

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER
TRIBUNAL
(INFORMATION RIGHTS)
Under Section 57 of the Freedom of Information Act 2000.**

Case Number: EA/2013/0017

BETWEEN:

LIZ TURNER

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

MINISTRY OF JUSTICE

Second Respondent

Before

Judge Brian Kennedy QC

Steve Shaw

Alison Lowtown

Sitting at Field House London on the 10th October 2013

Subject matter: Freedom of Information Act 2000, and the engagement of the commercial interest exemption in Section 43(2) and the application of the public interest test.

DECISION OF THE FIRST TIER TRIBUNAL

The Tribunal dismisses the Appeal:

REASONS

Introduction:

1. This judgment relates to an appeal against a Decision Notice (“DN”) of the First respondent (“the Commissioner”) on the 8th January 2013 (numbered FS50451356). The Notice of Appeal, dated the 11th February 2013.

Background:

2. On the 27th March 2012, the Appellant requested information from the second respondent (“the MoJ”) in relation to two prisons.
3. In relation to HMP Peterborough, the Appellant asked (“the Peterborough request”): *“The HMP Peterborough payment by results pilot will pay the provider (Sodexo) an agreed amount per court appearance leading to a conviction which is avoided, if they reduce crime by 10% for each cohort compared to the base-line sacheved from the matched control group, or if the reduce by 7.5 % compared to base-line when all three cohorts are combined. when all three counts . My question is: What is the value of the agreed amount which will be paid per court appearance leading to conviction avoided?”*
4. The Appellant also submitted the following request in relation to HMP Doncaster (“the Doncaster Request”): *“The HMP Doncaster payment by results pilot (run by Serco) means that: If HMP Doncaster fails to reduce the proportion of released offenders who reoffend by 5% compared to base-line (2010 rate) then they will lose 10% of the contract value. If they succeed in reducing the proportion who reoffended by 5% they will receive additional success payments fro each additional percentage point, up to a maximum of 10%. My questions are How much will HMP Doncaster/Serco lose if they fail to meet their target? And How much will they receive for each additional percentage point reduction in proportion of offenders reoffending?”*
5. On the 24th April 2012 the MoJ cited section 42(2) in response to the Peterborough request and also found that the public interest test favoured maintaining that exemption. On the same day the MoJ also issued a refusal notice

in response to the Doncaster request in which it claimed section 21 in relation to the first limb of that request and section 43(2) in relation to the second element.

6. On the 27th April 2012, the Appellant requested an internal review, arguing that the public interest test in disclosure was particularly weighty in the circumstances of this case and should favour disclosure.
7. On the 28th May 2012 the MoJ notified the Appellant that the outcome of their internal review was to uphold its application of section 43 to the Peterborough request. In relation to the Doncaster request, the MoJ withdrew its reliance on section 21 and argued that section 43 was applicable to all information which fell within the scope of the request.
8. The appellant complained to the Commissioner on the 6th June 2012.

The Decision Notice:

9. The Commissioner issued his DN on the 8th January 2013 finding that section 43 was engaged on the basis that disclosure of the requested information would prejudice the commercial interests of the MoJ and both third party contractors. See paragraph 19 of the DN, the Tribunal accepts the Commissioner's reasoning on the engagement of section 43 and the Appellant does not challenge the engagement of section 43. The DN is a matter of public record and we will not rehearse the detail of its contents herein.
10. The Commissioner went onto consider the public interest test, acknowledging that there were substantial arguments on both sides but that the public interest in the non-disclosure of information about the profitability of unique and innovative proprietary financial model formulae at the time of the request was a decisive consideration such that the public interests in maintaining the exemption outweighed those in favour of disclosure. His detailed reasons are to be found in the DN. We will return to this later as it is the issue we must deliberate upon.

The Appeal and the Issues for the Tribunal:

11. On the 11th February 2013, the Appellant submitted a Notice of Appeal and although it was out of time, the Commissioner has agreed that the application be accepted and the Tribunal accordingly will hear the appeal.

