Neutral citation number: [2025] UKFTT 248 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: FT/EA/2024/0279

Determined without a hearing on 18 February 2025
Decision given on: 26 February 2025

Before

JUDGE ANTHONY SNELSON
TRIBUNAL MEMBER SUSAN WOLF
TRIBUNAL MEMBER DR PHEBE MANN

Between

MAVERLIE TAVARES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

On reading the written representations by or on behalf of the Appellant and the Respondent, the Tribunal unanimously determines that the appeal is dismissed.

REASONS

Introduction and procedural history

1. On 5 February 2024 the Appellant, Ms Maverlie Taveres, wrote to ACAS, her employer, requesting information pursuant to the Freedom of Information Act 2000 ('FOIA')[1] in the following terms:

> - **Disclosure of the documents referred to in the email exchange received relating to my JEGS[2] evaluation – the JEGS handbook and scoring algorithms for grades 6 and 7.**
> - **In relation to the above the information setting out the points per factor.**
> - **Any further information held relating to the JEGS job evaluation beyond the given score for the CAC CEO role and any Acas specific grading guidance or level descriptors.**
> - **Confirmation as to whether I have been subjected (as in the JEGS evaluation and appeal) to a decision based solely on automated processing given the need for software to generate the scores outcomes.**
> - **Why I was not informed of this and why were my rights under the Data Protection legislation not set out clearly.**

2. ACAS responded on 26 February 2024, refusing to supply the information sought by the first question and citing s43(2) (commercial interests), providing answers under FOIA to the second and third questions and, in response to the fourth and fifth questions, pointing out that they were not properly seen as requests under FOIA but supplying certain information nonetheless.

3. Ms Tavares took issue with that response (at least to the first question) but on 5 March 2024, following an internal review, ACAS reaffirmed its stance.

4. On 8 March 2024, Ms Tavares complained to the Respondent ('the Commissioner') about the way in which her request for information had been handled. An investigation followed.

5. By a decision notice dated 27 June 2024 (the DN') the Commissioner determined that the exemption under s43(2) was engaged and that the public interest favoured maintaining the exemption.

6. By a notice of appeal dated 22 July 2024, Ms Tavares challenged the Commissioner's adjudication.

7. The Commissioner resisted the appeal in his response dated 23 August 2024.

8. In answer to that Ms Tavares served a reply dated 6 September 2024 and a 'witness statement' dated 6 November 2024, the latter, despite its name, being more in the nature of a written argument or submission.

9. The dispute came before us for determination 'on the documents'. We were satisfied that it was just and in keeping with the overriding objective to adopt this procedure.

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[1] To which all references to section numbers below refer

[2] Job Evaluation Grading and Support

10. A bundle of documents running to 146 pages was before us.

The Law

11. By s1 it is provided that:

> **(1) 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.**

12. S43(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).**

13. In assessing prejudice and/or the risk of prejudice for the purposes of s43(2), we direct ourselves in accordance with the decision of the FTT in *Hogan and Oxford City Council v ICO* (EA/2005/0026), which proposes three questions. First, what interest (if any) is within the scope of the exemption? Second, would or might prejudice in the form of a risk of harm to such interest(s) that was 'real, actual or of substance' be caused by the disclosure sought? Third, would such prejudice be 'likely' to result from the disclosure in the sense that it 'might very well happen', even if the risk falls short of being more probable than not? (*Hogan* is, of course, not binding on us but it draws directly on high authority[3] and has been specifically approved by the Court of Appeal: see *Department of Work and Pensions v IC* [2017] 1WLR 1.)

14. Where a qualified exemption, such as one under s43, is shown to apply, determination of the disclosure request will turn on the public interest test under s2(1)(b), namely whether, 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'. The proper approach, as explained by the Upper Tribunal in *APPGER v IC* [2013] UKUT 560 (para 149) 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, proof, explanation and examination of both (a) the harm or prejudice, and (b) the benefits that the proposed disclosure would (or would be likely to or may) cause or promote.**

15. The relevant date for the purposes of applying any public interest balancing test and, it seems, determining the applicability of any exemption, is the date

[3] In particular, on the meaning of "likely", the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

on which the request for information was refused, not the date of any subsequent review: see *Montague v ICO and DIT* [2022] UKUT 104 (AAC), especially at paras 47-90.

16. The appeal is brought pursuant to the FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal consider –**
>
> **(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 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.**

Outline Facts

17. Ms Tavares is and at all relevant times was employed by ACAS as the CEO of the Central Arbitration Committee ('CAC'), a body independent of ACAS but staffed exclusively by ACAS employees.

