sums of public funds are involved. There is a limited public interest in the disclosure of the Report in that it would provide further transparency into the Government's decision. That interest is limited because of the information about OneWeb and the Government's decision that was publicly available at the relevant time.

37. It is submitted that disclosure is not necessary for the public to understand the Report's key findings, or the role that it had within the Government's assessment of whether to make the investment, because this set out within the published letter of Sam Beckett dated 26 June 2020.

38. UKSA submit that it is not necessary for the public to see the Report to gain an understanding technically of OneWeb satellites. A technical overview of LEO satellites was provided of UK satellite strategy and of satellite-based broadband to the BEIS Strategy Committee on 17 September 2020.

39. It is submitted that the appellant's case is based upon several misconceptions. There is no evidence of any assumption being made by the Government that by investing in OneWeb a replacement would be provided for the EU Galileo system. It has not been suggested that the first generation of OneWeb satellites could provide "position navigation and timing" capability. Nor is there any evidence that UKSA advised against the investment.

40. By contrast, it is submitted that there is a strong public interest in withholding disclosure of the Report. The public interest is even greater if the information is confidential.

Section 41

41. The Report contains the assessments and analysis of Aerospace. The Report states that it consists of confidential information and that its release is approved only to members of the UKSA and HMG, and that public release is not authorised.

The Commissioner's response

42. The Commissioner accepts that there is a general public interest in disclosure to enable the public to understand and challenge the decisions and actions taken by public authorities, facilitate accountability and transparency in the spending of public money, and ensure that public authorities are providing value for money. The Commissioner further accepted in the DN that, on the particular facts of this case, disclosure of the withheld information would enable the public to be better informed about the Government's decision to

invest in OneWeb. However, the Commissioner maintains that there is also a public interest in protecting commercial interests.

43. The Commissioner reasonably gave weight in his DN to the following public interest factors which favour withholding the requested information:-

43.1. OneWeb's commercial interests are likely to be harmed by disclosing information which is market-sensitive and / or useful to its competitors;
43.2. It is crucial for businesses and the government to be able to communicate privately about commercially sensitive information which helps Government to formulate policies, understand the difficulties businesses face and think through solutions;
43.3. Disclosure would undermine confidence that businesses have in the Government that their commercial interests and opportunities will be protected.

44. Further, if it is accepted by the Tribunal that disclosure of the withheld information would prejudice the commercial interests of OneWeb, the Commissioner submits this will add weight to the public interest in maintaining the exemption.

45. The public interest factors advanced by the appellant are, in the Commissioner's submission, insufficient to outweigh the public interest in maintaining the exemption on the facts of this case.

46. No request for disclosure of information relating to the effects of radiation was made in the appellant's request dated 29 November 2022 which is the subject of this appeal (the appellant did request such information in an earlier request dated 17 September 2020 though the request dated 29 November 2022 was treated as a separate request by UKSA and responded accordingly). In addition, the request for health information was not part of the appellant's section 50 complaint to the Commissioner. Accordingly, the Commissioner did not investigate or reach a conclusion in his DN regarding this information.

The appellant's reply

47. The appellant relies on her witness statement in her previous appeal, which the tribunal has read and taken into account.

48. The appellant submits that the Report, which included financial advice to the Government, has not been subject to scrutiny or independent review. She submits that this is important because:

48.1. There has been no question asked about why, given the clear advice from UKSA that OneWeb's low earth orbit satellites were "not viable"

as a replacement of Galileo, the government spent US$500m on this bankrupt company.

48.2. The government overpaid for this asset and the public are entitled to know why it did so. The public are entitled to know why the government ignored the advice of its experts the UKSA and its advisers.

48.3. The public are entitled to know why BEIS used its own private slush fund ("NSSIF") which sits on the British Business Bank's books but over which the BBB has no control, to buy this asset.

48.4. The public are entitled to know why the then Secretary of State of BEIS, the then Chancellor of the Exchequer and the then Prime Minister signed off on this purchase.

48.5. It would be interesting is to know what date the Report was provided and what date the financial report was provided. The Report contained comments about the 'financials' of this purchase. If the Report was received first, and the government did not like the answer, it may have sought the financial report subsequently to justify the purchase given that its own internal advisers told it not to buy OneWeb.

49. The appellant does not accept that OneWeb does not hold any information relating to the effects of radiation. They did not state that they did not hold this information in 2020, they stated that it was outside their remit. The appellant submits that is not credible that they do not hold the information, given the health impacts of radiation.

