



Neutral citation number: [2024] UKFTT 98 (GRC)

Case Reference: EA/2022/0443

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

Heard by: determination on the papers

**Heard on: 13 November 2023
Decision given on: 30 January 2024
Promulgated on: 01 February 2024**

Before

**TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER PIETER DE WAAL
TRIBUNAL MEMBER SUSAN WOLF**

Between

THOMAS ALLUM

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2022/0443, set out below, is substituted for the Commissioner's Decision Notice reference IC-161869-W3C7 dated 21 November 2022 with regard to the request for information made to Lewisham Homes Limited by Thomas Allum dated 16 December 2021.

Substituted Decision Notice

1. Lewisham Homes Limited is not entitled to rely on section 43(2) of the Freedom of Information Act 2000 to withhold the requested information, because that section is not engaged.
2. Lewisham Homes Limited must disclose the requested information, subject to any applicable redactions of personal data pursuant to section 40 of the Freedom of Information Act 2000. For the avoidance of doubt, the information to be disclosed

must include details of all relevant contracts and correspondence from (and including) 2017 onwards (and should not be limited to 2017 only).

3. Lewisham Homes Limited must disclose such information within 35 days of the date on which the Information Commissioner sends it notification of this decision in accordance with the Directions below.
4. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.
5. Lewisham Homes Limited breached section 10 of the Freedom of Information Act 2000 by not responding to the request for information within 20 working days of receipt. No further steps are required to be taken by Lewisham Homes Limited in respect of this breach.

Directions

6. The Information Commissioner is directed to send a copy of this decision to Lewisham Homes Limited within 35 days of its promulgation, or (if either party applies to appeal this decision) within 14 days after there is an unsuccessful outcome to such application or any resulting appeal.

REASONS

Preliminary matters

1. In this decision, we use the following terms to denote the meanings shown:

Appellant	Thomas Allum.
Authority:	Lewisham Homes Limited.
Commissioner:	The Information Commissioner.
Contractor:	Pace Recovery and Storage Limited, trading as Ace Security Services (being the contractor whose contracts and correspondence with the Authority were the subject of the Request).
Decision Notice:	The Decision Notice of the Information Commissioner dated 21 November 2022, reference IC-161869-W3C7.
FOIA:	The Freedom of Information Act 2000.
Public Interest Test:	The test as to whether, in all of the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the information, pursuant to section 2(2)(b) of FOIA (set out in paragraph 39).
Request:	The request for information made to the Authority by the Appellant dated 16 December 2021, more particularly described in paragraph 9.

Requested Information: The information which was requested by way of the Request.

Withheld Information: The information held by the Authority falling within the scope of the Request but which was not disclosed in response to the Request.

2. We refer to the Information Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the time of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the time of the Request.
3. Unless the context otherwise requires (or as otherwise expressly stated), references in this decision to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

4. This was an appeal against the Decision Notice, which (in summary) held that the Authority could rely on section 43 of FOIA (commercial interests) in order to withhold the Requested Information. The Decision Notice did not require the Authority to take any steps.
5. We consider that it is important to stress what was outside of the scope of the appeal. The appeal was not about the merits or otherwise of the Authority's implementation of a controlled parking scheme, nor any alleged breach of any lease, nor any alleged impropriety or other wrongdoing by the Authority. Nothing we say should be interpreted as an expression of opinion on any of those issues. The appeal can only be determined with regard to the remit and powers of the Tribunal, to which we refer below.

Mode of Hearing

6. The parties consented to the appeal being determined by the Tribunal without an oral hearing.
7. The Tribunal considered that the appeal was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and was satisfied that it was fair and just to conduct the hearing in this way.

Background to the appeal

8. The background to the appeal is as follows.

The Request

9. On 16 December 2021, the Appellant made a request to the Authority for information in the following terms:

"Under the Freedom of Information Act I respectfully request copies of any contracts or agreements between Lewisham Homes and Ace Security Services, from 2017.

I also request copies of any correspondence between Ace Security Services and Lewisham Homes relating to these agreements/contracts, their continuance or termination, either before

or after 2017.”.

