



IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2014/0091

B E T W E E N :-

JULIAN LE VAY

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

Tribunal

**Brian Kennedy QC
Henry Fitzhugh
Narendra Makanji**

Subject matter: Freedom of Information Act 2000 generally and specifically whether the section 40(2) and section 41 exemptions are engaged.

DECISION OF THE FIRST-TIER TRIBUNAL:

The tribunal refuses the appeal.

REASONS

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the Act”) generally and also specifically in relation to exemptions claimed under section 43(2) of the Act.
2. The appeal is against the decision of the Information Commissioner, who is the First Named Respondent, (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 31 March 2014 (reference FS50501792). The DN held that the public authority, the Home Office, had correctly applied the exemption in section 43(2) FOIA to the Appellant’s request for the actual annual cost of each Immigration Removal Centre (“IRC”) for the last year for which information was available, together with other information concerning the costs of operating IRCs.
3. The Tribunal Judge and lay members sat on 4 September 2014 and decided the case after an oral hearing where the Appellant represented himself and the Second Respondent (“the HO”) and their witnesses were represented by Joseph Barrett of counsel. The Background has been helpfully summarised on behalf of the Commissioner as follows ;

Factual Background:

4. On 21 March 2013 the Appellant wrote to the HO and requested information in the following terms (“the Request”):
“I make the following application under the Act: for each Immigration Detention (or Removal) Centre, for the latest year for which the data exists: the total cost the average occupancy of those held there by or on behalf of UKBA, a note on how the costs deal with: HQ overheads; capital; maintenance; future pension, liabilities; and insurance”.
5. The HO responded to the Request on 24 April 2013. The response confirmed that the Home Office held the requested information in relation to the costs involved with each contract for the operation of IRCs, however, the HO declined to provide this information on the basis that (i) disclosure would prejudice the commercial interests of the Home Office and its suppliers, thus invoking section 43(2) and (ii) having considered the public interest arguments

in favour of disclosure and in favour of withholding the costs information, ultimately concluded that the public interest lies in favour of maintaining the exemption. Further, the Home Office provided the Appellant with electronic links to websites containing published information about (i) contract payments made by the Home Office above a particular threshold and (ii) information on the number of detainees entering detention, and thus relied on section 21(1) to justify withholding this information on the basis that it is in the public domain.

6. On 26 April 2013 the Appellant sought an internal review of the response. On 31 May 2013 the HO informed the Appellant of the outcome of its internal review, namely to uphold its original response. The internal review clarified the following matters:
 - a. the Request was interpreted as a request for details of contracts with third parties (paragraph 9);
 - b. the website links provided to the Appellant in response to the Request contained details of the type of expenses incurred by the HO for contracts over a particular financial threshold in order to meet the Government's transparency agenda requirements. The provision of further information would prejudice contractors as it would give the exact details of their bid for each constituent part of the contract (paragraph 10);
 - c. to release costs for contracted out services for individuals contracts would prejudice the ability of the Government to leverage value for money for the British taxpayer (paragraph 11);
 - d. the information provided to the Appellant relating to detainees was data relating to the numbers entering detention, rather than the average lengths of detention. In the event that Appellant sought information relating to the average length of detention, section 12 may be engaged on the basis of the costs incurred in complying with this request, which would involve checking thousands of individual records to establish when a detainee arrive/left a detention centre (paragraphs 12 and 13); and
 - e. the Appellant was advised that redacted versions of each contract document relating to IRCs were published on the Government's website and he was directed to where this could be obtained.

7. The Appellant complained to the Commissioner on 17 June 2013 about the manner in which the HO had dealt with the Request. The case was allocated to a senior case officer, who undertook an investigation and considered representations from the Appellant and the Home Office.