18. A job evaluation exercise was carried out which related to the position held by Ms Tavares. We do not seem to have been told the date of the exercise or its scope.

19. As already noted, the disputed element of Ms Tavares's request, addressed to ACAS, was for the JEGS Handbook ('the Handbook') and the scoring algorithms for grades 6 and 7 ('the algorithms'). It may be (we do not know) that this focus resulted from a perception on her part that her post had been positioned on the wrong side of the dividing line between the two grades.

20. JEGS is a software-supported analytical job evaluation methodology, developed and designed for the Civil Service. The Handbook is a guide for the proper use of the JEGS methodology. It lists a number of job evaluation factors and a set of 44 questions against which the role under consideration is to be measured. In a letter of 26 February 2024 responding to the request, the ACAS Information Rights Team included this explanation of the process:

> **I can confirm that you have not been subjected to an automated process. I have been informed that it is a computer assisted process. A trained analyst, or in this case a trained evaluation panel, are required to respond to each question in the JEGS Question Set (44) by reference to job information provided and agreed by role-holder and line manager. A judgement is made on the appropriate response level for each question … That response is input into the Web-based JEGS software. When**

> **all responses are complete … the JEGS software will generate a score for the role which indicates into which grade level the role will fall by virtue of the 44 responses.**
>
> **As no automated decision-making has taken place, no personal information is processed by the software … It is the role and not the individual that is analysed.**

21. The Handbook and JEGS software were and are the intellectual property of a limited company which specialises in what it calls rewards data intelligence (which seems to embrace a range of services including job evaluation work, salary surveys, benchmarking and the like). We will refer to it as the RDI company.

22. ACAS pays the RDI company a licence fee, entitling it, on a strictly confidential basis, to use the Handbook and software.

23. As a result of the request, ACAS approached the RDI company to invite its comments on the likely consequences of the release of the Handbook into the public domain. The reply included this:

> **This subject comes up every now and again and our standard response is to not provide the Handbook as it would have negative commercial implications on [us] if it were available in the public domain. The primary reason for keeping the Handbook out of the public domain is really to do with the potential for gaming the system – armed with the handbook individuals would be able to influence the responses they provide to the job analysis and interview process and thus have the potential to inflate their grade outcome. The JEGS Handbook is only provided to individuals who have been through the formal JRGS training and are trained job evaluators.**

The reply was later shared with the Commissioner.

24. The RDI market in the UK is highly competitive.

25. ACAS retains a separate company to train its staff in the use of the JEGS system. We will refer to it as the JEGS training company.

The Rival Cases

Ms Tavares's case

26. Ms Tavares disputed that s43(2) was engaged. She stated (witness statement, para 6) that the JEGS training company had a long-standing contract with the government due to run until 2025 (and so was current at the time of the request). Accordingly, so it was argued, there was no risk of commercial prejudice. Moreover, the suggested risk that publication of the requested information would enable individuals to gain an unfair advantage in any job evaluation exercise was misguided - certainly where such individuals were without formal training.

27. Ms Tavares further contended that, even if s43(2) was engaged, the public interest favoured disclosure. It was important that job evaluation schemes and systems should be transparent and, without disclosure, affected individuals are not in a position to raise effective challenges. Publication would also increase the accountability of Government in relation to grading decisions and thereby foster public confidence.

28. In addition, Ms Tavares prayed in aid a judgment of the High Court (Mr Justice Lavender) in *Anyon & others v Secretary of State for Work and Pensions* [2024] EWHC 326 KB and further complained that the Commissioner's decision was inconsistent with a previous decision by one of his predecessors in what is said to have been a similar case in 2007.

The Commissioner's case

29. The Commissioner submitted first that s43(2) was engaged because disclosure of the disputed information would be likely to prejudice the commercial interests of the RDI company. This was because, in a job evaluation exercise:

> **… individuals with the Handbook would be able to tailor their responses to gain an advantage and be able to provide answers that inflate their grade. … an individual could gain an advantage, or a competitor would be able to provide a service that would enable candidates to gain an advantage in the job evaluation process.**[4]

30. Turning to the public interest, the Commissioner acknowledged that there was a public interest in transparency and accountability in relation to public expenditure decisions but submitted that the public interest in protecting commercially confidential information was the more powerful.

31. The Commissioner further contended that Ms Tavares's reliance on an alleged inconsistency between the DN and a decision of a predecessor of his 17 years ago was misplaced. No system of precedent applies. In any event, the two disputes were decided on different facts.