The reply

10. The Authority responded on 21 February 2022. It released some information within the scope of the Request and withheld the remainder, relying on sections 40 and 43 of FOIA. The Authority upheld its position at an internal review.
11. The Appellant contacted the Commissioner on 18 March 2022¹ to complain about the Authority’s response to the Request, in respect of its application of section 43 of FOIA. The Appellant did not complain about the Authority’s application of section 40 of FOIA.

The Decision Notice

12. The Commissioner decided, by way of the Decision Notice, that the Authority was entitled to withhold all remaining Requested Information on the basis that section 43 of FOIA (commercial interests) was engaged and that the Public Interest Test favoured maintaining that exemption.
13. The Commissioner explained that the Authority had argued that disclosure of the Withheld Information would be likely to damage the commercial interests of the Contractor. The Commissioner stated that that Authority had provided evidence that the arguments presented by the Authority had come from the Contractor itself.
14. The Commissioner agreed with the Authority and the Contractor that the Contractor operated in a small and highly competitive environment. The Commissioner’s view was that the Withheld Information comprised financial information and commercial negotiations relating to the contracts which were in place between the Authority and the Contractor. The Commissioner considered that, although the contracts which were sought by way of the Request may no longer be running and the Authority may have introduced Traffic Management Orders, the Withheld Information would still be very useful to the Contractor’s competitors and that the pricing information and the specific commercial negotiations within the Withheld Information were not out of date. Consequently, the Commissioner concluded that the Withheld Information could be used by the Contractor’s competitors to outbid it during future bids and tendering exercises with other public authorities and organisations and that this would place the Contractor at a disadvantage and hinder its ability to secure future work at competitive rates.
15. In respect of the Public Interest Test, the Commissioner acknowledged that there was a public interest in openness, transparency and seeing how the parking contract in question was priced and negotiated. However, the Commissioner decided that it was not in the public interest to disclose specific financial information and individually negotiated terms and costs which would be likely to damage the commercial operations of the Contractor. The Commissioner’s view was that it was in the public interest to maintain an open and fair marketplace “*where all can compete without bias for new contracts and customers and offer the best possible terms and conditions they can*”².
16. The Decision Notice also held that the Authority breached section 10 of FOIA by failing

¹ The Decision Notice erroneously stated that it was 19 March 2022.

² Paragraph 11 of the Decision Notice.

to respond to the Request within 20 working days of receipt. However, the Decision Notice did not require the Authority to take any steps.

The appeal

17. The appeal was an appeal against the Decision Notice pursuant to section 57 of FOIA.

Grounds of appeal

18. In his grounds of appeal, the Appellant provided some background to the Request, stating that the Withheld Information concerned a controlled parking contract established between the Authority and the Contractor, which underpinned a controlled parking scheme which came into operation in 2017 across a residential housing estate in Deptford, London (known as 'Crossfields Estate'). The Appellant explained that the Crossfields Estate comprises nine blocks of flats totalling 344 households and that management of the estate is undertaken by the Authority, on behalf of the London Borough of Lewisham (being the freehold landowner of the Crossfields Estate).
19. The Appellant's grounds of appeal did not dispute the application of section 43 of FOIA but were focussed on the application of the Public Interest Test. In essence, the Appellant challenged the Commissioner's view that the balance of public interest lay in ensuring an open marketplace for the Contractor. The Appellant contended that the Commissioner's assessment of any public interest in favouring disclosure of the Withheld Information was insufficient and lacked context.
20. The Appellant considered that the public interest favoured disclosure of the Withheld Information. Primarily, this was on the basis of his assertions that the contract entered into between the Authority and the Contractor "lacked legitimacy or legal basis", because the Authority agreed it without following the consultation procedure required by the Appellant's lease (and also, he infers, by other residents' leases) and without complying with certain statutory requirements under the Landlord and Tenant Act 1987.
21. The Appellant also alleged that the introduction of a controlled parking scheme was imposed on the Crossfields Estate rather than ever being proposed or considered, no proper means of consultation with leaseholders was offered, and there was no change to any leases.
22. Linked to his concerns about the legitimacy of the Authority's contract with the Contractor, the Appellant also contended that there was a further public interest in disclosure of the Withheld Information because of the involvement of public funding. He stated that, in the absence of the Withheld Information, the public was "*denied the opportunity either to scrutinise or gain any understanding of how and why such a contract was embarked upon*".