8. On 16 October 2013 the HO provided the Appellant with average IRC occupancy data following further consideration of the matter, thus answering the second part of the Request.
9. On 27 November 2013 the Home Office provided further information to the Appellant, namely:
 - a. the length of contracts for particular IRCs, together with the expected total contract value for each IRC at the point of the award (Net Present Value figures);
 - b. advice as to where he could locate monthly spending in excess of £25,000 for each supplier (although this was not linked to particular IRCs); and
 - c. figures for the average costs of detention per day in the previous quarter, and the average costs per day for 2012/2013.
10. On 2 December 2013 the Commissioner corresponded with the Appellant noting that the HO had answered the second part of the Appellant's request. Further, the Commissioner noted that the Home Office had provided some information on the other two parts of the request, and the Commissioner was minded (subject to further representations from the Appellant) to uphold the HO's reliance on section 43(2) in respect of i) the actual annual costs for each IRC and ii) the breakdown of the annual costs figures.
11. On 3 February 2014 the Appellant confirmed that he wished to obtain the actual annual cost of each IRC, both publicly and privately run, for the last year for which information was available at the date of his request. He made further representations in support of his request.

The Decision Notice:

12. The Commissioner issued a Decision Notice on 31 March 2014 upholding the HO's refusal to provide the requested information on the basis that the exemption in section 43(2) was engaged and that the public interest favoured maintaining the exemption.
13. The Commissioner's analysis of the application of s.43 (2) to the facts of the present case is set out in detail at § 9 – 29 of the Decision Notice.
14. The Commissioner first considered whether the withheld information, if disclosed, would or would be likely to prejudice the commercial interests of any person, namely the HO and/or its suppliers. The Commissioner directed himself to the three-stage test for engaging a prejudice based exemption (§ 10) and concluded that the exemption in section 43(2) was engaged on the following basis:

- a. The nature of the harm envisaged by the HO (namely damage to its commercial interests and those of its suppliers by revealing market sensitive information) clearly relates to the interest which section 43(2) is designed to protect (DN § 15).
 - b. Having regard to the submissions made by the HO, namely that i) recent contract awards by the HO had resulted in significant savings for the public purpose, ii) the HO had retained the right to market test the contracts for some or all of its IRCs in the future, iii) disclosure of the withheld information would prejudice its ability to achieve best value in any future tender exercises from the limited market of suppliers by revealing the exact amount it was prepared to pay for the service and iv) disclosure would offer the current supplier's competitors an opportunity to analyse the current contracts and gain a business advantage, the Commissioner was satisfied that there is a causal link between disclosure of the requested information and the prejudice identified, that it can correctly be described as real, actual or of substance and that it would arise (DN § 16 and 17).
15. Having concluded that the withheld information would prejudice the commercial interests of the HO and its suppliers, the Commissioner went on to consider the public interest test.
- a. The Commissioner set out the public interest balancing test (DN §18).
 - b. The Commissioner considered the public interest arguments in favour of disclosing the withheld information, namely
 - i) increased accountability and transparency in the application of public funds and a basis for a more informed public debate about the value for money being obtained and
 - ii) providing assistance to others considering whether or not to tender for future contracts with the Home Office and assisting more bidders to enter the market in future (DN § 19 – 21).
 - c. The Commissioner considered the public interest arguments for maintaining the exemption namely
 - i) avoiding the prejudice that would arise from disclosure,
 - ii) the fact that the HO had already provided a considerable amount of information in relation to costs to the Appellant,
 - iii) disclosure would undermine the HO's ability to obtain value for money in future, iv) disclosure of costs, contrary to the wishes of the suppliers, would undermine confidence and trust in the HO and could deter potential future bidders (DN § 20 – 27).

- d. The Commissioner considered that there was substantial weight on both sides of the public interest balancing test, however, on balance, the prejudice that would occur to the ability of the HO to achieve further significant savings in any future re-tendering exercises and the HO's need to maintain the trust of its suppliers, along with the need not to expose the detailed current performance of existing suppliers to their likely future competitors meant that the balance of the public interest favoured maintaining the exemption (DN § 28).
16. The Commissioner further relied on the reasoning set out in the Decision Notice in response to the Appeal.