50. The appellant asserts that Electromagnetic Hypersensitivity has been recognised as a disability. If there is no document that relates to the health impacts of this investment, she submits that the Secretary of State is in breach of his statutory public sector equality duty and is guilty of wrongdoing in approving and making a Direction in relation to this investment. Wrongdoing by the government is a public interest argument in favour of the disclosure of the technical assessment.

51. The appellant confirms that she does challenge the findings that section 43 is engaged because the information is not confidential in nature. Many, if not all, competitors of OneWeb, had access to all of its financial and technical information. Much if not all of OneWeb's financial information was before the US bankruptcy court and could be seen by the public. Aerospace's analysis also was not commercially sensitive.

52. The appellant refers to a number of previous decisions which she submits support her argument that the information should be disclosed.

53. Under section 41 the appellant submits that there is no evidence before the tribunal of any confidentiality sought by the provider of the Report to UKSA.

She submits that the provider had no expectation of confidentiality in relation to the advice sought. If they did, then the public interest in maintaining confidentiality is outweighed by the public interest in disclosure.

54. The appellant submits that the public interest in disclosure is strengthened where there is a plausible suspicion of wrongdoing, evidence of public concern, even with no objective basis or if information in the public domain is misleading or does not present the full picture. The appellant submits that the facts engage all of these.

55. Disclosure of the technical assessment will greatly add to the understanding of the Secretary of State of BEIS making the Direction to the Accounting Officer and help to inform the public debate around this decision. It would also give the public some understanding of the operation of a public authority with significant responsibility and of its decision-making process in relation to the investment in OneWeb which brought this company into the position of an "associate" for BEIS accounting purposes.

56. The appellant submits that disclosure would not discourage people from confiding in public authorities.

57. The appellant submits that it is in the public interest to know the terms of the reference of the request to Aerospace.

58. The appellant submits that the fact that there is rubric on the document relating to confidentiality is not enough to prevent disclosure of the document in the public interest.

59. It is submitted that the value of the government's and other investors' investments is unlikely to fall with disclosure. At the time of the request and the UKSA's initial response, there was no market for shares in OneWeb. Nobody was suddenly going to sell their shares in OneWeb at a discount because of the Report.

60. The appellant suggest that the relevant date is 14 October 2020 not 23 December 2022. If not, the appellant queries whether OneWeb was at that time an independent company or, in fact, a government department given the government's shareholding and its Golden Share. Section 81(2) FOIA states that one government department cannot claim that disclosure by it of any information would constitute a breach of confidence actionable by another government department.

61. She submits that anyone dealing with the government knows that anything it does may be disclosed because of the public interest laws in the UK. Suggesting disclosure would undermine trust is a red herring.

62. In relation to information already in the public domain and the various committees which had meetings to ask about OneWeb's purchases, the appellant submits that it is apparent from the minutes of the meetings that there was no transparency. No one asked to see the Report. No one asked about the advice which the government received from Aerospace. No one knew it was Aerospace that provided the advice. No one understood the nature of the Report or asked why the decision was made in spite of the advice from Aerospace and from the UKSA.

63. The appellant disagrees strongly that the disclosure is not necessary given the public information in the letter of 16 June 2020. She submits that Sam Beckett's statement does not give an indication of the vigour of the advice or how the advice was couched. It does not give a flavour of exactly what Aerospace was asked to advise on.

64. Given the conflict of interest inherent in this purchase by way of the fees obtained by UKSA for OneWeb satellite licences (close to £500,000) and the cap in November 2020 on damages which an individual can obtain if their property is damaged by satellites belonging to UK companies (limited to £250,000 per property), it is imperative that the public understands why those later decisions were made and the conflict of interest position of the government.

65. The appellant submits that the Report would not have been a lecture to HMG on the technicality of OneWeb's business. It would have been an analysis of its operational and technical capabilities. It is that analysis which would contain negative advice to the government on which the public interest bites and makes it imperative for the Report to be disclosed.

66. In relation to the submission that the appellant's case is based on misconceptions, the appellant submits that the Secretary of State for BEIS stated in Committee that the Government was considering how to use OneWeb to replace Galileo.

    It is submitted that the Government represented that the financial and technical advice was aligned in favour of purchase in one of the annual reports for BEIS. They did not represent the dissent on both the technical and financial sides.