The Commissioner's response

23. In response to the appeal, the Commissioner essentially relied on the reasons set out in the Decision Notice. The Commissioner further contended, in summary, that:
 - a. There were compelling considerations of commercial prejudice which favoured withholding the Withheld Information, as set out in the Decision Notice. The

Withheld Information included pricing and other commercial terms, sufficiently recent to be of use to the Contractor's competitors and there was a real and significant risk that disclosure of this would undermine the Contractor's position in other tenders and would also reduce the Authority's bargaining power in the future.

- b. The Appellant's complaint about the Authority's conduct did not give rise to any public interest requiring disclosure of the Withheld Information. This was because any issues regarding whether the Authority complied with leasehold terms were "narrow issues of pure law" and the detail of negotiations and agreement with the Contractor were "wholly irrelevant" to those issues.
- c. By contrast, there was a strong public interest in maintaining a fair and competitive market for the provision of services to the Authority and other public authorities. That market would be jeopardised, with direct consequences for the public purse, if the terms on which parties tendered and contracted were to become widely known through disclosure of the Withheld Information. That risk was particularly acute where (as referred to in the Decision Notice) there were a small number of operators active in the market, as was the case here.

24. For the above reasons, the Commissioner's position was that the public interest favoured withholding the Withheld Information.

The Appellant's reply

25. In his reply to the Commissioner's response, the Appellant stated, in summary, as follows.

26. The Appellant submitted that no argument was put forward within the Decision Notice to suggest the likelihood of damage to the Authority's commercial interests (as opposed to the Contractor's commercial interests) by disclosure of the Withheld Information. In respect of any alleged damage to the Authority's commercial interests, the Appellant contended that:

- a. The termination of the Authority's contract with the Contractor at the end of 2021 and its immediate replacement with a Traffic Management Order eliminated any realistic prospect of the Authority negotiating a future contract with a private parking company.
- b. The freeholder was required to provide leaseholders with information on planned contracts where the amount involved exceeds £100 in any single accounting period. This information included the tender figures from each bidding contractor involved. There was no convincing basis for the assertion that the release of financial details within the specific contract in question, established with a private parking company, would be likely to detriment such future negotiations with entirely different types of contactors.

27. In respect of alleged damage to the Contractor's commercial interests, the Appellant disputed the Commissioner's views in the Decision Notice that the market in which the Contractor operated was a "small and highly competitive environment" and the Commissioner's assertion (in his response to the appeal) that the level of risk of commercial prejudice to the Contractor was "particularly acute" where there was a small number of operators active in the market. The Appellant submitted that no

evidence had been provided in support of the view that the market was small.

28. The Appellant provided information which he contended related to the size of that market. This included a press release issued by the RAC Foundation, in November 2021 (the month before the date of the Request), which identified a surge in the number of private parking companies accessing vehicle data. Amongst other things, this press release included analysed data published by the Driver and Vehicle Licensing Agency (DVLA), which showed that 159 companies bought vehicle-keeper records from the DVLA in the first three months (April, May and June) of the 2021 financial year.
29. The Appellant also referred to a further press release issued by the RAC Foundation from March 2023, which again analysed DVLA data, which found further increases in the number of private parking companies accessing driver's details and levels of fines being issued and which suggested that the sector is expected to become a 'billion-pound-a-year' industry.
30. The Appellant considered, in essence, that the Commissioner should not have accepted the Authority's assessment of the Contractor's marketplace conditions without evidence to support it. Based on the above (and other) information, the Appellant's view was that the Contractor's marketplace was not small and highly competitive as concluded by the Commissioner.
31. The Appellant also disputed the Commissioner's assertion that there was a real and significant risk to the Contractor's commercial interests should the Withheld Information be disclosed. He considered it unlikely that the Contractor's competitors would obtain an insight into its negotiating strategy and its financial "bottom line" by mere disclosure of the Withheld Information. Consequently, the Appellant considered that the Contractor's competitors would not gain the advantage alleged by the Commissioner.
32. Accordingly, the Appellant considered that the Commissioner's view regarding the likelihood of prejudice to the Contractor's commercial interests, which was predicated (at least in part) on the basis that the Contractor operated in a small and highly competitive environment, was flawed.
33. In respect of the Public Interest Test, the Appellant submitted as follows (in summary):
 - a. Following the introduction of the controlled parking scheme to the Crossfields Estate in 2017, there was a number of instances of residents receiving tickets from the Contractor, despite the residents having valid parking permits. The Ministerial foreword to the government's guidance document Private Parking Code of Practice³, addressed concerns about the enforcement practices of private parking companies. That guidance document also suggested appropriate action in regard to private parking companies' relationships with landowners:

"Particular care is needed to establish appropriate contractual terms, including the application of parking restrictions, in respect of controlled land where leaseholders may have rights that cannot be qualified or overruled e.g. by imposing a requirement on the

³ The Appellant's citation was: "www.gov.uk/government/publications/private-parking-code-of-practice/private-parking-code-of-practice#relationship-with-landowner (published 7 February 2022; temporarily withdrawn 7 June 2022 pending review of the levels of private parking charges and additional fees)"

resident of an apartment block to display a permit to park in contravention of their rights under their lease.”⁴

- b. It was therefore in the public interest that the Contractor be mindful of pre-existing contracts (which we understood to mean the leases of the residents of the Crossfields Estate) when establishing their own parking-control contracts, particularly when such contracts are made with public-body landowners. There was an adverse impact to the Crossfields Estate community as a result of the relevant contract entered into between the Authority and the Contractor, in terms of inconvenience and high costs to residents. This impact was not confined solely to residents who owned vehicles, because the visitors of residents (including carers and health workers) also received parking fines despite displaying visitor permits.
- c. Any discussions and negotiations which took place between the Authority and the Contractor were “key questions pertinent to the public interest”, including as to whether there was any awareness of potential problems for residents and what safeguards were considered to mitigate those risks in connection with the contract between the Authority and the Contractor.
- d. As there was no evidence to support the Commissioner’s view that the Contractor operated in a small marketplace, this meant there was less value in the public interest served by enabling an open market. While open-market considerations were certainly important, they ought to be placed in context and balanced against the overall public interest.
- e. Other factors in favour of disclosure of the Withheld Information were that management fees were paid to the Contractor by a public body and that there was a lack of consultation or democratic process (required by Section 37 of the Landlord Tenant Act 1987) in connection with the residents’ leases.
- f. As there was evidence of impropriety by the Authority in relation to the introduction of a controlled parking scheme on the Crossfields Estate, the release of the Withheld Information was in the public interest *“in order to foster transparency and accountability, to promote public understanding and the safeguarding of democratic processes, helping to ensure good decision-making by public bodies, and securing the best use of public resources”*.

The Tribunal’s powers and role

34. The powers of the Tribunal in determining this appeal are set out in section 58 of FOIA, as follows:

“(1) If on an appeal under section 57 the Tribunal considers –

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by

⁴ Paragraph 14 of the guidance document.

the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may Review any finding of fact on which the notice in question was based."

35. In summary, therefore, the Tribunal's remit for the purposes of the appeal is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.

The law

The relevant statutory framework

General principles - FOIA

36. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

37. In essence, under section 1(1) of FOIA, a person who has requested information from a public authority (such as the Authority) is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) of FOIA provides:

"Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

38. It is therefore important to note that section 1(1) of FOIA does not provide an unconditional right of access to any information which a public authority does hold. The right of access to information contained in that section is subject to certain other provisions of FOIA, which we address below.

Exemptions – FOIA

39. Section 2(2) of FOIA addresses potential exemptions to the duty to provide information pursuant to section 1(1)(b) of FOIA. Section 2(2) of FOIA provides:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”.