Legal Framework:

17. Section 1(1) of FOIA provides for a general right of access to information held by public authorities. This is subject to the exemptions contained in FOIA, including section 43 (commercial interests).
18. This appeal concerns the exemption in section 43(2) of FOIA. This provides as follows:
“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).”
19. The following decisions of the First-Tier Tribunal, relied upon by the Commissioner, whilst not formally binding, encapsulate an approach in relation to section 43(2).
20. a. Section 43(2) is a prejudice based exemption. In *Hogan v the ICO and Oxford City Council* (EA/2005/0026 and 0030) the Tribunal stated that “The application of the ‘prejudice’ test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption. Second, the nature of ‘prejudice’ being claimed must be considered. A third step for the decision-maker concerns the likelihood of occurrence of prejudice” (at [28] - [34]).
- b. The word “commercial” depends on the context in which it is used, and should not be tied solely to competitive participation in buying and selling goods and services. The section makes clear that commercial interests include the interests of public authorities: *Student Loans Company v IC* (EA/2008/0092) at [49].
- c. For example, in *Department of Work and Pensions v IC* (EA/2009/0073) the Tribunal accepted as prejudicial to the commercial interests of the DWP and its

supplier disclosure of the detail of certain commercially sensitive terms of a contract with Atos to host and support the “Government Gateway” website on the basis that disclosure of this information would be likely to prejudice the commercial interests of the Department of Work and Pensions in any future procurement of the Gateway service or similar service (at [81]).

- d. The imminence or otherwise of a re-tendering of a contract may be important to the likelihood of prejudice: *Cranfield University v Information Commissioner* (EA/2011/0146).
 - e. The extent of competition within the market may also be important when considering the likelihood of prejudice to the commercial interests of public authorities and suppliers by the disclosure: *Visser v Information Commissioner and LB Southwark* (EA/2011/0188).
 - f. Where a public authority is seeking to rely on the prejudice to commercial interests of a third party, it should not speculate on potential prejudice, rather it should ordinarily obtain the views of the relevant third party: *Derry City Council v Information Commissioner* (EA/2006/0014).
 - g. Where the engagement of s.43 has been triggered by application of the “prejudice” test, there is an obvious overlap between that test and the application of the public interest test that follows: see *Hogan* (supra) [27]. In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question: *Department of Work and Pensions v IC* (EA/2009/0073).
 - h. The public interest balancing exercise is time-sensitive and to be judged at the time when the Appellant made the request: see *Derry City Council v Information Commissioner* (supra) at [28(b)].
21. The HO also rely on the exemption under section 41 FOIA which inter-alia provides:
- “(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.”* However because of the exemption under section 43(2) was accepted by the Commissioner he did not find it necessary to go on to consider the section 41 exemption.

22. **The Appellant's Grounds of Appeal:** are set out in a document accompanying his Notice of Appeal dated 16 April 2014. The Commissioner has submitted that the grounds of appeal are not well-founded for the reasons set out below.:

Ground 1 - Exclusion of public sector IRC's was perverse and unjustified:

23. First, the Appellant submits that the Request related to IRCs operated publicly (i.e. by the Home Office) and privately (i.e. by contractors), however, the Home Office has wrongly interpreted the Request as being limited to IRCs operated by private companies pursuant to a contract. This point, the Commissioner argues, is without merit. As he indicated in the DN (see § 7), the Commissioner considered the scope of the Request to include both publicly and privately run IRCs. Therefore the Commissioner argues he did not wrongly exclude this from his consideration. This Tribunal agree with this conclusion and adopt the reasoning of the Commissioner. As made clear in the Commissioners' response (see § 20), he expressly considered the request in respect of publicly operated IRC's
24. Second, the Appellant submits that section 43 cannot apply to services provided publicly by one part of Government to another. However, the Commissioner does not agree that section 43 is so confined. The language of the section, he argues, makes clear that the relevant prejudice can be to the commercial interests of any person, which can include either the Home Office, or indeed any other Government Department. If disclosure of information relating to the costs incurred by one Government Department in providing particular services to another Department would prejudice the commercial interests of either Department, that would be sufficient to engage section 43(2). Again, this Tribunal agree with this conclusion and adopt the reasoning of the Commissioner.

