



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

Appeal Reference: EA/2020/0350P

**Determined, by consent, on written evidence and submissions
Considered on the papers on 30 July 2021.**

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mrs Suzanne Cosgrave
and
Ms Susan Wolf

Between

Michelle Currie

Appellant

And

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is partially allowed and a decision notice substituted.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 440 and a closed bundle.

INTRODUCTION

4. On 25 February 2020 the Appellant requested the following information from Milton Keynes Council (the Council):-

Under the Freedom of Information Act, I should like to request information relating to the free school competition run by MKC for Glebe Farm School.

In particular

- Information sent to interested parties
- All internal and external emails, and any other correspondence, related to the free school competition for Glebe Farm School
- Applications received and all supporting documentation
- Name and designation of the people on the panel that short listed applications
- Documentation related to the short listing decision and supporting information, including assessment criteria, weighting of criteria and performance of each application against scoring system

- Presentation agenda for short listed Trusts, meeting notes/minutes from these meetings, and names and role of attendees
 - Final selection decision and supporting information, including assessment criteria, weighting of criteria and performance of each application against scoring system
 - The submission to the Regional Schools Commissioner for approval of preferred provider and all supporting information.
5. On 27 February 2020 the Council responded to the Appellant and refused the request and applied section 36(2) FOIA (prejudice to the effective conduct of public affairs) and section 43(2) (commercial interests) FOIA to the withheld information.
 6. On 28 February 2020 the Appellant asked for an internal review and on 18 May 2020 the Council provided its internal review outcome, and maintained its original position to withhold the requested information under the exemptions cited.
 7. The Appellant contacted the Commissioner on 25 June 2020 to complain about the way her request for information had been handled. The Appellant disagrees with the Council's refusal to provide the information, and indicated that there could be involvement of potential maladministration.
 8. The Commissioner's decision notice is dated 20 November 2020 and notes that during the course of the Commissioner's investigation of this case, the Council withdrew its reliance on section 36 FOIA and applied section 43(1) FOIA to the information requested.

THE STATUTORY FRAMEWORK

9. As stated above, the relevant exemptions relied on by the Council are in

section 43(1) and (2) FOIA which, materially, reads as follows:-

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).

10. In relation to the test for prejudice in s43(2) FOIA, in *Hogan v Information Commissioner* (EA/2005/0026, 17 October 2006) it was stated as follows:-

28. The application of the 'prejudice' test should be considered as involving a number of steps.

29 First, there is a need to identify the applicable interest(s) within the relevant exemption...

30 Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a *de minimis* threshold which must be met. ..

31 When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use.

32...

33 ...

34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "likely to

prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), where a comparable approach was taken to the construction of similar words in Data Protection Act 1998. Mr Justice Munby stated that ‘likely’: “connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”

35 On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests (considered later in this decision). In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.

11. S43(2) FOIA is a qualified exemption and, even if it is applicable, the public interest in disclosure or withholding the information must also be considered.

THE DECISION NOTICE

12. The Commissioner set out her approach to the application of the exemption in s43(2) FOIA as follows:-

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to commercial interests;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of

the withheld information and the prejudice to those commercial interests; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.

13. The decision notice also explains something of the background to the case as follows:-

13. The withheld information consists of documents relating to the Free School competition run by the Council for Glebe Farm School. It includes specification and application forms, stakeholder list, panel members, miscellaneous correspondence, competition questions, scoring sheet, emails, decision letters, all associated with the Free School bid and the decision.

14. The Commissioner notes from viewing the local media reports, news of the new school announced for Glebe Farm and that the new school is expected to open in September 2022.

15. The Council stated its position that the information sought is the business processes of the partnership with the DfE, which is a confidential competitive process. It said that it would cause prejudice to the interest of third parties if the information were disclosed. The Council provided the Commissioner with the information which it considered commercially sensitive and listed the third parties.

14. Considering the application of the exemption, the Commissioner said:-

16. The Commissioner accepts on the basis of this reasoning that the information is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

18...the Commissioner accepts that the prejudice envisaged would be to the commercial interests of third parties....

19. The Council stated "It is our reasonable opinion that disclosure of the information under FOI would inhibit the free and frank exchange of views for the purposes of deliberation. The competition

is one run in partnership with the Department for Education. Many providers put forward their business cases for running schools on the basis that this information will not be shared with others. The marking systems and deliberations that go on are vitally important for the board making the determination”.