Analysis and Conclusions

Preliminary

32. Although the main focus has been on the Handbook, we have applied our minds carefully to the request in so far as it relates specifically to the algorithms. Having done so, we are satisfied that there is no scope for any separation of the two elements of the request. The request, essentially, is for the information which, collectively, constitutes the job evaluation system as it applies to grades 6 and 7.

[4] DN, para 12

Is s43(2) engaged?

33. With the advantage of having seen the disputed information, we are clear that the exemption under s43(2) is engaged. Having no ground to doubt it, we accept the factual basis of the information put to the Commissioner by the RDI company during the investigation and we see real force in the company's concern that, if the Handbook and associated software were made public, interested parties might well seek to 'game the system' by responding to the 44 questions in such a way as to favour their individual interests. In this event, it is easy to see that the credibility of the JEGS system would be undermined and that that consequence would almost inevitably prejudice the RDI company's reputation and its position in the marketplace.

34. In addition, it seems to us that disclosure of the disputed information would also be likely to occasion a different form of harm to the RDI company. Publication under FOIA being disclosure 'to the whole world', it would result in the company's competitors being placed immediately at an advantage over it in having sight of the entire JEGS system, while continuing to enjoy the confidentiality of their own systems. Such an advantage would inevitably prejudice the RDI company's commercial interests.

35. Unfortunately, Ms Tavares, acting without the benefit of legal advice, has proceeded on the mistaken premise that the relevant commercial interests are those of the JEGS training company. It is possible that, correctly directed, she might have been disposed to give ground on this part of the case. At all events, whether this speculation is right or not, we regard the answer to the question whether the exemption is engaged or not as obvious. It is.

The public interest balance

36. Here, although there are arguments either way, we are again clear that the submissions for the Commissioner are greatly to be preferred. We are in no doubt that there is a public interest in transparency and accountability on the matter of decision-making bearing on pay arrangements in public bodies. But we are satisfied that that public interest must yield to the more powerful public interests the other way. We have a number of reasons.

37. First, the public interest in transparency and accountability is itself counterbalanced by the public interest in pay grading decisions being based on robust and reliable job evaluation processes which are not open to distortion or manipulation.

38. Second, there is a significantly more powerful public interest in safeguarding commercial interests and ensuring that those engaged in commercial activity are able to compete effectively (see *eg Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and others* [2012] PTSR 185 CA, [111]) and,

generally, *Coppel on Information* Rights, 6th ed (2023) [34-047] and cases there cited).

39. Third, the greater the prejudice or risk of prejudice, the further the public interest balance tilts in favour of maintaining the exemption. Here, the prejudice to the RDI company which would result from disclosure would be severe. In our view, it would be likely to take as many as three different forms: damage to its profitability as a result of the loss of income from licences; damage to its reputation in the marketplace resulting from its model being undermined; and the inevitable disadvantage resulting from its confidential trade information being laid bare before its competitors.

40. Fourth, the unfairness of these consequences speaks for itself.

41. Fifth, the impact of the prejudice would be likely to extend beyond the RDI company itself, for example to its shareholders and wider trading connections.

42. Sixth, if the exemption is maintained, Ms Tavares, like any other employee left dissatisfied by a job evaluation exercise, will not be left without a remedy. Such processes usually have complaints procedures built in. In any event, the option of raising a free-standing grievance is always available.

43. Seventh, in any litigation arising out of a job evaluation exercise, the Handbook and/or associated materials might well be disclosable, depending upon the precise issues for decision in such litigation.[5] But there, the crucial difference would be that the materials disclosed would be capable of being used *only* for the purposes of the litigation. The proper confidentiality attaching to it would, for all other purposes, rightly be preserved.

44. Eighth, there is nothing in Ms Tavares's point on consistency. The Tribunal is not assisted by a debate about whether two decisions of the Commissioner, 17 years apart, involving different parties and different facts, are on one point or another incompatible with one another. Nor do we accept that the case of *Anyon* provides any assistance. There, the issue before the High Court was whether the claimants, whose claim concerns the conduct of a job evaluation exercise, should be granted permission to amend their claim form. The judgment and reasoning of the learned judge lend no support to either side in this FOIA appeal.

Disposal

45. For all the reasons stated, we conclude that the appeal has no merit. The Commissioner's decision was in accordance with the law. The appeal must be dismissed.

[5] As the *Anyon* case (cited by Ms Tavares) illustrates (para 16).

Anthony Snelson

Judge of the First-tier Tribunal

Date: 21 February 2025