



**THE FIRST TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

EA/2016/0074

ON APPEAL FROM A DECISION OF THE INFORMATION COMMISSIONER

B E T W E E N

COUNCIL OF THE BOROUGH AND COUNTY OF THE TOWN OF POOLE

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

BEFORE

**Melanie Carter
Narendra Makanji
Marion Saunders**

1. The Council of the Borough and County of the Town of Poole (the “Council”) appeals, under section 57 of the Freedom of Information Act 2000 (“FOIA”), against a Decision Notice of the Information Commissioner dated 24 February 2016 requiring disclosure of information relating to payroll and pension services provided by the Council to schools.
2. On 8 October 2015 the requestor wrote to the Council requesting information in the following terms:

“... the names of the schools (including all types of school and academies) that are currently supplied with your Payroll/pensions service to be broken down by the actual service given to those schools and charges made for those services at each school.”
3. The Council responded on 6 November 2015 and 10 November 2015, disclosing a list of

schools, but did not provide the charges made at each school and the services rendered, arguing that the information was exempt under section 43(2) FOIA because it would be likely to prejudice the Council's commercial interests.

4. The requester (who is not a party to this appeal) contacted the Information Commissioner ("the Commissioner") on 26 November 2015 to complain about the part refusal of her information request. The Commissioner considered the complaint and issued a Decision Notice ordering the disclosure of the information on the basis that s.43(2) was engaged but that the public interest test favoured disclosure. . This appeal is against the Decision Notice and the task for the Tribunal is to consider whether it is in accordance with the law.
5. It was accepted by the parties that s.43(2) was engaged, there being a likelihood of prejudice to the commercial interests of the Council. The Council however argues that the Commissioner, in undertaking the public interest balancing exercise under s.43(2) of the FOIA:
 - failed to have sufficient regard to, and place sufficient weight on, the commercially sensitive nature of the information (Ground 1); and
 - erred in its assessment of the public interest in the disclosure of the information, and in so doing placed too much weight on the public interest in that disclosure (Ground 2).
6. As such, this decision essentially concerns the application of the public interest balancing test further to an application of the commercial interests exemption at section 43(2).
7. The decision of the Tribunal is to uphold the appeal on the basis that the Council was entitled to rely upon the exemption at section 43(2) FOIA and not to have made disclosure (see however paragraph 50 and the information referred to therein which is still to be disclosed).

Legal Background

Section 43(2)

8. Information is exempt from disclosure pursuant to s.43(2) if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

9. In respect of the term 'prejudice' under section 43(2), the Upper Tribunal has held that:

“...It is well-established that the prejudice must be real, actual or of substance, and that in this context "likely" means a very significant and weighty chance of prejudice (see *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) at paragraph [106]).”

Department for Work and Pensions v (1) The Information Commissioner, (2) FZ [2014] UK.UT 0334 (AAC) at paragraph 26.

10. As explained in *Sally Ballan v Information Commissioner* UKIT EA/2015/0021, 17 July 2015, paragraph 8:

“While the chance of prejudice need be significant and weighty, the extent of the prejudice need not be (though it will be relevant to the public interest balance). It is sufficient that “some commercial disadvantage” is likely to be suffered”

11. As set out in the Upper Tier Tribunal case of *London Borough of Camden v Information Commissioner & Voyias* [2012] UKUT 190, para 11, the correct approach to assessing the potential prejudicial consequences of disclosure is to only take into account consequences that “can be readily anticipated as realistic possibilities”. If prejudice is considered a realistic possibility, the next step is to assess the likelihood of any such prejudice.

12. If a public authority seeks to rely on the s.43(2) exemption on the basis of prejudice to the commercial interests of a third party, the public authority must provide evidence from the third party of the prejudice as confirmed in the case of *Derry City Council v ICO* (EA/2006/0014). Thus, the successful application of s.43(2) is dependent on a public authority's ability to demonstrate a clear link between disclosure and the commercial interests of an individual, a company or the public authority itself.

13. The exemption under s.43(2) of the FOIA is not absolute. The application of the exemption requires consideration of whether the public interest in the maintenance of the exemption outweighs the public interest in the disclosure as per s.2(2)(b) of the FOIA.