40. The effect of the above is that some exemptions set out in Part II of FOIA are absolute and some are subject to the application of the Public Interest Test. Where an applicable exemption is not absolute and the Public Interest Test applies, this means that a public authority may only withhold requested information under that exemption if the public interest in doing so outweighs the public interest in its disclosure.
41. Section 2(3) of FOIA explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. For the purposes of this appeal, the relevant exemption is section 43 of FOIA, which is not included in that list.
42. Accordingly, an exemption under section 43 of FOIA is a qualified exemption, so that the Public Interest Test has to be applied, even if that exemption is engaged.

Time limits

43. So far as is relevant, section 10 of FOIA provides:

“(1)... a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”.

Section 43 – commercial interests

44. Section 43(2) of FOIA 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).”.

Relevant case law

Prejudice-based exemptions

45. The exemption under section 43(2) of FOIA uses the terms ‘would’ and ‘would be likely to’ prejudice the commercial interests of any person. This means that the prejudice in question is more probable than not or that there is a real and significant risk of it happening.
46. The following statement from a First-tier Tribunal case was subsequently confirmed by the Court of Appeal in the case of *Department for Work and Pensions v Information Commissioner & Frank Zola*⁵ as being the correct approach:

“On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.”.
47. Therefore for such exemption to apply, there must be some causative link between the potential disclosure of the relevant information and the prejudice to the commercial

⁵ [2016] EWCA Civ 758, paragraph 27 – see also *Carolyn Willow v Information Commissioner and Ministry of Justice* [2017] EWCA Civ 1876 at paragraph 27.

interests of a person (which may include the public authority). The prejudice must also be real, actual or of substance and it must relate to the interests protected by the exemption.

The Public Interest Test

48. In the case of *O’Hanlon v Information Commissioner*⁶, it was held that the Public Interest Test required the following three-step approach:

“The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did. This explanation should not be difficult if the tribunal has undertaken the analysis in the first two steps properly. It may even be self-evident.”

49. The Public Interest Test is applied as at the time when the public authority refused disclosure of requested information; it cannot be re-assessed later, in the event of an appeal to the First-tier Tribunal, by reference to any public interest which has subsequently arisen (see, for example, the case of *Maurizi v Information Commissioner and another*⁷).

The pleadings and evidence

50. The Tribunal read and took account of an open bundle of evidence and pleadings, as well as a closed bundle (which included the Withheld Information). We also read and took account of final written submissions from each party.

The Commissioner’s final submissions

51. In his final submissions, the Commissioner reiterated the position he set out in the Decision Notice and in his response to the appeal. The Commissioner also submitted (in summary):
- a. The Appellant’s assertion that there was evidence of impropriety on the part of the Authority was not directly relevant, including because there was no suggestion that specific details sought to be withheld by the Authority, as to the prices chargeable under its contract with the Contractor, were themselves capable of substantiating an allegation of impropriety.
 - b. The Appellant had misinterpreted the reference to the Contractor’s “bottom line” (see paragraph 31) as meaning its ‘overall net profit’. That is not what the Commissioner was describing in his response to the appeal (but rather, the minimum profit margin that the Contractor might be prepared to work to, when providing services to a public authority, which other landowners and other controlled parking operators would have an insight into) and the Appellant’s subsequent submissions, seeking to extrapolate such margins from DVLA data, were not relevant.

⁶ [2019] UKUT 34 (AAC), paragraph 15.

⁷ [2019] UKUT 262 (AAC), paragraphs 181-184

- c. There were compelling considerations of commercial prejudice which favour withholding the Withheld Information, as set out in the Decision Notice and as described in the closed bundle (and in part in the open bundle).
- d. The Appellant's complaint about the conduct of the Authority did not give rise to any public interest requiring disclosure of the Withheld Information. The details of negotiations and agreement between the Authority and the Contractor were "wholly irrelevant" to the issues which the Appellant was concerned with (such as whether the Authority was obliged to give notice or consult leaseholders). No public interest would be served by requiring the disclosure of such material, nor would that material shed any light upon whether a valid consultation was conducted by the Authority. The Appellant's concerns regarding the conduct of the Authority, including any implications regarding the terms of his lease, were essentially private matters and no public interest would be served in disclosure of the Withheld Information.
- e. By contrast, there was a strong public interest in maintaining a fair and competitive market for the provision of private parking services to the Authority and other public authorities. That market would be jeopardised, with direct consequences for the public purse, if the terms on which parties tendered and contracted were to become widely known through disclosure pursuant to FOIA.