20. The Council added “To share these (and by sharing this information, we would be sharing it with the world at large) would discourage the free and frank exchange of views, as it would discourage providers from putting forward business cases if they believed that they would be shared with the public at large. It would also further it would discourage the board and the DfE from being able to frankly exchange views, which is essential in judging competitions of this type.”

21. Having considered the arguments, together with the withheld information, the Commissioner is satisfied that the Council demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interest....

22the Council believes that there could be reputational damage to third parties, should information concerning their submission be “publicly shared”. The Council compared the submission process to be similar to “applying for a job”, and there is an expectation that this information would not be disclosed into the public domain.

23. The Council considers that there would be a real prejudice to future competitions, “such that the submitting schools would not feel comfortable in providing the information for fear of it being released under FOI.” It also considers that there is a real prejudice occurring from the release of the specifics of the submissions put forward to those schools’ competitiveness in future competitions.

24. The Council confirmed that it had not approached third parties regarding this request, and that its arguments are based on prior knowledge of a particular third party and their concerns. The Council said that it had consulted with its service area with regards to the impact on disclosing the information, as they have a relationship with the partners.

25. The Commissioner has considered these details and she believes that the Council has clearly demonstrated that the disclosure of the information, would have a detrimental impact on its commercial activities; specifically, upon businesses to effectively bid in future competitions.

26. In light of the Council's submissions, it is clear that disclosing the withheld information could result in competitors having access to sensitive commercial information. This could be used for a bid in the next tender for the same project. The Commissioner is of the view that it would not be fair to disclose information that would disadvantage companies in future tender processes.

27. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of third parties, would result through disclosure of the information in question. She therefore finds that disclosure would result in prejudice to the commercial interests of third parties, and on this basis, section 43(2) of the FOIA is engaged.

15. Having reached that conclusion, the Commissioner went to consider the public interest test in relation to s43(2) FOIA with the following result:-

37. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes...

38. ...All the associated documentation including the decision, was made in a confidential competitive process. The Commissioner recognises that the complainant has concerns regarding the process of awarding a free school via a local competition, and she notes the complainant's suggestion of potential maladministration. With regards to any wrongdoing, there is no evidence of this that the Commissioner is aware of...

39. The Commissioner accepts that disclosure of the withheld information would provide an insight into how the decision was made, and reveal details of the competition process, strategies and commercial approach. It would also reveal discussions between third parties and the exchange of views conducted during this competition.

40. The Commissioner also accepts that disclosing the information would allow competitors to take advantage of this knowledge and use it for the next bid for future tenders. She is aware that competitors are likely to have significant interest in obtaining confidential information that can be used to their own advantage. The Commissioner notes that opponents and competitors could seek to undermine third parties' bids for future tenders.

41. The Commissioner considers that there is a strong and inherent public interest in ensuring fairness of competition, and in her view it would be firmly against the public interest if the commercial interests are harmed. She also considers that protecting third parties' ability to operate effectively within a competitive market, by not disclosing information that competitors could use to its commercial disadvantage, outweighs the public interest arguments for the information's disclosure. The Free School competition process which involves marking systems and deliberations (important for the board/judging panel in making the determination) has also been considered.

...

44. The Commissioner has examined the arguments presented by the complainant and the Council. She accepts that disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises. The Commissioner is therefore satisfied that the greatest weight must be given to the potential harm to the commercial interests of third parties, should the withheld information be disclosed.

16. As the Commissioner decided that the information requested is exempt from disclosure under section 43(2) FOIA she did not go on to consider the application of section 43(1) FOIA.

THE APPEAL AND RESPONSE

17. The Appellant's appeal is dated 8 December 2020. In a 16 page submission it is noteworthy that the Appellant did what the Commissioner failed to do in the decision notice and that is to analyse each part of her request and make submissions as to whether or not s43(2) FOIA should apply. The Appellant also noted that some of the withheld material had subsequently become available from other sources.

18. The Council has not made a response to the appeal but, on the request of the Commissioner, has produced the withheld material in a format which means

that the Tribunal can see which part of the request each item of the withheld material relates to.

19. The Commissioner's response to the appeal, nevertheless, takes the same broad-brush approach as the decision notice and fails to consider whether any of the withheld information is not subject to s43(2) FOIA. The Commissioner notes that:-

The Council are entitled to rely on s43(2) and the public interest in withholding the information at the time of the refusal notice and internal review outcome. This is reflected in the DN. Although the passage of time might mean some documents have been released (by other means), the DN is not in error of law.