Ground 2 - Failure to respond to request for information about how the costs figures dealt with overheads etc.:

26. The Appellant submits that there has been no response to the third part of his request, namely to explain whether payment to contractors include or exclude particular costs. He makes this complaint both in respect of the costs information which he has been provided with (namely Net Present Value figures) and the actual annual costs information that has been withheld.

27. In its initial response, the Home Office withheld the information sought in relation to costs pursuant to section 43(2) FOIA and in so doing addressed the first and third part of the Appellant's requests. Further, in its response to the Appellant's request for an internal review, the Home Office addressed (at paragraph 10), the request for a breakdown of costs. The Home Office explained that it had directed the Appellant to where he could locate details of contracts with a value over a particular financial threshold and which set out some details relating to the name of the Home Office Department, name of business area incurring expenses, types of expenses, name of suppliers and amount spent. The Home Office's position is that to release further details/breakdown of costs would prejudice the commercial interests of its suppliers.
28. In his DN the Commissioner argues that he was addressing both the first and third part of the Appellant's Request, namely the actual annual cost of each IRC (the first part of the Request), together with other information concerning the operating of IRCs (the third part of the Request) (DN § 1), although the Commissioner noted that the Appellant had confirmed in correspondence that his principal concern related to the actual annual cost of each IRC (DN § 8). The Decision Notice treated the costs information sought by the first and third part of the Request together and the reasoning is of application to both parts of the Request.
29. The Commissioner argues that it is therefore incorrect to assert that the Home Office and the Commissioner have failed to address the third part of the request. This Tribunal agree with this conclusion and adopt the reasoning of the Commissioner.

Ground 3 - Refusal to supply cost information is inconsistent with the previous practice of the Government and Home Office:

31. The Appellant submits that actual annual cost information for individual institutions has previously been published in respect of prisons, namely published by the Home Office (prior to 2007) and is now provided by the Ministry of Justice and also by the Scottish Prison Service.
32. The Commissioner addressed this issue at § 14 of his DN and noted that the HO's position was that these were not like-for-like comparisons. Further, he

argues there is no evidence to suggest that any information concerning the actual costs of operating IRCs has ever been published.

33. Further, the Commissioner argues, each request for information has to be judged on its own merits. The fact that the Home Office have previously published similar cost information in respect of prisons some years ago does, he argues, not undermine the Commissioner's view that disclosure of the requested information would prejudice the commercial interests of the Home Office and its suppliers. This Tribunal agree with this conclusion and adopt the reasoning of the Commissioner.

Ground 4 - The application of action 43 is not properly reasoned.

35. The Appellant disputes that the exemption in section 43(2) is engaged.
36. First, he submits that the Home Office has already revealed the bid prices from which you can deduce the average annual payment under the contract (by dividing the contract award by the contract term). However, the Commissioner submits that the fact it may be possible to deduce the average annual cost from knowledge of the bidding price does not undermine the point that provision of the actual annual cost is commercially sensitive information, particularly in circumstances where i) the actual annual payments may differ from the total cost expected at the time the contract was awarded, namely the bid price, and ii) payments may not be flat across the contract term.
37. Second, the Appellant submits that the wishes of suppliers are not a sufficient ground to trigger prejudice under section 43 and their wishes have been set aside in publishing the value of the contract at the point of the award. The Commissioner submits that he accepts that the wishes of a third party are not determinative as to whether section 43 is engaged, however, he argues, they are plainly a relevant factor in considering whether the relevant prejudice would or would be likely to arise. The fact that some information as to costs has been disclosed by the Home Office, he argues, does not mean that the objection of third parties to the balance is irrelevant.
38. Third, the Appellant submits that publication of the withheld information would not prejudice the Home Office as purchaser in a fresh tender process as bidders would need to bid lower than any existing prices. The Commissioner does not agree with this assessment. For the reasons set out in the Decision

Notice, disclosure of the actual annual cost would reveal the exact amount the Home Office was prepared to pay for a service and therefore prejudice its ability to achieve best value in any future tendering exercises from the limited market of suppliers (DN § 14 – 16).