14. The public authority must apply the public interest test by reference to the specific information which it seeks to withhold: *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC).

Evidence

15. The evidence before the Tribunal was limited in nature. It had before it two witness statements from Carl Wilcox, the Head of Human Resources at the Council. Most notably his statement set out that:

“10. ...As a small unitary council, Poole has a relatively small-scale Human Resources function with a gross annual budget of approximately £1.85 million. Roughly £350K (nearly 20%) of this budget is met through external income, generated by selling payroll and other HR services, mainly to schools and academies as well as to other outside bodies.

11. If [the Council] loses the business it currently has a result of being forced to disclose this commercially sensitive information to a competitor (as the ICO admits would potentially be the result in the reasoning it sets out in its judgment), the Poole HR budget would be cut by 20% and a commensurate number of its HR employees would need to be made redundant, or would not be replaced upon resignations, retirements, etc., depending how swiftly this loss of business occurs.

12. This, in turn, would mean the Council's HR function has to drop down to an even smaller capacity (after already absorbing 7 years of significant cuts, due to the national “austerity” drive). Poole HR was cut in size and in budget by 25% across 2009/10 and 2010/11 combined, and has had additional smaller reductions since. Once we lose that further capacity and those resources, Borough of Poole would no longer, realistically, be in a position to compete for external business, and it would reach a point at which its ability to fulfil its core functions for the organisation itself would be in question.

13. The Council's Payroll team, in particular, would be adversely affected. Poole currently pays over 7,000 employees in nearly 20 separate payroll runs, whereas the Council itself only employs around 4,000. So a major element of their customer-base is employees of separate, external organisations. Therefore, if most or all of this business becomes lost, as a consequence of the ICO decision, around half the Payroll team would inevitably lose their employment here.

14. Operational overheads then become more significant as a result of further contraction in the team's size, and that of the HR service as a whole, as we lose economies of scale. This therefore means that the costs of our services to our

own organisation would go up in real terms, at a time when the Council is trying everything it can to become more efficient in order to protect front-line services to the community which are in genuine danger of being cut as a result of austerity".

16. Further, as explained in Mr Wilcox's statement, the Council contacted in excess of 50 other councils regarding these proceedings. Those authorities who responded to that contact have "pressed [the Council] to do all it can to fend off the pressure to disclose, on the basis that they can foresee the difficulty it would also cause to them."

17. At tribunal Mr Wilcox gave the following additional evidence:

- a) The Council, in line with the position generally, had in recent years been subject to severe financial cost cutting. The Council was a relatively small unitary authority and the fear was that its services would lose their economies of scale. Hence, the Borough of Poole HR had a 'survival through growth' policy.
- b) It had been under increasing pressure and exhortation from central government to maximise its sources of income, including commercial sources. The Council was still finding its way providing commercial services in competition with other public sector providers and the private sector.
- c) In 2010, the Council had lost the contract for a particular academy, but since then, generally, had been very successful in competing for payroll and pension services (in relation to which its prices were competitive). The Council provided what he described as a high quality service. This created a tension in that academies often needed to put price first.
- d) Multi academies often had their own HR function (or arrangements for outsourcing) and this was one reason, other than price, that academies chose not to use the services of the Council.
- e) Previously the Council had in effect been subsidising various academies, but due to the financial pressures upon the Council it could no longer justify this and had moved in recent years to a full cost recovery model.
- f) With regard to the description of the services provided to the academies this was withheld on the basis that this would be of use to the private sector competition. The private sector did not have the specialist knowledge enjoyed by the Council in certain areas.

g) Mr Wilcox told the Tribunal that there were many studies in relation to the long term impact of privatising services. Ultimately these found that long term costs were likely to go up. This was consistent he argued with his prediction that whilst initially costs may go down, when the public sector providers were priced out of the market, the private sector providers would start to increase their fees. In 4 or 5 years, he would expect prices to have exceeded where they are currently are.

18. In addition, the Tribunal had before it three emails which were to and from academies interested in engaging the services of the Council in the provision of payroll and pensions services.

