



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0166

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50528553
Dated: 19 June 2014**

Appellant: HOWARD TAIT
Respondent: INFORMATION COMMISSIONER
Heard at: NEWCASTLE SCCS
Date of hearing: 21 OCTOBER 2014
Date of decision: 27 NOVEMBER 2014

Before

ROBIN CALLENDER SMITH
Judge

and

JEAN NELSON and PAUL TAYLOR
Tribunal Members

Date of promulgation: 1 DECEMBER 2014

REPRESENTATION:

For the Appellant: Mr H Tait
For the Respondent: written submissions from Mr M Thorogood, solicitor for the
Information Commissioner

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
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Case No. EA/2014/0166

Subject matter: FOIA

- s.43 (2)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 19 June 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Mr Howard Tait (the Appellant) is the managing director of Martin Tait Redheads Limited (MTR), a well-established and highly regarded advertising agency in the North of England.
2. MTR unsuccessfully tendered for a contract with the North of England Commissioning Support Service (NECS) to act as a media buyer on its behalf for a particular campaign/project.
3. The Appellant asked the NECS for details of the winning bidder's proposals.
4. NECS provided some of the details to him on 21 November 2013 but refused to disclose the remainder on the grounds that it was exempt information under section 43 (2) FOIA.
5. Without rehearsing all the detailed reasons given in the Commissioner's original decision notice dated 19 June 2014 he found, in essence, that with the exception of certain pages identified at

Paragraph 36 of the Decision Notice, disclosure of the withheld information would be likely to prejudice the commercial interests of the winning bidder.

6. Also, that the public interest in maintaining the exemption outweighed the public interest in disclosure.
7. NECS was ordered to disclose parts of the withheld information and did so on 8 July 2014

The appeal to the Tribunal

8. In the Grounds of Appeal, and at the oral hearing, the Appellant maintained that there had been an error of law in the Commissioner's decision.
9. By applying section 43 (2) to the costing information submitted in respect of the winning bidder it was not possible to confirm whether the Appellant's firms costs were higher than those submitted by the winning bidder.
10. MTR was the largest independent media buyer in the North East of England and the firm's negotiated rates were always extremely competitive. The prices his firm had put forward were the lowest possible based on the target delivery and reach of the audiences. There had been incidences within the industry when prices quoted to clients had not been actual costs to deliver the specific outcomes and targets identified.
11. The Appellant was seeking the appointment of an independent arbitrator to look at the costs submitted by MTR and the costs submitted by the winning bidder. The arbitrator sought should be

familiar with the advertising industry and the media buying process and the purpose would be to analyse the costs proposals and to make independent observation on the value and the delivery of both tenders. MTR was prepared to fund 50% of any fee charged by the arbitrator.

Evidence

12. We heard oral evidence from the Appellant and we also had the benefit of seeing the closed, confidential material in relation to the tendering process that had not been disclosed to him.

13. The Appellant emphasised to us that over the past 10 years MTR had worked on numerous campaigns for the NHS and won many awards for the work. The firm had great respect for everything the NHS did and had contributed over £100,000-worth of time, expertise and resource to NHS children's hospital entertainment with its voluntary work with the Theatre Royal.

14. While it is not possible, in the terms of this judgement, to reveal the confidential and withheld points of that information to the Appellant we can assure him that the tendering process produced a result that – on the details we have seen – made it inevitable that the winning bidder would succeed.

Conclusion and remedy

15. It should be noted that NECS had disclosed to the Appellant an anonymized evaluation sheet showing how the competing businesses scored against the criteria used in the tender process.

16. That document showed that the Appellant's business did not score the highest in relation to the "cost" element. When NECS conducted an

internal review, an edited version of the evaluation sheet – discounting the cost element – was provided to the Appellant. Even discounting the cost criteria, the Appellants firm would not have scored the highest rank to win the contract.

17. When the Commissioner had considered the public interest factors in favour of disclosure, he had correctly identified them. Disclosure might reveal whether or not an appropriate tendering process had been followed and confirmed that no maladministration had occurred and it would allow the public to scrutinise whether the services promised by the bidding organisation represented value for money.
18. We have had the opportunity of examining and considering the withheld material and there is no evidence of either of those two elements.
19. There is a clear public interest in ensuring that a private company is not commercially disadvantaged.
20. The Appellant made it clear to us that, had his firm been the successful bidder, it would have had no objection to all the elements of its bid being exposed to public scrutiny. He believed that was the correct way to approach such matters because it encouraged transparency and openness.
21. That, however laudable it is as a statement of principle, covers only a hypothetical situation because his firm was not the successful bidder.
22. We explained to the Appellant that we had no powers under FOIA to appoint an independent arbitrator to look at his cost proposals vis-a-vis those of the winning bidder.

23. We have no hesitation in upholding the Commissioner's decision in relation to the operation of section 43 (2) FOIA in relation to the withheld information for the reasons we have given above.

24. For that reason, the Appellant's appeal must fail.

25. Our decision is unanimous.

26. There is no order as to costs.

Robin Callender Smith

Judge

27 November 2014