39. Fourth, the Appellant disputes that disclosure of the withheld information will deter contractors from bidding for the contracts and asserts that new bidders would be more likely to bid if they knew the price currently being paid. The Commissioner accepts that one argument in favour of disclosure of the information is that disclosure of actual annual costs would assist others when considering whether or not to tender for future contracts and would assist more bidders enter the market (DN § 21). However, he argues, that when considering the public interest arguments in the round, his view is that the public interest arguments in favour of maintaining the exemptions outweigh those in favour of disclosure (DN § 22 – 29).
40. Fifth, the Appellant submits that the objection that contractors will be reluctant to give information is not well founded as contractors have to indicate the bid price to the Home Office. The Commissioner's position is not that contractors will be reluctant to provide information, but rather that disclosure contrary to their express wishes would undermine confidence and trust in the Home Office, thus making it less likely that bidders would readily trust the Home Office in future (DN § 26 and 28).
41. On each of the five above issues this Tribunal agrees with the findings and adopts the reasoning of the Commissioner and finds that the Appellant has failed to persuade us that the Commissioner was wrong. The Tribunal accept that the HO has deliberately made available information that demonstrates the average annual cost of each IRC contract. We accept that it has done so as a public body that is committed to acting in a transparent manner. We accept that it is the disclosure of this information, such as has already been disclosed, that meets and satisfies the various public interests that the Appellant identifies in his grounds of appeal. We further accept the argument presented by the HO that disclosure of this information in no way detracts from the fact that the actual annual cost for the most recent financial year is legitimately regarded as commercially sensitive information and we note (1) actual annual payment may differ from the total cost expected as the time the contract was awarded, namely the bid price; and (2) depending on a service provider's particular business model, annual payments may not be flat across the relevant contract

term. The Tribunal note that the HO accept that the wishes of service providers are clearly not determinative, they are a relevant factor and in this case the service provider consider it would be prejudicial to them if this information were to be disclosed.

Ground 5 -the Public Interest test:

42. The Appellant submits that there is a strong interest in disclosure of the information namely i) ensuring value for money, ii) promoting accountability and transparency about the spending of public funds and iii) concerns about outsourcing of contracts for privately operated detention facilities, including the conditions in which detainees are being held and that this was not assessed properly by the ICO.
44. The Commissioner accepts that there are public interest arguments in favour of disclosing the requested information, however, balancing these against the public interest arguments in favour of maintaining the exemption (set out at DN § 22 – 27), the Commissioner submits that the public interest favours maintaining the exemption and relies on the reasoning set out in the Decision Notice. Again this Tribunal agree with this conclusion and adopt the reasoning of the Commissioner. We further accept the Ho submission that the Appellant fails to demonstrate how the public interest would be materially assisted by the further disclosure of the legitimately sensitive commercial information he seeks. We accept the submission of the HO that to the extent these public interests are engaged in the present case, they are fully satisfied by the average annual costs figures for each IRC that the HO has already disclosed.

Ground 6 - the Application of the Prejudice test:

45. The Appellant disputes that disclosure would result in prejudice falling within the scope of section 43(2) in light of the fact that publication of similar data in respect of prisons has not given rise to prejudicial effects.
46. The Commissioner's position is that previous data published does not provide a like-for- like comparator and commercial prejudice to the Home Office and third parties would result from disclosure of the requested information and relies on the reasons set out in the Decision Notice at § 12 – 17. This Tribunal agree with this conclusion and adopt the reasoning of the Commissioner.

47. The HO in their response adopt the Commissioners reasoning and argue that in light of the substantial information that the HO has already disclosed it is very difficult to see what public interest would be materially furthered by disclosure of the yet further information the Appellant seeks. This Tribunal accept this argument on the facts of this case.
48. The Evidence: The Tribunal heard evidence from Mr. Colin Welch, the Assistant Director, Supplier Relationship Management Lead in the Corporate Services Commercial Team of the HO. In this role, which he has held since January 2007, he has responsibility for the commercial management of an extensive portfolio of contracts for Immigration Enforcement to include contracts and/or service level agreements for all IRC's and Escorting related services. He provided important background information generally but specifically satisfied the Tribunal on the following points: a) Disclosing the actual annual costs of each IRC would undermine the ability of the O to achieve value for money from the whole supplier market. He explained how if the actual costs were disclosed, this would disclose what the HO is prepared to pay for ten services in question. This, he explained would allow a prospective bidder in future tender rounds to submit a bid within the parameters of what was currently paid, based on an understanding of what the HO is prepared to pay, rather than the actual costs that the service could be provided for. Over time, he explained, all suppliers and bidders in the market would converge around the figure of what was currently paid. These situations, he explained undermine effective bidding and competition, which would damage the HO's commercial interests. b) He further explained that the disclosure of the actual annual costs of each IRC would also prejudice the commercial interests of the suppliers who currently provide services in respect of running IRC's. He had personally contacted various suppliers who are contracted by the HO to run IRC's in relation to the Appellants' request for information and they all confirmed that they viewed this commercially sensitive information is not suitable for disclosure. He continued to give detailed evidence in support of the contention that the actual costs as opposed to average costs would disadvantage suppliers.
49. Most significantly in light of the Appellants submissions to this Tribunal on disclosure of Ministry of Justice contracts for running custodial facilities and HO contracts and direct comparisons between the two public bodies, Mr. Welch explained how it was difficult to make direct comparisons as they were not like for like and taking into account the difficulties of interdepartmental comparisons. In any event he was clear in that he thought the HO undoubtedly

obtained better value for money as a result of not disclosing the actual cost as sought by the Appellant.

50. The Appellant failed to undermine or discredit the evidence of Mr. Welsh in any meaningful way.
51. The Tribunal accept that the HO has provided very significant disclosure in response to this request and the HO has acted responsibly and a high level of transparency has been achieved without causing prejudice.
52. On the other hand the Appellant has failed to persuade this Tribunal that there was any compelling public interest in disclosure of the specific information now sought.
53. On the evidence heard at this hearing, we accept that the disputed information is confidential and commercially sensitive and that there is a public interest balance in favour of non disclosure.
54. We do not find the Appellants reliance on the disclosure of information by the Ministry of Justice to be like for like or a helpful comparison. The evidence of Mr. Welsh confirmed the figures do not disclose actual costs because they incorporate various other costs items met by the public sector.
55. Mr Welsh has persuaded us that non disclosure does and will continue to result in significant savings to the HO in this tendering process and he has confided that suppliers have expressly stated their objections to disclosure and this is a factor that the HO must take into consideration both for long term relations with suppliers and their responsibilities to the public interests generally discussed in detail throughout this appeal.
56. Closed Session: In summary form the Tribunal considered in closed session each piece of redacted information contained in the closed bundle. and asked the HO to explain and justify each redaction.
 - a) The Tribunal stated that it did not consider the redaction at page 5 of the Commissioner's letter to the HO dated 2 October 2013 to be justified. The HO have now agreed.
 - b) The Tribunal asked the HO to justify why the detailed financial figures relating to insurance arrangements under the contract were redacted. The HO

explained that in its view, and acting on advice from its insurance advisers, it considered that these figures were commercially sensitive.

- c) The Tribunal asked the HO to justify why the financial figures under the "Formula for Monthly Payment" were redacted. The HO explained that this was a key pricing/commercial risk provision which it, and suppliers, regarded as commercially sensitive.
- d) The Tribunal asked the HO to justify why the detailed financial figures under the "Operating Fee Analysis" were redacted. The HO explained that this was contained in the detailed context price breakdown which it, and its suppliers, regarded as of the highest level of commercial sensitivity"
- e) The Tribunal stated that it did not consider the redaction of Part 1 of Sch Q to be justified. The HO agreed.
- f) The Tribunal asked the HO to justify why the financial figures on the second page of the HO's letter to the Commissioner dated 11 March 2014 were redacted. The HO explained that this referred to actual savings figures which it, and suppliers, regarded as commercially sensitive.

57. The Commissioner finding section 43(2) was properly engaged by the HO did not go onto consider the exemption under section 41 and this is therefore not a subject for this appeal.

58. For the above reasons the Tribunal dismisses the appeal.

Brian Kennedy QC
Tribunal Chairman
DATE: 13 October 2014.