67. In relation to the submission that there is no evidence that UKSA advised against the investment, the appellant submits:

> "The evidence from Sam Beckett's letter is clear that both the technical and financial advice contained "considerable uncertainties". I would like to see a professional report which confirms there are "considerable uncertainties" which then advises a purchase without couching its advice in clear terms. On balance, the public need to see the report to see

for itself what the government was told which led Ms Beckett to ask for a Ministerial Direction (which is an extremely rare occurrence) which was then given."

68. The appellant submits that the public interest in disclosure is overwhelming for the same reasons relied on in relation to her earlier appeal. She adds to this the fact that the technical advice regarding the investment, which was an extraordinary event and subject to a ministerial direction, has received no public scrutiny at all.

69. The appellant makes the following general submissions on the public interest:

69.1. Disclosure will contribute to increased transparency, accountability and public participation.
69.2. The technical assessment may have had a reference to the health impacts.
69.3. There is misinformation or an inaccurate record in the public domain of precisely why the government bought OneWeb.
69.4. The information can be released without causing significant administrative burden or breaching any confidentiality.
69.5. Total confidentiality can never be guaranteed when advising the government.

Legal Framework

70. Section 43(2) provides:

> "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)"

71. 'Commercial interests' should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity.

72. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

73. Section 43 is a qualified exemption, so that the public interest test has to be applied.

74. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.

75. The APPGER case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> "… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

Section 41

76. Section 41 provides, so far as relevant:

> **"S 41 – Information provided in confidence**
>
> (1) Information is exempt information if –
> (a) it was obtained by the public authority from any other person (including another public authority), and
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

77. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

(i) Does the information have the necessary quality of confidence?
(ii) Was it imparted in circumstances importing an obligation of confidence?
(iii) Is there an unauthorised use to the detriment of the party communicating it?

78. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of 'private' information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.

79. Section 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence. The burden is on the person seeking disclosure to show that the public interest justifies interference with the right to confidence.

The role of the Tribunal

80. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

List of issues

81. The issues for the tribunal determine are:

    81.1. Does the tribunal have jurisdiction to determine whether UKSA held any information within the scope of the appellant's request for 'health information'.
    81.2. Is section 43(2) engaged on the basis that disclosure would be likely to prejudice the commercial interests of OneWeb, its investors and/or the Government?
    81.3. If so, is the public interest in disclosure of the requested information outweighed by the public interest in maintaining the exemption?
    81.4. Is any of the disputed information confidential within the meaning of section 41(1) FOIA?
    81.5. For any information which is confidential, would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

Evidence

82. We read an open and a closed bundle.

83. The closed bundle consists of:

    83.1. The closed witness statement of Matt Archer
    83.2. The withheld information
    83.3. Documents that refer to the content of the withheld information or of which disclosure would otherwise defeat the purpose of the proceedings.

84. The tribunal was satisfied that it was necessary to withhold the information in the closed bundle under rule 14.

85. We read witness statements and heard oral open and closed evidence from Matt Archer, formerly part of the UKSA Covid19 Sector Response Team and responsible for commissioning the Report in issue.

86. We held a closed session. The following gist of the session was provided to the appellant in the hearing:

1. Counsel for the Second Respondent explained that the production of the Aerospace Report was preceded by:
   a. the submission to the Aerospace Corporation of a specification for the project by the Second Respondent
   b. and the submission to the Second Respondent of a proposal for the project by the Aerospace Corporation.

2. The Aerospace Report is not subject to a non-disclosure agreement. Although it was originally envisaged that Aerospace would be provided with proprietary information from OneWeb, Mr Archer explained that this ultimately was not provided. Mr Archer gave evidence that he was not aware of any report published by Aerospace on OneWeb. Counsel for the Second Respondent submitted that:
   a. the Aerospace Corporation stated clearly their expectation within the Report and the proposal that the Report would be held in confidence and would not be published.
   b. the Report contains the considered opinions of the authors which are not publicly available, although some of the source data is publicly available.
   c. the authors used their experience and knowledge of OneWeb gained from work with previous customers.

3. Mr Archer gave evidence that he was not aware of any feedback from Ministers on the Report that they "did not like it", as claimed in the submissions of the Appellant.

Submissions

87. We heard and took account of oral submissions from both parties.

Discussion and conclusions

The tribunal's jurisdiction to consider the request for health impact reports

88. Neither party addressed the jurisdictional point in detail, and both parties asked the tribunal to make a ruling on whether or not the UKSA, on the balance of probabilities, held information within the scope of part 2 of the 2020 request. Despite this, we have concluded that we do not have jurisdiction to do so. The

jurisdiction of the tribunal is not a matter that can be determined by agreement between the parties.

89. The appellant's request to UKSA in 2020 had two parts. The first part was for the Report, and the second part was for reports considering the health impact of radiation. In her letter to UKSA on 14 October 2022 the appellant made clear that the reason she was challenging the 2020 response was because she had 'just noticed' that UKSA had addressed the financial report rather than the Report in their response in 2020. That letter concludes 'I would be grateful for your swift response that you will release the technical report…'.

90. Although there is a hyperlink to the request made in 2020, there is no indication whatsoever in the letter that she wishes to raise any issue in relation to the second part of the 2020 request relating to health impact reports. The letter clearly explains why she is only now challenging the response to the first part of the 2020 request but contains no explanation as to why she had not made any earlier challenge to the second part of the request.

91. In our view, the only sensible interpretation of the letter of 29 November 2022 is that it relates purely to the first part of the request in 2020 i.e. the request for the technical report. This would be our view whether that letter is treated as a new request, or as a request for an internal review of the 2020 request.

92. When the appellant applied for an internal review of the 2022 response, she headed her letter 'request for technical report prepared by the UK Space Agency relating to the purchase of OneWeb'. There is no reference in that letter to the second part of the 2020 request. The internal review dealt only with the first part of the 2020 request.

93. The appellant initially complained to the Commissioner about the failure to provide the Report, and the Commissioner accepted a complaint about the request dated 29 November 2022. The appellant later attempted by email dated 20 March 2023 to add a complaint about the response of UKSA in 2020 to the second part of the request relating to health impact reports. The Commissioner appears to have taken no action in relation to this additional complaint. The response to the request in 2020 did not form part of the Decision Notice under appeal.

94. In our view, it is not within our jurisdiction to consider anything other than the request made on 29 November 2022. As explained above, we do not consider that that included a request for health impact reports. No decision notice has been served in relation to the request in 2020 or indeed any request for health impact reports. An appeal cannot be made to the tribunal unless a decision notice has been served. Accordingly, we do not have jurisdiction to consider an appeal in relation to the second part of the 2020 request.

Section 42(3) – commercial interests

95. The material time for the public interest balance is 23 December 2022.

96. There is a public interest in preventing prejudice to commercial interests. Accordingly in this appeal there is some overlap in the evidence, the submissions and, to some extent, our reasoning in relation to the issues of whether the section is engaged and where the balance of public interest lies.

97. When considering whether UKSA has established a causative link or that the prejudice would be likely to happen, we have to take account of the fact that disclosure has not yet happened. It is a hypothetical, future event. There is therefore unlikely to be concrete or direct evidence of the specific effect of this particular disclosure.

98. UKSA assert that the relevant commercial interests are those of OneWeb, its investors and the Government.

99. The claimed prejudice is that the value of OneWeb would be likely to fall and that OneWeb would be likely to be placed at a competitive disadvantage. It is argued that this would cause prejudice to the Government and other investors because their investment would be worth less. We accept that this amounts to prejudice to commercial interests that is real, actual and of substance.

100. UKSA submit that this would be likely to happen because the Report contains independent expert analysis and opinion by the Aerospace Corporation in relation to OneWeb's business plan and operational and technical capacity. The views of Aerospace carry significant weight in the space sector.

101. It is a matter of public knowledge from the letter of Sam Beckett dated 26 June 2020, that the Report 'highlights the substantial technical and operational hurdles that OneWeb would need to overcome in order to become a viable and profitable business' and that taking that into account, 'UKSA consider that there is a high likelihood of further investment being required to complete the constellation and encourage user uptake of the services'. It is also a matter of public knowledge that the Report 'illustrates the considerable uncertainties in the modelling done of HM Treasury'.

102. We acknowledge that the analysis and expert opinion given in the Report is based, in the main, on factual information that was in the public domain. However the analysis and opinion of a highly regarded expert, which led to the conclusions set out in the previous paragraph, are not in the public domain.

103. We know that in April 2023, only 4 months after the relevant date, OneWeb was already in merger negotiations with Eutlestat. We accept, as a matter of common sense, that publishing the detail of the expert analysis and opinion by

the Aerospace Corporation that led to those conclusions carries a real and significant risk, at the relevant time, of both a fall in value of OneWeb and of placing OneWeb at a competitive disadvantage in any upcoming or current negotiations or in the market in general. This, in turn, carries a real and significant risk of prejudice to the commercial interests of Government (and a consequent impact on the public purse) and other investors.

104. On that basis we are satisfied that there is a causative link and that there is a real and significant risk of prejudice and we conclude that the exemption is engaged.

105. We are not persuaded that disclosure would be likely to undermine the trust between the Government and OneWeb or future potential commercial partners to the extent that it would be likely to cause any prejudice to commercial interests by discouraging companies from contracting with the Government in the future. There are significant benefits to be gained from contracting with the Government and those who contract with the Government will be aware of the existence of FOIA. Further this is not a disclosure of information communicated in confidence by OneWeb to the Government, it is information communicated in confidence by the Aerospace Corporation to the Government.

106. In relation to the prejudice in which we have accepted there is a causative link, the extent of any prejudice is relevant to the public interest. The likely extent of any prejudice is, in our view, highly uncertain. We do not have any concrete or direct evidence before us that can assist us in assessing the likely extent of the prejudice. This is, in the main, because we are predicting the level of prejudice that would be caused by a hypothetical, future event.

107. However, taking particular account of (i) the content of the Report, (ii) the Aerospace Corporation's reputation and the consequent weight of its opinion and (iii) the early stage of OneWeb's business and its live need for further investment at the relevant time (demonstrated in part by the earlier Report and in part by the soon to commence negotiations with Eutlestat), in our view release of this Report at that time could have caused significant reputational damage. Given the level of public investment, even a small fall in value would have had a significant consequential impact on the public purse.

108. Further, we acknowledge the fact that the Aerospace Corporation provided frank advice and analysis in a document explicitly stated to be confidential and not for public release. We accept that it is important for businesses and the government to be able to communicate commercially sensitive advice and analysis privately and frankly in order to assist the Government in properly formulating policies and reaching decisions. In our view releasing a report such as this while the commercial issues were still 'live' (in the sense set out in

the previous paragraph) would impact on that ability. This is not in the public interest.

109. Overall, for the reasons set out above, we conclude that there is a clear public interest in preventing prejudice to the commercial interests of the Government in particular, but also of OneWeb and its investors. There is a clear public interest in preventing distortion to competition. Finally, there is a clear public interest in protecting a space for communicating frank commercially sensitive advice and analysis. Taken together, we find that there is a strong public interest in withholding the information.

The public interest in releasing the information

110. In summary, whilst we accept that the appellant has identified a number of issues in relation to which there is a very strong public interest, we have concluded that the extent to which those interests would be served is limited by the content and nature of the Report, and the information already in the public domain.

111. We accept that there is a very strong general public interest in relation to transparency and scrutiny of the reasons that the Government decided to invest in OneWeb and in relation to the technological, operational or other hurdles faced by OneWeb. This was a controversial investment at the time. A ministerial direction was sought. It is a very large amount of public money to invest in a company of this nature and in this position. There is a strong public interest in knowing the conclusions of the independent technical assessment procured by UKSA which the Government took into account when deciding whether or not to invest.

112. In our view, this interest is largely served by the summary set out in the letter dated 26 June 2020 from the Acting Permanent Secretary and Accounting Officer, Sam Beckett, to the Secretary of State which gives a fair and unvarnished summary of the Report and the conclusions that UKSA reached based on the Report:

> "It highlights the substantial technical and operational hurdles that OneWeb would need to overcome in order to become a viable and profitable business. Taking that into account, UKSA consider that there is a high likelihood of further investment being required to complete the constellation and encourage user uptake of the services, increasing the risk that further HMG investment would be required in order to realise the potential benefits. As a result, UKSA's judgement is that the independent technical assessment further illustrates the considerable uncertainties in the modelling done for HM Treasury."

113. Further, given the Chapter 11 bankruptcy proceedings there was already a large amount of information about the financial position of OneWeb in the public domain. There was also a significant amount of information about the technological and operational hurdles faced by OneWeb already in the public domain. We know this because the Report is based, in the main, on publicly available information. This reduces the value of publication of the Report in serving the public interest identified above.

114. There has also been public scrutiny of the decision in parliament, although we accept that this does not deal with many of the issues raised by the appellant.

115. Although we find that it is not necessary for the public to see the Report in order to be sufficiently informed, we find there does remain some public interest in knowing the detail of the Aerospace Corporation's expert opinion and analysis, because this is an investment of a significant amount public money, made on the public's behalf. Given the value of the investment and its controversial nature this public interest remains reasonably strong.

116. The appellant also raises the following specific issues which she says contribute to an increased public interest in publication.

