First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0136V

Heard by CVP on 9 February 2021

Before

JUDGE ANTHONY SNELSON

Between

MINISTRY OF JUSTICE

Appellants

and

THE INFORMATION COMMISSIONER

First Respondent

and

MR PATRICK COWLING

Second Respondent

CONFIDENTIAL ANNEX TO OPEN REASONS

Introduction

1. This Confidential Annex should be read with my Decision and Open Reasons of even date[1], in which I explain my grounds for holding that, subject to certain redactions to paragraphs 12A and 12C, the disputed information ('the Report') must be disclosed in full. The summary of the background and applicable law in the Open Reasons will not be repeated. The terminology and abbreviations used there will be adopted here.

[1] I will adopt here the vocabulary and abbreviations used in those Reasons.

2. In my Closed Reasons of even date, I explain my grounds for holding that the information to be redacted is exempt under s43(2) and the public interest in maintaining the exemption outweighs the public interest in disclosure.

3. In this Confidential Annex, I explain my grounds for holding that disclosure of the Report should not be subject to any redaction of paras 9 or 10. It is necessary to set them out in this Annex because my reasoning cannot be adequately explained without trespassing on, or venturing perilously near to, closed material. I do not deal with other parts of the Report here because my grounds for ordering their disclosure in full are sufficiently explained in my Open Reasons.

Paras 9 and 10 – engagement of s43(2)

4. Mr Metcalfe, counsel for the MoJ, argued strongly that disclosure of material in para 9 and, to a lesser extent, para 10 of the Report engaged s43(2) because its content was directed to the contractual relationship between the MoJ and a key supplier, Atos, and that the risk of prejudice resulting from such disclosure was particularly acute given that their current contract was due to be renegotiated in the autumn of 2019[2].

5. The main points made in paras 9 and 10, contained within the 'Findings' section of the Report, can be summarised in this way.

   (1) The 2016 contract between the MoJ and Atos was, from the Department's point of view, poorly structured in that it made no explicit provision for 'live monitoring' of capacity and incidents, putting the Department in a weak position in the event of systems failures such as those of January 2019. That was a regrettable state of affairs.
   (2) Even under the limited terms of the contract, Atos failed to provide the monitoring services required of them.
   (3) Had Atos carried out the monitoring required of them, the second and third of the three systems failures might have been averted.
   (4) The MoJ's difficulties in reacting to the systems failures were compounded by its own deficiencies in such areas as organisation, IT governance, communication and risk planning.
   (5) The MoJ was already (ie by April or May 2019, when the Report was completed) taking (specified) steps to address the disadvantage stemming from the poor structuring of the contract, but these were not a substitute for a 'live monitoring' service.

6. Once paras 9 and 10 are carefully analysed, it is apparent that most of the content consists of a combination of primary ('what?') and secondary ('why?') findings. Items (2) to (5) fall into that category without qualification. In my judgment, there is no reason to treat them differently from the other narrative

[2] It seems that the current contract expired in October 2019.

and evaluative findings in the Report. I can well understand why the MoJ was anxious to keep Ms Cooper's critical comments out of the public eye but I have explained in my Open Reasons my view that, embarrassing and uncomfortable as they may be (for the Department and Atos), they do not engage s43(2).

7. Item (1) is arguably in a slightly different class from items (2)-(5). It does involve direct comment on the structure of the contract between the MoJ and Atos and Mr Metcalfe understandably stressed the impending renegotiation. I accept that there would have been a degree of sensitivity within the MoJ (and, no doubt, Atos) about publication of any independent comments on the contract and its structure and that any sensitivity may have been heightened somewhat given the context of the events of January 2019 and the fact that the contract was due for renewal within a matter of months of the Report being completed. But the fact that the subject might have been delicate and the remarks uncomfortable does not warrant the conclusion that any real prejudice was occasioned. In the end, the item (1) findings were merely further evaluative statements critical of the way in which the MoJ had managed its IT interests. I do not accept that their publication in the summer or autumn of 2019 would have told Atos anything not already obvious from the context or left the Department hamstrung in discussions about renewal of the contract. In light of the events of January 2019 and a history of many months' of debate over drafts of the CDIO Report and negotiation over compensation, it would surely have been plain and obvious to Atos that the MoJ would enter discussions about any renewed contract with a shopping list of fresh terms to afford them better protection against systems failures. And it would have taken little reflection to spot that improved defensive measures (for example, 'live monitoring') would be likely to feature high on the list. The idea that disclosure of anything in paras 9 or 10 could have given Atos an unfair advantage in the negotiations is, in my view, fanciful.

8. Nor do I accept that disclosure of paras 9 and/or 10 in the summer or autumn of 2019 would have prejudiced the MoJ vis-à-vis any other potential future supplier. Given that much information about the events of January 2019 and its effects was (inevitably) in the public domain, any rational and reasonably well-informed bidder for any part of its IT business would in any event have entered into negotiations (in autumn 2019 or at any time thereafter) alive to the likelihood that the contract would not be won without it being prepared to shoulder significant obligations designed to protect the Department against future service failures.

9. I *might* have seen the item (1) question differently had paras 9 and 10 included specific *advice* as to how the anticipated renegotiation should be approached. I can see that a party to commercial negotiation (essentially a quasi-adversarial process) might be embarrassed if relevant tactical advice which it had received were made public. But the passages under consideration here cannot sensibly be read as recommending any particular negotiation stance or strategy. They

point to the danger of being left commercially exposed but go no further than that.

10. For these reasons, I am satisfied that paras 9 and 10 do not engage s43(2). Neither the second nor the third limb of the *Hogan* test is satisfied.

Paras 9 and 10 – application of the public interest balancing test

11. In case I am mistaken and s43(2) is to any extent engaged, I am satisfied to a high standard that the public interest in disclosure of the information in paras 9 and 10 outweighs any public interest in maintaining the exemption. I rely on the grounds set out in my Open Reasons, paras 51-54, which I will not repeat.

Anthony Snelson

Judge of the First-tier Tribunal
Date: 25 March 2021