Grounds of appeal and submissions

Ground One: Insufficient Weight given to the Commercial Sensitivity of the Information

Submissions by the Council

19. The Council explained that the schools within the Borough of Poole are not under an obligation to use the Council's services. Rather, they are free to buy their payroll and pension services from the Council or other public or private providers of similar services.

20. Mr Wilcox told the Tribunal that generally, the Council enters into contracts on an annual basis; a few contracts are on a three-year basis. Thus, the tendering process for HR and payroll services is, effectively, always ongoing. This means that the withheld information is and will remain relevant to competitors who are bidding for contracts in the short to medium term. The schools to which the Council sells the services are highly motivated by levels of cost when reaching their decisions.

21. The Council argued that there are three key factors which should be considered in assessing the weight to be ascribed to the public interest in maintaining the exemption.

22. First, there is a public interest in public bodies, such as the Council, being able to compete on a level playing field. If the Council has to disclose its pricing strategies, and the private sector companies against which it competes do not, the playing field between private and public HR services providers will not be a level one. The Commissioner has accepted that this factor "adds more weight in favour of maintaining the exemption".

23. Second, if, as is expected, business is lost as a result of the release of the information, the impact on the Council would be significant, as explained by Mr Wilcox.

24. Third, disclosure is inconsistent with the expectation, from Central Government, that authorities such as the Council must raise funds by selling their services commercially. Local authorities have been urged by Central Government to meet these budget shortfalls by replacing “lost Government Funding innovatively with other income sources from trading, commercial and entrepreneurial activities”. As requiring disclosure would create an uneven playing field for local authorities seeking to operate commercially, it is inconsistent with this policy.
25. Taking these points together, the Council argued that there is a strong public interest in maintaining the exemption.

Submissions by the Commissioner

26. In the Decision Notice, the Commissioner accepted that “knowledge of the exact fee charged by the Council could enable other providers to undercut that fee” and thus harmed its commercial interests. Given this he accepted that the exemption provided by Section 43(2) was engaged. The Decision Notice stated however as follows:

“14. ...The next step is to consider whether the circumstances in which the Council secures contracts with schools suggests that it is being undercut by competitors is a likely outcome. If there was little competition for the provision of these services, for example, or if the schools were obliged to contract with the Council, this would suggest that there was not a strong likelihood of the outcome predicted by the Council occurring.”

27. The Commissioner accepted that there would be some prejudice to the Council but argued at the hearing that the cuts were likely to be to HR and not front line services and that as such the prejudice was of a lesser nature.

Ground 2: Benefit to other public authorities overstated

28. The Council argued that the Commissioner’s assessment, that the public interest in disclosure of the withheld information is weighty, is premised on an assumption that release of the information will result in schools paying less for payroll and pension services across Poole and the surrounding area. From this it makes a finding that “there is a public interest in creating an environment in which publicly maintained schools can secure contracted services at a lower rate due to a competitive market.”
29. Mr Wilcox’s Statement outlines the risk that if public authorities are forced to disclose this information and are consistently underbid, public authorities could be forced out of the

market, at which point “schools and academies would surely end up paying more in real terms than if councils were enabled to continue to compete fairly for this business.”

30. Therefore, it was argued, in assessing the public interest in disclosure, little weight can be placed on the assumption that disclosure will necessarily result in reduced payroll and pension services fees for schools given the uncertainties associated with this assumption.
31. Second, the Commissioner assumes that some contracts which the Council might lose in the future would be won by other public bodies. This was a key plank on which the Commissioner rested his finding that the public interest in disclosure outweighs that of maintaining the exemption in that it allowed the Commissioner to characterise the balancing act as, on the one hand, disclosure benefiting schools and other public authorities and, on the other, harming only one local authority.
32. Mr Wilcox rejected this as “baseless conjecture and almost certainly wrong”. The Council competes not only with local councils but also with private sector companies. Mr Wilcox explained that:

“7. In tender competitions over the recent past, the Council has been competing against 5 separate private sector companies and only 3 other local authority HR/Payroll functions. To date, the latter have been much more tightly constrained by geographical factors, whereas the former have not. Private companies tend to bid for any contracts regardless of geography. In theory, public bodies could also do this, but in practice they have thus far tended to range far less widely beyond their own local geographical patch, with the exception of one neighbouring county council. If this ICO decision is allowed to stand, this neighbouring local authority will very likely receive similar FOIA requests to divulge its pricing to commercial sector rivals, and will see its competitiveness rapidly undermined as a result.”
33. Thus, it was argued that it was incorrect to assume that other public authorities will necessarily benefit from disclosure because: (1) there is no likelihood that contracts will go to other public authorities over private competitors; (2) public authorities are constrained by charging based on full cost recovery and thus cannot underbid, strategically, the way a private competitor could; and (3) public authorities offering similar services will suffer from the same “*unlevel*” playing field as the Council as they too will be required to disclose fees charged. Again, in assessing the public interest in disclosure, given these uncertainties little weight can be placed on this assumed benefit.

34. Third, there is no public interest in receipt of the withheld information in and of itself. It is not information which, for example, has been said to be of value in terms of holding the Council to account in terms for public spending.
35. Thus, in contrast to many cases in which s.43(2) is invoked, the public benefit stems not from disclosure of the information but from the consequences which it is assumed might flow from that disclosure. As explained above, less weight should be given to that benefit because it is uncertain, as opposed to the situation where the benefit flows directly from the disclosure of the information.
36. Further, the Council's budget and accounts are published on its website annually. Thus, information is available to hold the Council to account in terms of the money it obtains from these services.

The Commissioner's submissions

37. The Commissioner relied upon the fact that the beneficiaries of lower prices would also be publicly funded bodies: schools and other public authorities competing against the Council. In all cases, disclosure would be likely to lead to a savings in public funds as a result of schools being required to spend less to secure these services. In cases where the rival contractor that benefits by securing the contract is another local authority, there would be no loss to the public purse as a result of the contract going to the private sector. Thus it was argued that whilst the public interest in favour of maintenance of the exemption is on the basis of harm to the commercial interests of a single public body, the public interest in disclosing this information relates to the commercial interests of a number of public bodies; all the schools in the list disclosed to the complainant, and other local authorities that win contracts as a result of disclosure of the information in question.
38. The Commissioner challenged the supposition that prices would eventually go up as all local authorities were priced out of the market. It was said to be unlikely that the private sector firms would either act in concert or all adopt the same commercial strategy.

Tribunal conclusions

39. Most cases before the Tribunal in relation to the section 43(2), commercial interests exemption, arise from circumstances in which the public authorities are the commissioners of services. The strikingly different aspect to this appeal was that the Council was acting here in the competitive market for the provision of services to others. The commercial interests at play were therefore those of the Council itself, acting in a

competitive market: not directly in the quest for value for money, but rather the purpose of maximising income to the Council. Perhaps as a result, also strikingly, transparency and accountability were not the main factors at play in this appeal, rather, what was said to be the urgent need to maintain income to the Council in the highly pressurised financial circumstances that currently face local government. Indeed, the backdrop to this appeal was an exhortation from Government to maximise trading and commercial services and for local government to act competitively in their relevant markets.

40. It was apparent to the Tribunal, on the evidence before it, and in particular the testimony of Mr Wilcox, that there was: (1) regular competition in the provision of payroll and pension services to academies and other public bodies; (2) that, pursuant to this regular competition, the Council's competitors could use the withheld information to gain an advantage and undercut them in tenders; and (3) this would make it more difficult for the Council to secure contracts. The commercially sensitive nature of the withheld information is supported by the three emails and the fact that the information was sought by a competitor, demonstrating that it does have commercial significance.
41. The Tribunal formed the view that the Commissioner had not given adequate weight to the likely prejudice to the Council's commercial interests. First, in forming his view in the Decision Notice, he had not been aware that most of the competitors were from the private sector (he had been under the mistaken impression that the majority of the other providers were other local authorities).
42. Second, the Commissioner had not given adequate weight to the impact of the loss of this source of income on the Council's wider services. The evidence from Mr Wilcox on this point was compelling. It was clear that the economies of scale would enable the Council to spread its costs, allowing for greater capacity and resilience to respond to institutional change, avoid reducing front line services and to maintain the policy of "survival through growth". Whilst cuts would in the first instance likely fall on HR staff, the Commissioner did not seem to have given sufficient weight to the loss in terms of economies of scale and the impact this would have on wider front line services.
43. Whilst the documentary evidence from the Council was, as the Commissioner suggested, rather thin, the Tribunal accepted that beyond the three emails produced, it was likely that most evidence of prejudice to the competitive process would have been contained in oral conversations. It was to be expected that such evidence would be difficult to adduce. The Council could have produced better evidence of its contact with the 50 authorities and the responses, but on balance, the Tribunal was prepared to