117. We do not accept that the Government had lied to the public about investment in OneWeb as a replacement for the EU Galileo system. There is no evidence before us of any assumption being made by the Government that this would be made possible by investing in OneWeb. It has not been suggested by the Government that the first generation of OneWeb satellites could provide position, navigation and timing capability. There was media speculation about this, but the Report itself does not serve to illuminate this issue.

118. The appellant has relied, in part, on the condition of Electromagnetic Hypersensitivity (EHS). She relies on the judgment of the First-tier Tribunal (Special Educational Needs and Disability) in EH925/10/0026 which found, on balance and on the basis of the evidence before it (i) that some individuals are sensitive to electro-magnetic fields, and (ii) that the child in question's symptoms were caused by electro-magnetic fields. The tribunal found that the child had an impairment by reason of her sensitivity to electro-magnetic fields and that it had a substantial and long-term adverse effect on her ability to carry out normal day to day activities, which meant that she had a disability within the Equality Act 2010.

119. Part of the tribunal's reasoning in concluding that the child was disabled was the failure of the local authority to produce evidence of its own or challenge evidence given by the parents. Judge Jacobs in the Upper Tribunal stated that this concerned him and said that it is 'always preferable to base a decision on the fullest evidence that can be provided'.

120. We do not accept that it can be said, on the basis of a decision that was expressly *not* based on a full consideration of all the relevant evidence, that a failure to carry out a disability impact assessment of the potential health impact of this investment in the light of EHS would be a breach of the PSED.

121. Even assuming that a disability impact assessment should have been carried out by the decision maker, that decision maker is not UKSA. The decision to invest was not taken by UKSA. UKSA were instructed to procure a particular report. They were not asked to include a disability impact assessment in that report or to consider any potential health impacts. Accordingly, they did not ask the Aerospace Corporation to consider any health impacts. Given the defined scope of the Report it is not surprising that the Report did not consider any health impacts. The fact that this Report does not consider health impacts does not mean that they were not otherwise considered by the decision maker.

122. Even if we were persuaded that it would be a breach of the PSED to fail to carry out a disability impact assessment relating to EHS, we could not conclude that there was a reasonable suspicion of wrongdoing on the basis of the evidence before us, because we do not know if the Government did, separately, carry out a disability impact assessment.

123. For those reasons, we find that disclosure of the Report does not illuminate the EHS issue or any potential breach of the PSED and would not serve this particular public interest identified by the appellant.

124. We place significant weight on the views set out in the report of the United States Government Accountability Office (the GAO report). In our view this is clear evidence of genuine concerns about particular potential environmental and other impacts of deploying large constellations of satellites into low Earth orbit. Although the GAO report post-dates the Government's decision to invest, many of the documents cited or relied on in the GAO report were in existence in 2020.

125. Having read the GAO report, in our view there is an extremely strong public interest in knowing the extent to which, if at all, the potential environmental and other impacts of deploying large constellations of satellites into low Earth orbit identified in the GAO report were considered by the Government. This public interest is particularly strong given the Government's 'net zero' commitments and the potential impact of emissions identified in the report. The particular potential impacts identified in the GAO report are set out in 'factual background' above.

126. However, we do not accept that disclosure of the Report would serve that public interest to any more than a very minimal extent. That is because the UKSA were not instructed to procure a report that considered those potential

impacts. Their instructions to the Aerospace Corporation therefore did not ask for those potential impacts to be considered and the Report does not consider those potential impacts. That does not mean that those impacts were not considered by Government. That may be the case, but it does not follow from the fact that they did not do so by means of the Report.

127. We accept that there is some, minimal, contribution to this particular public interest in that disclosure would demonstrate more clearly than the letter of 26 June 2020 that this particular report was not intended to cover those particular issues. Overall we conclude that the Report is of very limited assistance in illuminating the extent to which those issues were considered by the Government.

128. In our view, the Report is of very limited assistance in illuminating any of the specific public interests identified by the appellant, whether specifically set out above or otherwise, and therefore they do not add anything of significance to the general and reasonably strong public interest that we have highlighted above.

Conclusions on the public interest balance

129. Overall we take the view that the reasonably strong public interest in disclosure is outweighed by the strong public interest in withholding the information.

130. For the above reasons we conclude that the Commissioner was correct to decide that the UKSA was entitled to withhold the requested information under section 43 and the appeal is dismissed. We do not need to go on to consider section 41.

Signed Sophie Buckley Date: 26 January 2024
Judge of the First-tier Tribunal