52. The Commissioner also clarified in his final submissions that he had not relied upon any prejudice to the Authority's commercial interests⁸, although he considered that the Authority, along with other landowners (both public and private sector) would ultimately experience the effects of a less competitive market for equivalent parking services.

The Appellant's final submissions

53. The Appellant's final submissions related only to procedural and administrative matters and we do not comment on them further.

Findings, discussion and conclusions

Outline of relevant issues

54. Whilst the Authority relied on section 40 of FOIA to redact certain personal data from information which it provided in response to the Request, the application of that section was not disputed by the Appellant. We do not consider it necessary to address that section.

55. The Commissioner stated in his response to the appeal that the Appellant had not contended, in his grounds of appeal, that the Withheld Information was not "commercially sensitive" but that the Appellant had instead focussed his appeal on the application of the Public Interest Test. However, the engagement of section 43 is not dependent on whether information is "commercially sensitive" (we comment further below on the wording of the exemption). Whilst we acknowledge the possibility that the Commissioner was simply using shorthand by using that expression, we believe that it is appropriate, especially given the remit of the Tribunal

⁸ The submissions referred to there being no such reliance by the Commissioner "in upholding the appeal", which we believe was instead intended to refer to the Decision Notice.

to undertake a 'full merits review' (as outlined in paragraph 35), to first consider whether section 43 of FOIA is engaged in respect of the Request. Only if it is will we then need to turn to the application of the Public Interest Test.

Was section 43 of FOIA engaged?

56. As set out above (paragraph 44), section 43(2) of FOIA relates to information which, if it was disclosed, would, or would be likely to, prejudice the commercial interests of any person.
57. Those commercial interests could include those of the public authority (in this case, the Authority). As we have noted, the Commissioner stated that he had not relied upon any prejudice to the Authority's commercial interests. However, his final submissions included the view that the Authority would ultimately experience the effects of a less competitive market for equivalent parking services should the Withheld Information be disclosed. The Commissioner's response to the appeal also stated that disclosure of the Withheld Information would reduce the Authority's bargaining power in the future. These points, of course, primarily relate to the commercial interests of the Authority, as opposed to the Contractor. However, no further submissions or evidence were provided by the Commissioner in support of these views. Indeed, the commercial interests of the Authority did not form part of the Decision Notice and accordingly we consider that it is not necessary to address that point further.
58. In respect of the commercial interests of the Contractor, we find that a material factor supporting the Commissioner's view of the prejudice to those interests, was that the marketplace in which the Contractor operated was "small and highly competitive". In his final submissions, the Commissioner referred to the risk being "*particularly acute where there are a small number of operators active in the market, as is understood to be the case here*". We concur with the Appellant's assertion that the Commissioner had insufficient evidence on which to form that view of the marketplace. In turn, we also find that the Commissioner simply relied on the view of the Contractor (as did the Authority) regarding the marketplace.
59. In contrast, the Appellant put forward some evidence (to which we have referred) regarding the size and scale of the marketplace for car parking companies. We accept that evidence as demonstrating, at the very least, that there is doubt that the applicable market is small as the Commissioner concluded. We appreciate that the size of the market needs to be assessed as at the date of the Authority's refusal to disclose the relevant Requested Information and that some of the evidence from the Appellant post-dated that, but it does refer to the position around that date and, in any event, we are satisfied that the evidence provided demonstrates that the market could not reasonably be considered to be 'small' at that time.
60. The Commissioner's final submissions also stated that the Commissioner was not mandated to carry out a detailed market assessment and that the Authority may be able to provide further assistance on the characteristics of the market at the time when it refused the Request. We accept that the Commissioner is not mandated to carry out a detailed market assessment, but nevertheless the Commissioner should have sufficient evidence on which to base his views set out in the Decision Notice. As we have noted, we find that that was not the case here. Indeed, the Commissioner's reference to the possibility of seeking further information from the Authority is

instructive, as it illustrates that the Commissioner did not do this in connection with reaching his conclusions in the Decision Notice.