12. The Grounds of appeal are as follows:

THE INFORMATION COMMISSIONER RULED THAT ON BALANCE DISCLOSURE WOULD BE MORE HARMFUL TO THE PUBLIC INTEREST THAN WITHHOLDING THE INFORMATION, WITH THE DECISIVE CONSIDERATIONS BEING:

- (1) THE UNIQUE AND INNOVATIVE NATURE OF THE PROPRIETARY FINANCIAL MODELS
- (2) THE TIMING OF THE REQUEST

I DO NOT BELIEVE THAT THE COMMISSIONER HAS TAKEN ADEQUATE NOTE OF THE CONCERNS I RAISED IN MY REQUEST FOR INTERNAL REVIEW (SEE ATTACHED), IN PARTICULAR THE LACK OF OBJECTIVE EVIDENCE FOR THE CLAIM THAT DISCLOSURE WOULD RESULT IN LESS EFFECTIVE USE OF PUBLIC MONEY. WHILST DISCLOSURE MAY BE RESISTED BY THOSE COMPANIES WITH WHOM THE MINISTRY OF JUSTICE CURRENTLY CONTRACTS, THIS DOES NOT IN AND OF ITSELF CONSTITUTE CLEAR EVIDENCE THAT THE PUBLIC INTEREST (AS OPPOSED TO THE INTERESTS OF THE GOVERNMENT OR PARTICULAR COMPANIES) WOULD SUFFER WERE DISCLOSURE TO TAKE PLACE. INDEED FOI ACT AWARENESS GUIDANCE 5 STATES THAT: "PUBLIC AUTHORITIES SHOULD BE WARY OF ACCEPTING ARGUMENTS THAT THE POTENTIAL FOR COMMERCIAL INFORMATION TO BE RELEASED WOULD REDUCE THE NUMBER OF COMPANIES WILLING TO DO BUSINESS WITH THE PUBLIC SECTOR, LEADING TO REDUCED COMPETITION AND INCREASED COSTS. IN PRACTICE, MANY COMPANIES MAY BE PREPARED TO ACCEPT GREATER PUBLIC ACCESS TO INFORMATION ABOUT THEIR BUSINESS AS A COST OF DOING BUSINESS WITH THE PUBLIC SECTOR. INCREASING ACCESS TO INFORMATION ABOUT THE TENDERING PROCESS MAY IN FACT ENCOURAGE MORE POTENTIAL SUPPLIERS TO ENTER THE MARKET. A BETTER UNDERSTANDING OF THE PROCESS, THE AWARD CRITERIA, KNOWLEDGE OF HOW SUCCESSFUL BIDS HAVE BEEN PUT TOGETHER, COULD ALSO LEAD TO IMPROVED BIDS BEING SUBMITTED IN THE FUTURE. THIS WILL LEAD TO MORE COMPETITION AND SO DECREASE COSTS TO THE PUBLIC AUTHORITY. INDEED WHERE A CONTRACT COMES UP FOR RENEWAL LIMITING THIS KIND OF INFORMATION IS LIKELY TO FAVOUR THE CURRENT CONTRACTOR AND SO MAY BE ANTICOMPETITIVE." I DO NOT BELIEVE THAT THE COMMISSIONER HAS TAKEN ADEQUATE NOTE OF THIS GUIDANCE.

13. The Appellant has the burden of establishing, on the balance of probabilities, that the Commissioner was wrong in coming to his decision, either because he took into consideration something he should not have, or failed to take into consideration something he should have.

- 14.** The Commissioner responds to the Appellant's grounds of appeal firstly as follows: "*---- it will not always be possible to provide objective evidence of the prejudice which would or would be likely to be caused by the disclosure of the requested as suggested by the Appellant. Instead, such arguments are necessarily speculative as they relate to events or circumstances which may occur in the future rather than events or circumstances which have occurred and which may therefore be evidenced. However the Commissioner would still expect to be presented with logical arguments to support any claim that disclosure would be likely to result in prejudice and such arguments should amount to more than an assertion.*" The Tribunal accepts this argument and notes the Appellant's general criticisms are just that. They lack the specificity one would expect to challenge the particular and quite unusual criteria of the contractual information being sought in the circumstances of this case.
- 15.** The Commissioner goes further to say: "*--- that he has taken into account the arguments put forward by the Appellant in her internal review ----*" and he refers to the arguments in favour of disclosing the requested information at paragraph 21 of the DN. The Tribunal acknowledge this assertion and accept it in light of the contents of the DN.
- 16.** The Commissioner disputes he failed to take adequate note of his own guidelines and points out that they are not binding and in any event must be considered with specific reference to the particular circumstances and merits of each individual case and reminds us that the public interest test requires consideration of the factors both in favour of disclosure and non-disclosure. Again he refers to Paragraphs 21 – 23 of the DN which he asserts illustrate that he did give due regard to the factors for and against disclosure. The DN clearly demonstrates to us that the Commissioner is correct in that assertion.
- 17.** The Tribunal therefore find that on balance the Appellant has failed to establish that the Commissioner was wrong. If the Tribunal are wrong in this they, and the parties, have since had the advantage of the joinder of the MoJ and on the 22nd March 2013, the Tribunal directed that the MoJ be made a party, the second respondent, to this appeal. Their response was delivered on the 18th April 2013 and is to found at pages 25 – 30 of the Open trial bundle before us.

18. The MoJ added to the debate about the public interest test with particulars specific to the contract which are the subject matter of the requested information. Inter-alia they made the following pertinent points:

- Research of the Payment by Results (“PBR”) pilot contract in place at Doncaster and Peterborough, whose purpose is to assess the viability and practicalities of paying contractors on the basis of prisoners’ reoffending rates, use novel payment structures developed by the contractors concerned (Social Finance and Serco) in dialogue with the MoJ.
- At the time of the request in March 2011 (which is the relevant time to assess the public interest), the MoJ had put out to tender a number of other PRB schemes of a similar nature to the pilots at Peterborough and Doncaster. The tenders sought innovative bids, i.e. bids which adopted new and creative payment structures. Both Social Finance and Serco were involved in bids for such schemes.
- The MoJ asked both Social Finance and Serco for their views on disclosure of the financial information in the relevant contracts, sought by the Appellant. Both contractors asked for the information to be withheld for reasons of commercial confidentiality.
- Disclosure would have given other contractors an unfair advantage in bidding for other PBR contracts. They would have obtained the payment models. Other contractors would also have obtained an unfair competitive advantage by knowing the level at which Social Finance and Serco were likely to pitch their bids for other tenders, enabling them to match or undercut such bids.
- If the MoJ had released the withheld information, it is likely that Social Finance and Serco would have lost confidence in the MoJ’s willingness or ability to protect their confidential commercial information. As a result the relationship between Social Finance & Serco and the MoJ would almost certainly have become less open and trusting and more adversarial.
- That loss in itself could very well have increased the costs and difficulty of managing existing contracts between the MoJ and Social Finance/Serco. It could also have led to them deciding not to bid for similar projects in future, this restricting the choice of providers available to the MoJ. Such a result would have been seriously detrimental to the public interest, in circumstances where Social Finance and Serco are important providers within the relevant field.
- If other contractors had obtained the relevant information, it would have enabled them to copy the financial models for the purpose of the MoJ’s 2011 tenders. That would have defeated one of the major objects of the tenders, which was to encourage innovative financial models.
- Conversely, bidders who felt themselves unable to match the financial terms in the pilot contracts could have withdrawn from the tendering process, thus restricting choice, competition and innovation.
- If less experienced bidders had been able to copy the financial models proposed by Serco and Social Finance, it would have created a risk of a bidder without the appropriate experience receiving an inappropriately high score in the tender process, and winning a tender without the necessary expertise to deliver the services sought under tender.

- Disclosure of the financial models could also have meant the MoJ received identical pricing from multiple bidders. This would normally result from price fixing. Publication of the pricing structure would have prevented the MoJ from identifying and eliminating this illegal activity (because it would have been impossible for the MoJ to distinguish between price fixing, and mere copying of existing pricing proposals).
- For all the above reasons, disclosure of the disputed information would have undermined commercial confidentiality; could very well have detrimentally affected relations between the MoJ and Serco/Social Finance; and risked undermining both the pilot projects at Doncaster and Peterborough, and other tenders being conducted by the MoJ at the relevant time.

19. The Tribunal further noted the correspondence (two letters) between the MoJ and the Appellant dated the 28th May 2012 from B. Richardson, Senior Contracts Manager, the various correspondence between the respondents and further in the open bundle before us, the witness statements of Alisa Helbitz (a director at Social Finance) dated with voluminous appendices, the witness statement from Vincent Godfrey a director of Procurement for the MoJ dated the 6th June 2103, and finally the witness statement of Neil Spurway of June 2013 all of which contain compelling evidence to reinforce the points made at paragraph 18 above by the MoJ and in support of the public interest test being in favour of non disclosure.

20. The Tribunal are unanimous in finding the public interest test is in favour of non disclosure. Particularly relevant in our deliberations is the fact that at the time of the request there were relevant live tenders which could have been affected to the detriment of the MoJ. In all the circumstances we are satisfied that the evidence provided by the second respondent to this Tribunal supports the argument that the public interest is best served by non disclosure of the withheld information and we dismiss the appeal accordingly.

Brian Kennedy QC

18th October 2013.

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