20. The Commissioner gives her reason for considering the withheld information 'in its entirety' as follows:-

...even if the Appellant was provided with partial disclosure, such is her view that mal-administration has occurred, that she would not be satisfied by the partial redaction, and so it does not solve the issue...

21. The Commissioner upheld the decision notice approach to the public interest test.

DISCUSSION

22. In this case the Appellant has asked for a range of information which has resulted in a CLOSED bundle of withheld documents of over 500 pages. The Commissioner says that she has viewed the material.

23. The Tribunal has also viewed the material. What is surprising about the Commissioner's decision (and the initial claim for the exemption of the Council), is that the material has been considered as a whole by the

Commissioner with no attempt to analyse whether the exemption in s43(2) FOIA does, in fact, apply to all the material. It was immediately apparent to the Tribunal that this 'broad-brush' approach was not sufficient in this case, and it is disappointing that both the Commissioner and the Council have not taken a more granular approach to the material.

24. It does not seem to be a justification for this approach for the Commissioner to say, as she does, that the Appellant 'would not be satisfied with partial redaction'. The question is not whether the Appellant would be satisfied if not all the withheld material were disclosed, but whether s43(2) FOIA applies to the material for which the exemption has been claimed.

25. In addition, we note that this is a case where the Council is not claiming any prejudice to its own commercial interests but only to the commercial interests of third parties. Despite this, there is no evidence, in the form of correspondence or witness statements from those third parties to support the claim for the application of the exemption and this has further hampered the Tribunal in its task. Indeed the Commissioner's own guidance to public authorities (not cited by the Commissioner in her decision notice) states that:-

...if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial interests, you must have evidence that this accurately reflects the third party's concerns. It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances.

26. When the Commissioner did ask the Council for information about the interests of third parties the Council simply responded that it had not contacted the third parties but was aware of their concerns (without providing any details). This would seem to be the bare minimum that could be relied upon for the application of s43(2) FOIA by a public authority when the prejudice claimed would be suffered by third parties.

27. Having seen the withheld material, however, it is our view that the exemption in s43(2) FOIA does apply to much of it, and that the public interest balance is in favour of withholding the material. This is essentially for the reasons explained by the Commissioner in her decision notice.
28. Thus, much of the material is commercial in nature and disclosure would be prejudicial to third parties, specifically those bodies involved in competitive tendering to run an Academy school. Such bodies would expect that information about the process would not be made public, and there is a real risk that information would be disclosed which aid competitors in future tendering competitions, to the detriment of those third parties.
29. We also agree that for the information to which s43(2) FOIA applies, the public interest balance is in favour of withholding the information for the reasons set out by the Commissioner.
30. There is a strong public interest in the openness and transparency of public authorities and their decision-making processes, and disclosure would provide an insight into how the competitive process operated. However, in our view this public interest is outweighed by the need to prevent competitive disadvantage for third parties and to ensure fairness of competition.
31. However, when the Tribunal has considered the withheld material in more detail, it cannot agree that these conclusions can be applied to all of it. In particular, it seems clear to us that the exemption in s43(2) FOIA does not apply to all the withheld material.
32. The Tribunal has considered each part of the request for information by the Appellant, and the material withheld by the Council for each part, and has reached the conclusion that some of the information should be disclosed. We have included the references in the closed bundle to enable the Council to

identify the information for disclosure, and set out the relevant parts of the request below.

Part 1- Information sent to interest parties

33. At B9-B13 is information generated by the Council and sent for inclusion in a widely available publication, advertising the fact that the Council' has launched a competition for Multi Academy Trusts to apply to become the provider of the new all through school' and providing information on the process. At B15 - B24 is the competition specification, which is a document generated by the Council and provided to applicants. At B25 - B30 is a blank application form to be completed by all applicants. This is a document generated by the Council containing no information concerning commercial activities of third parties and clearly intended for widespread circulation. None of these documents have any third party content and disclosure cannot prejudice the commercial interest of third parties. This information should be disclosed.

Part 2- All internal and external emails, and any other correspondence, related to the free school competition for Glebe Farm School

34. At B14 is an email notification to an email address ending "education.gov.uk" so is an email address of a government body. At B31 and B32 are two emails sent by the Council to differing recipients advising them of the competition. At B33-35 is a circulation list of all interested parties. The documents at D52-D56 do not reveal any third party details and refer to the dividing up of the preparation work for shortlisting/interviewing by the Council officers. In none of these documents is there anything relating to the commercial interests of third parties and so S43(2) FOIA is not engaged. These documents should be disclosed subject to the redaction

of personal data (s40 FOIA) of names, individual email addresses, and telephone numbers

Part 3- Applications received and all supporting documentation

Part 4- Name and designation of the people on the panel that short listed applications

35. At F520 the names of the panel can be seen. These are senior Council officers and not employees of a third party and hence not revealing of any third party commercially confidential information. S43(2) FOIA is not engaged and the seniority of the staff members is such that they are/were public facing officials who would not in our view have a reasonable expectation of their names being kept confidential. The rest of that page should be redacted.

Part 5- Documentation related to the short listing decision and supporting information, including assessment criteria, weighting of criteria and performance of each application against scoring system

Part 6- Presentation agenda for short listed Trusts, meeting notes/minutes from these meetings, and names and role of attendees

36. At D63 - D64 are the panel prepared questions to be used when interviewing the shortlisted applicants, who are not named. This document has been generated by the Council. These questions do not appear to engage s43(2) FOIA as they are identical questions generated by the Council to put to the applicants. However, the additional questions on page D64 which refer to specific applicants would engage s43(2) FOIA in our view and should be redacted from that page. Otherwise the information should be disclosed. D69 and D76 are letters emanating from the Council notifying administrative arrangements to shortlisted applicants and do not engage s43(2) FOIA if the details of the recipients are redacted, and therefore should be disclosed.

Part 7- Final selection decision and supporting information, including assessment criteria, weighting of criteria and performance of each application against scoring system

37. Under this heading have been included 'panel questions and the initials of those asking the questions'. In our view s43(2) FOIA could not apply to the questions asked (rather than the answers given), and these should be disclosed: pages J541-542. We have already mentioned that there is no reason why the identities of the panel members should be withheld.

Part 8- The submission to the Regional Schools Commissioner for approval of preferred provider and all supporting information.

38. The information withheld in relation to this part of the request very largely cannot be said to risk prejudice to the commercial interests of third parties and s43(2) FOIA does not apply. Thus the email at K544 should be disclosed with the redaction of the personal data of the named Council officers. The letter to Dame Dethridge at K545 should also be disclosed with the redaction of the unsuccessful MAT(s) redacted as that information would be covered by s43(2) FOIA, and the redaction of personal data as before.

39. To summarise, our view is that the s43(2) FOIA exemption applies to the information we have not said should be disclosed above, and the public interest test is in favour of withholding that material.

40. We also note that the Council relied on s43(1) FOIA as an exemption but the Commissioner did not address this exemption. We also note the advice in as to how we should proceed in such circumstances from the UT in *IC v Malnick* [2018] UKUT 72 (ACC):-

109. ...If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies.

However it would be open to the FTT to consider whether E2 applies, either by giving its decision on the appeal in the alternative (e.g. E1 applies but, if that is wrong, E2 applies in any event) or by way of observation in order to assist the parties in assessing the prospects of appeal or, in the event of an appeal to the Upper Tribunal, so that that Tribunal has the benefit of consideration of all exemptions which may be in play including relevant findings of fact..... On the other hand, where the FTT disagrees with the Commissioner's conclusion on E1 it must consider whether E2 applies and substitute a decision notice accordingly .

41. The Commissioner's guidance on s43(1) FOIA states:-

FOIA does not define the term 'trade secret'. However, with reference to The Trade Secrets (Enforcement, etc.) Regulations 2018, the Commissioner considers that, to be a trade secret, information should:

- be secret, in the sense that it is not generally known among, or readily accessible to, people within the circles that normally deal with that kind of information;
- have a commercial value, because it is secret. Its disclosure should also be liable to cause real (or significant) harm to the owner or be advantageous to any rivals; and
- be subject to reasonable steps under the circumstances, taken by the owner, to keep it secret.

42. In our view however there is nothing in the material which we have decided should be disclosed that could conceivably be called a 'trade secret' so as to come within s43(1) FOIA, and therefore reliance on this exemption does not affect our decision. For all these reasons, we find that, the evidence falls a long way short of establishing that there is a real and significant risk of prejudice to the commercial interests of the Appellant or others.

43. On that basis this appeal is partially allowed and we issue a substituted decision notice to the effect that the following pages of the CLOSED bundle must be disclosed by the Council within 35 days, subject to the redactions we have described above:-

B9--B35, D52-D56, D63 - D64, D69, D76, F520, J541-542, K544-545.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 16 August 2021.

Promulgation 9 September 2022