61. We should perhaps stress that we are not criticising the quality or scope of the Commissioner's investigation into the Appellant's complaint - and that is not within our remit. However, the Commissioner should reach decisions on appropriate grounds and in this instance we find that there was insufficient evidence on which the Commissioner could determine that the Contractor's marketplace was small at the time of the Request or at the time of the Authority's refusal to disclose the relevant Requested Information. Given our finding that the size of the marketplace was a material factor underpinning the Commissioner's views of the prejudice to the Contractor's commercial interests, it follows that we consider that Commissioner's assessment of that prejudice was flawed.
62. We also note that the Commissioner did not take into account, in the Decision Notice, that the terms of the relevant contract agreed between the Authority and the Contractor (included in the Withheld Information) contained provisions which recognised the fact that there may be disclosure of the contract pursuant to FOIA. Whilst this would be subject to any applicable exemptions under FOIA, in our view the fact that potential disclosure under FOIA was known to, and agreed by, the Contractor is a relevant factor in the assessment of the potential engagement of section 43(2) of FOIA. We consider that the Commissioner should have taken this factor into account as part of his reasoning for the purposes of the Decision Notice.
63. In our view, another relevant factor regarding whether the exemption in section 43(2) of FOIA is engaged is that the Contractor's 2017 contract with the Authority had terminated at the date of the Request and the Authority had introduced Traffic Management Orders rather than using controlled parking services. Whilst we acknowledge that the Commissioner had taken this into account in the Decision Notice, we do not agree with the Commissioner's assessment that the Withheld Information would still be "very useful" to the Contractor's competitors. In the context of a contract which is no longer in force and the Authority's move to Traffic Management Orders, we consider that the potential prejudice in respect of disclosure of the Withheld Information is reduced. In part, this is because the market had evidently changed at the time of the Request from the position when the relevant contract was concluded, in that the Authority was no longer tendering for those types of contracts. Moreover, as indicated by the evidence provided by the Appellant, the marketplace was also continuing to evolve.
64. Overall, we find that there was insufficient evidence to support the Commissioner's conclusions in paragraph 10 of the Decision Notice. Moreover, the relevant threshold for the engagement of section 43(2) of FOIA is whether the disclosure of relevant information "would" or "would be likely to" prejudice a person's commercial interests. For the reasons we have referred to, we find (having regard to the approach to be adopted, as set out in paragraph 46), that the requisite prejudice has not been established.
65. In paragraph 10 of the Decision Notice, the Commissioner stated that "*pricing information and the specific commercial negotiations within the withheld information are not out of date and could be used by competitors to outbid the contractor during future bids*". It is noteworthy that the term "could" is used. The Commissioner's subsequent conclusion that the Contractor 'would' be put at a disadvantage is conditional on what he states

'could' happen. That is, of course, not sufficient to engage section 43(2) of FOIA. Indeed, the Commissioner's own guidance⁹ on the application of that section states: *"It is not sufficient for you to simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. You must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice you envisage."* In our view, for the reasons given, the Commissioner has not been able to demonstrate that in the current case.

66. Accordingly, we find that section 43(2) of FOIA was not engaged in respect of the Request.
67. Given that finding, it is unnecessary for us to go on to consider the application of the Public Interest Test.

Final conclusions

68. For all of the reasons we have given, we conclude as follows.
69. We find that the Commissioner erred in the exercise of his discretion and the Decision Notice involved an error of law in concluding that section 43(2) of FOIA was engaged in respect of the Request. Accordingly, the Authority was not entitled to rely on that section in order to withhold disclosure of the relevant Requested Information.
70. We also find that the Authority breached section 10 of FOIA by not responding to the Request within 20 working days of receipt.
71. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 30 January 2024

⁹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests>