



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

Appeal Reference: EA/2018/0238

**Decided without a hearing
On 4 April 2019**

Before

HH JUDGE SHANKS

SUZANNE COSGRAVE

STEPHEN SHAW

Between

OWEN JEBB

and

INFORMATION COMMISSIONER

Appellant

Respondent

DECISION OF FIRST-TIER TRIBUNAL

For the reasons set out below the appeal is allowed and the following substitute decision notice is issued.

Substitute Decision Notice

Complainant: Owen Jebb

Public Authority: Stockport Metropolitan Borough Council

Decision

The Public Authority did not deal with the Complainant's request for information made on 22 January 2018 in accordance with Part I of the Freedom of Information Act 2000 (FOIA) in that it wrongly refused to communicate to him the quantum of an outstanding extension of time request submitted by the contractor in relation to the A6 to Manchester Airport Relief Road project.

Steps to be taken

The Public Authority must by 1600 on 10 May 2019 provide the Complainant with that information.

HH Judge Shanks
11 April 2019.

REASONS

Background

1. This appeal concerns the project for the construction of the A6 Manchester Airport Relief Road (A6MARR). Construction started in spring 2015 and was due to be completed by spring 2018. The contractor was a joint venture between Carillion and Morgan Sindall and the relevant local authority was Stockport MBC.
2. The Appellant, Mr Jebb, lives in Bramhall in Stockport. The construction works, particularly lane closures at the A34 Stanley Green roundabout, caused him, and no doubt many other residents, a great deal of inconvenience.
3. By early 2018 at the latest Mr Jebb was concerned that the spring 2018 completion date was not going to be met, although the Council were still officially maintaining that the works would be completed on schedule. On 22 January 2018, he made a FOIA request to the Council seeking:

- **The original Contract completion date for this project**
 - **The revised completion date, if this has been amended under the provisions of the Contract;**
 - **The quantum of any Extension of Time request(s) submitted by the Contractor, which may be currently under review by the Engineer.**
4. The Council responded by email on 19 February 2018 stating that the original completion date was 30 March 2018, that there had been no revision to this date, and that information as to extension of time requests was commercially sensitive and that they were entitled to withhold it under section 43(2) of FOIA. Mr Jebb sought an internal review of the Council's response so far as it related to the quantum of any extension of time request. On 27 March 2018 the Council's Information Governance Manager wrote to him maintaining the Council's position and stating:
- Upon meeting with the Service Area, it was clear to me that no defined Extension of Time request has yet been submitted by the contractor. The Council and the contractor are still in negotiations as to the completion date of the scheme and that the Section 43(2) exemption has been applied to the details of those negotiations. Once a revised completion date is known the Council would be happy to share this. (sic)**
5. Mr Jebb complained to the Information Commissioner who issued a decision notice on 30 October 2018. The decision notice records that the Council had confirmed that they did hold information within the scope of the request but upheld their position in relation to section 43(2) of FOIA. Mr Jebb has appealed to this Tribunal against the Commissioner's decision notice.
6. The A6MARR finally opened on 15 October 2018 and the A34 Stanley Green roundabout lane closures were lifted on 15 November 2018.

The appeal

7. In addition to the papers in the open bundle, the Tribunal was provided with one relevant contractual document from December 2017 on a "closed basis". This document shows unequivocally that, contrary to what is stated in the Council's letter of 27 March 2018, there *was* a "defined extension of time request" in existence from December 2017 at the latest. We cannot say who at the Council was responsible for the misleading statement in that letter but it is a matter of some concern to the Tribunal that a public authority should have made such a statement in the context of dealing with a FOIA request.
8. On the appeal the Commissioner accepts that the document does indeed contain information answering Mr Jebb's request but she maintains that the Council were entitled to rely on section 43(2). The issues on the appeal are therefore whether, in the light of all relevant material now before us and looking at the position as at February/March 2018:

- (a) disclosure of “the quantum of the extension of time request” then in existence under FOIA would, or would have been likely to, prejudice the commercial interests of the Council and/or the contractor; and, if so
- (b) the public interest in maintaining the exemption outweighed the public interest in disclosing that information.

Prejudice

9. On the material we have seen, we are satisfied that there were sensitive and confidential negotiations going on between the contractor and the Council in early 2018 in which the contractor was seeking additional time and money. Further, it seems to us that the request for an extension of time was directly relevant to the position being taken by the contractor in those negotiations. It is not entirely clear to us, however, how disclosure of the quantum of the requested extension of time would have prejudiced, or would have been likely to prejudice, the commercial interests of the Council or the contractor.
10. As we understand the Council’s position (as set out in Mr Farooq’s email dated 2 October 2018 at pp 69/70 of our bundle), the concern was that disclosure of the requested information would have breached the confidentiality of the negotiations, which could have led to their failure, which in turn could have resulted in legal proceedings and further delay to the project, all of which would have involved further cost and thus damage to the Council’s commercial interests.
11. In our view that is not a very likely scenario. Any disclosure would have been limited to the quantum of the request for an extension of time which had been made by the contractor some months before the disclosure; it would not have included any financial details nor any of the underlying material to support the request. It would have been made by a public authority pursuant to a FOIA request. Although we cannot exclude a risk that the negotiations would have broken down in consequence of such disclosure, we would not regard it as a very significant risk. We do accept, however, that if negotiations had indeed broken down there could have been substantial commercial implications.
12. We therefore accept that section 43(2) of FOIA was engaged but, given our views as to the likelihood of the proposed scenario materializing, we do not consider that the public interest in maintaining the exemption was very weighty.

Public interest balance

13. It is therefore necessary for us to consider the public interest balance and to compare the weight of the public interest in disclosure of the requested

information as at February/March 2018 with the weight of the public interest in maintaining the section 43(2) exemption as we have found it to be.

14. The state of the project in early 2018 was undoubtedly a matter of substantial legitimate public interest: the overall cost of the project was (according to the Manchester Evening News report from 6 February 2018 at our pp 40-42) some £290 million; it had been discussed for many years; the works were causing substantial inconvenience to local residents; it was clearly subject to delays as at February/March 2018; and it was public knowledge that Carillion, one of the joint venture partners, had recently collapsed.
15. Furthermore, Mr Jebb's position is that at the time of his request the Council was "still stating adamantly that the ... project would be completed by spring" but that they must have known that this could not be achieved and that the reason for his request was that he was seeking to obtain more reliable information than that which the Council was putting out. That position has not really been challenged on the appeal and is broadly confirmed by the Manchester Evening News report we refer to and by the Council's approach in the letter of 27 March 2018. The fact that it appears that the Council was not providing accurate information to the public at the time of the request is in our view an important factor in increasing the weight of the public interest in disclosure.
16. Taking all those circumstances into account we consider that the weight of the public interest in disclosure in this case was substantially greater than the weight of the public interest in maintaining the section 43(2) exemption. It was not therefore open to the Council to rely on section 43(2) to withhold disclosure.

Outcome

17. In our view the Council ought to have provided Mr Jebb with the information he was seeking and we disagree with the Commissioner's decision to the contrary. We therefore allow his appeal and issue the substituted decision notice set out above. Our decision is unanimous.

HH Judge Shanks
(First Tier Tribunal)

Date of Decision: 11 April 2019
Date Promulgated: 12 April 2019