accept the testimony of Mr Wilcox on this point given the integrity of his evidence overall and the logical consistency with matters which were of common knowledge. In this regard, it was considered a matter of common knowledge that public authority providers of commercial services were (absent a ring fencing rule) able to cross subsidise other services and also that disclosure of price sensitive information in a situation in which contracts went out to tender annually, would put a public authority provider at a disadvantage.

44. Further, in the Tribunal's view, whilst the short term impact of disclosure was likely to be a price cut which would be of benefit to the schools (and other public sector recipients of the services) and thereby the public purse, it had not been presented with any evidence to substantiate that the long term position would remain so. First, the Tribunal did not consider it a realistic possibility (as asserted by the Commissioner), were the information to be disclosed, that local authorities would continue to feel able to refuse to disclose their own equivalent information. Given that the majority of the withheld information would likely be of a standard nature (that is, standard to local authority providers), it seemed a flawed analysis to assume that other local authorities would not end up being obliged to disclose their equivalent information and thereby suffer a similar disadvantage to the Council.
45. As such, the Tribunal did not feel able to accept the Commissioner's suggestion that other local authority providers of services would enjoy a stronger competitive position over the longer term.
46. The Tribunal formed the view that it could not come to any conclusions on the long term effects of disclosure. In this way, the Commissioner had overstated the potential benefit to the public purse in ordering disclosure. The Commissioner had argued that the Tribunal should not accept an argument with regard to prejudice to third parties on the basis that no evidence had been provided (*Derry*). The Tribunal found however that the issue here was rather in relation to the suggested benefit to public authorities, not prejudice to commercial interests of a third party.
47. Second, the Tribunal accepted Mr Wilcox's reference to studies showing that long term privatisation did not guarantee price reductions and in many cases led to greater pressure on the public purse.
48. Taken together, the Tribunal found that the above findings led to a conclusion that the Commissioner had in this case not given sufficient weight to the likely prejudice to the

Council's commercial interest and given too much weight to the likely benefit to other public authorities flowing from disclosure. In addition, he had erroneously taken into account the likely long term effects of such disclosure on competitor local authorities.

49. Balancing the public interest factors in favour of disclosure and those in favour of maintaining the exemption, the Tribunal came to the view that the latter outweighed the former.

Services

50. During the hearing, an issue arose with regard to whether absolutely all of the document setting out the services to be provided should be withheld. On further reflection, the Council accepted that all but page 1, paragraph 10, page 2 paragraphs 1, 3, 4, 5, 6 and page 3, paragraph 8 of the document in the withheld information setting out the nature of the payroll and pension services were not commercially sensitive. The Council conceded that there was no likely prejudice if all but these paragraphs were disclosed as these set out generic services which would be likely to be being provided by all competitors in the market. In these circumstances, the Tribunal decided that section 43(2) in this limited regard was not engaged. As such, all but the cited paragraphs above along with the heading to the document should be disclosed to the requester.

Conclusion

51. The Tribunal decided for the reasons set out above, that the Decision Notice was not in accordance with law and the appeal was upheld in part. When weighing the factors favouring disclosure against those favouring non-disclosure in this case, the cumulative weight of the factors favouring non-disclosure outweighed the weight of those favouring disclosure. As such the Council was entitled to rely upon section 43(2).
52. The exception to this was certain paragraphs of the document setting out the pension and payroll services mentioned in paragraph 50 of this decision, which the Council is still obliged to disclose, albeit on a different basis to that given in the Decision Notice.
53. The decision of the Tribunal was unanimous.

Melanie Carter
Tribunal Judge
13th September 2016