



**Appeal Reference: EA/2018/0081**

**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**PHILIP SWIFT**

**obo CLAIMS MANAGEMENT & ADJUSTING LTD**

**Appellant**

and

**THE INFORMATION COMMISSIONER**

**Respondent**

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**Heard: 3 September 2018 at Field House – London.**

**Tribunal: Brian Kennedy QC, Marion Saunders and David Wilkinson**

**Result: Appeal refused.**

**Introduction:**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 13 March 2018 (reference FS50693918) which is a matter of public record.

## **Factual Background to this Appeal:**

[2] Full details of the background to this appeal, Mr Swift's request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Transport for London ("TfL") was correct to withhold some requested information under section 43(2) FOIA.

## **Chronology:**

21 June 2016	Appellant requests information about the London Highways Alliance Contract ("LoHAC")
1 Sept 2016	Follow-up request for further information regarding payments in LoHAC
12 July 2017	TfL discloses some information but withholds remainder, citing s43 FOIA as concerning commercial interests
1 Aug 2017	Appellant requests internal review and complains to Commissioner
31 Aug 2017	Council upholds refusal under s43
20 Sept 2017	Commissioner accepts Appellant's complaint for investigation
13 March 2018	DN upholding the refusal

## **Relevant Legislation:**

### **Freedom of Information Act 2000**

#### ***43 Commercial interests.***

- (1) Information is exempt information if it constitutes a trade secret.
- (2) 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).
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

## **Commissioner's Decision Notice:**

[3] The Appellant requested information from TfL about to the London Highways Alliance Contract ("LoHAC"), specifically relating to the schedule of rates, lump sum arrangements

and percentage adjustments (uplifts) for the four regions of the Contract. Some information was disclosed, but the rest was withheld under s43. TfL later confirmed to the Commissioner that it did not hold some requested information (relating to various contractual factors), and apologised for not informing the Appellant of this when he made his requests. It also clarified some of the information that it had released.

**[4]** TfL stated that the savings to London boroughs and TfL from LoHAC have been estimated as being up to £450 million over the eight years of the contracts. LoHAC contractors carry out specified core services for an agreed TFL specific lump sum. In addition LoHAC contractors may be required to carry out other works not covered by the lump sums, the price of which is calculated by reference to the contractor's schedule of rates and percentage adjustments.

**[5]** TfL told the Commissioner that the withheld information "demonstrates a significant divergence between elements of pricing, reflecting the bidding strategies of the respective contractors". The schedules of rates, lump sums and uplifts are all negotiated with the separate contractors and differ between the areas. TfL explained that disclosure would be likely to prejudice the commercial interests both of the contractors concerned and its own commercial interests.

**[6]** The four LoHAC contracts are up for re-tender within the next few years, and each one will be individually negotiated with interested bidders. Disclosure of the remaining withheld information would mean that the individually negotiated prices for each of the current contracts would be available to the general public. Current contractors would be in a position to compare their contract with other areas and tailor their bids accordingly, potentially driving up prices for TfL. Similarly, bidders may cluster their bids around the current contract, rather than striving for the most competitive outcome.

**[7]** Three of the four contractors provided submissions or explained to TfL why it viewed the remaining withheld information to be commercially sensitive, arguing that it may prejudice their ability to negotiate with third parties. Schedules of rates and uplifts are common instruments for service contracts across the country, and publishing the LoHAC information would be likely to lead to other clients comparing their own contracts with the contractors to the four LoHAC contracts, which could damage current commercial relationships.

[8] The Commissioner accepted the arguments from TfL regarding its own commercial interests and those of the contractors, and found that s43 was engaged. The Appellant argued that the public interest lay in disclosing the information in the interests of accountability for the expenditure of public money. TfL acknowledged this, but stated that they went some way to meet this by publishing details of all expenditure over £250. The Appellant also argued that the ability to compare contracts, far from being a reason not to disclose the information, would support fairness in dealings between contractors and third parties who are liable for damage caused to the highway as it would allow an assessment of the reasonableness of any bill. TfL countered that a schedule of rates is published by The Civil Engineering Contractors Association (CECA) and therefore it seems a benchmark already exists publicly that allows third parties to compare the rates presented to them to determine whether these are reasonable. Additionally, the courts have the power to adjudicate on any bill presented by a contractor that a third party considered unreasonable. On the balance of public interests, the Commissioner accepted TfL's argument and held that the remaining information should not be disclosed. She did, however, criticise most strongly TfL for taking 12 months to respond to the Appellant's first request, and 10 months to respond to the second, describing such delay as "excessive and unacceptable".

### **Grounds of Appeal:**

[9] Following the publication of the DN, the Appellant wrote again to the Commissioner requesting she disclose the requested information in order to permit him to prosecute his appeal. He claimed that he would be prejudiced from doing so without the information as he was not privy to all the submissions of TfL that were considered by the Commissioner. He alleged that the Commissioner had been biased in favour of TfL in her considerations. His request has a serious purpose, and the public interest favours disclosure as he alleges that third party companies are subsidising the artificially low rates charged by the contractors to TfL. This, he alleged, was malfeasance by TfL, who also misled the Commissioner as to the sensitivity of the information.

### **Commissioner's Response:**

[10] The detailed explanation given by the Commissioner in the DN is, in her submission, sufficient to permit the Appellant to understand the appeal. Contrary to the Appellant's allegations of bias, the Commissioner argued that she had reviewed the withheld material

and considered the submissions of both parties, She had carefully set out at length why she accepted that disclosure would prejudice the commercial interest of TfL, the present contractors, future bidders and the market in general.

[11] The information relates to contract value and pricing, matters which the Tribunal in *Brighton and Hove City Council v IC EA/2016/0119* found could be sufficiently commercially valuable as to allow competitors to “take advantage” and “exploit”. As the information in this case is clearly commercially sensitive, the Commissioner considered that the thrust of the Appellant’s argument must be that the information is not ‘secret’ as it is already shared between competitors through joint ventures and staff meetings. This is contrary to the evidence provided by contractors and TfL, which demonstrate “significant divergence” between the various contracts in the different areas. We accept and adopt this finding.

[12] The Appellant raised concerns about “*bid-rigging and black-listing evidence collusion*”. He provided no evidence of this, but if he can substantiate his claims he should refer such conduct to the Competition and Markets Authority. Again this Tribunal accept and adopt this proposition.

[15] The Commissioner accepted that there is a public interest in ensuring transparency and accountability in the use of public money. The Appellant clearly has a personal commercial interest in finding out this information, but FOIA cannot be used to “circumvent the reality of commercial business”; he is conflating his personal commercial interests with the public interest. This Tribunal accept this proposition and find in any event that the public interest favours non-disclosure for the reasons given by the Commissioner and set out above.

### **Tribunal Findings:**

[16] The Tribunal has considered all the evidence and seen the details of negotiated contracts, which are obviously issues of commercial sensitivity as determined by the Commissioner. (Page 24 Paragraph 7 & page 30 at Paragraph 24).

[17] The Appellant’s arguments regarding the public interest seem to us to be rooted in his own commercial interests, as the information would be of use to his own business activities. There is no evidence of any fraud perpetrated on or by TfL or any of the contractors, and we

have seen nothing that would justify a finding that the Commissioner has erred in her findings of fact or application of the Law or for overturning the reasoning in the DN. We refuse the appeal accordingly.

Signed Brian Kennedy QC

Date: 24 September 2018

Promulgation date: 28 September 2018