



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/2012/0158

B E T W E E N:-

RHONDA MOORHOUSE

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Before:

**Brian Kennedy QC
Malcolm Clarke
Jean Nelson**

Representation:

For the Appellant: Rhonda Moorhouse & Andre Menache

For the Respondent: Edward Capewell of Counsel.

**Date of Hearing: Thursday 20th December 2012, Court Employment
Tribunal, Liverpool Civil and Family Court.**

DECISION

This Tribunal dismisses the appeal and the respondent's Decision Notice is upheld.

REASONS

INTRODUCTION

1. This appeal is brought under s. 57 of the Freedom of Information Act 2000 ("FOIA"). The Appellant appeals against Decision Notice ("DN") number FS50418656 issued by the Respondent on 25 June 2012. The disputed information relates to information concerning the Department for Business, Innovation and Skills ("DBIS") facilitation of banking and insurance services to Huntingdon Life Services ("HLS"). The exemptions at issue are ss. 21 (information reasonably accessible) , 35(1)(b) (ministerial communications) and 43(2) (prejudice to commercial interests) of FOIA.

REQUEST FOR INFORMATION

2. On 24 April 2011, the Appellant made a request for information to BIS. The request sought information relating to the provision of banking and insurance services provided by BIS to HLS since 2001. The request was set out as follows:
 1. *For what purpose have banking and insurance services been provided to HLS since 2001.*
 2. *If the banking and insurance services provided to HLS by your department since 2001 were provided free of charge or has a charge been applied?*
 3. *If the banking and insurance services were provided free of charge to HLS, what was the monetary value of the services was; i.e. how much has it cost the taxpayer? How much would the services etc. have cost HLS if a charge had been applied?*
 4. *If the banking services provided to HLS included any loans or grants and if so what was their monetary value?*
 5. *If any pay-outs have been made to HLS under the terms of the insurance services and if so what was their monetary value?*

3. DBIS initially responded to the request on 26 May 2011. It provided some information for part 1 of the request. It confirmed that no grants or loans had been provided to HLS – which provided a response to part 4 of the request. BIS refused to provide any information for parts 2, 3, and 5 of the request, relying on section 43(2) FOIA.
4. The Appellant requested an internal review. DBIS upheld its initial response. The Appellant remained dissatisfied with how DBIS handled her request and complained to the Commissioner.

THE COMMISSIONER'S DECISION

Scope of the Request

5. The Respondent considered more information fell within the scope of the request than the information initially referred to by DBIS, particularly in respect of part 1 of the request. The matter was referred to DBIS, who made further disclosures of some information and sought to rely on new exemptions for the information falling within the revised scope. The exemptions therefore considered in the DN are ss. 21, 35(1)(a) and 43(2) FOIA. [DN§§8-15]

Section 21 FOIA

6. In relation to some information falling within part 1 of the request, DBIS were entitled to rely on section 21 FOIA, as this exemption applies where information is reasonably accessible to the Appellant otherwise than under FOIA. It is an absolute exemption.
7. The Respondent found the Parliamentary Questions relating to the provision of banking and insurance services to HLS was accessible to the Appellant via Hansard. [DN§§17-18] .

Section 35(1)(b) FOIA

8. The Respondent determined that section 35(1)(b) FOIA was engaged in respect of two pieces of information contained with documents 2 and 3 as set out in

Confidential Annex A to the DN. Section 35(1)(b) is a qualified exemption relating to Ministerial communications; which includes any communications between Ministers of the Crown. The reasons the exemption is engaged are set out in Confidential Annex A. [DN§§19-20] .

9. The DN sets out the arguments put forward by both DBIS and the Appellant for the public interest test which were considered before the Respondent determined the balance of the public interest favoured withholding the information. In considering the balance of the public interest test, the Respondent noted the factors in favour of disclosure; general public interest in transparency and accountability, understanding the reasons why the government took the unprecedented step of facilitating banking and insurances services to a private sector organisation. The Respondent did not consider the allegations made by the Appellant concerning deaths caused by reactions to medicines and an unfair advantage over competitors and holding back progress as requiring any weight, due to the lack of any independent evidence to support the allegations. The Respondent further noted the factors in favour of maintaining the exemption; to some extent the information relates to live issues, the policy decision for the banking and insurance services was made some time ago, and therefore preserving the safe space has diminished over time. The main factors in favour of maintaining the exemption, to which significant weight was afforded, are: the overall policy issues are still live; there is a need for a safe space for this policy to be discussed with frankness and candour and for general policy debates on HLS and the life science sector in general. Disclosure of the disputed information would have a detrimental 'chilling effect' of these communications in the particular circumstances of this case. There are further factors set out in Confidential Annex B to the DN. [DN§21-31]. Having heard the evidence at this appeal, and considered the closed bundle of materials, this Tribunal is on balance satisfied that the Respondent was correct in the above reasoning and has heard or seen no evidence that would undermine the basis thereof.

Section 43(2) FOIA

10. Section 43(2) is engaged where the disclosure of the information would or would be likely to prejudice the commercial interests of any person. It is a qualified

exemption and subject to the public interest test. Under part 1 of the request, information being withheld under this exemption is contained within document 4 as described in confidential annex A.

11. For the reasons set out in confidential annex B, the Respondent accepted that disclosure of the withheld information would be likely to prejudice the commercial interests of HLS. [DN§§34-36] Again on balance and after considering all the evidence, his Tribunal agree.
12. In considering the factors for maintaining the exemption and the factors favouring disclosure, the Respondent determined the balance of the public interest was in maintaining the exemption. In reaching this conclusion the Respondent considered the arguments and factors made by the Appellant and DBIS. The factors in favour of disclosing the information are: understanding why public resources have been and are being used to support HLS and the UK life science industry, general public interest in transparency and accountability, and understand why the government has taken unprecedented step to facilitate banking and insurance services to a private business. Factors in favour of maintaining the exemption include: the significant and enduring detrimental impact on HLS's commercial interest. Discussion of the factors are also set out in confidential annex B. [DN§§37-43]. This Tribunal heard and read the submissions of both parties and on further consideration of the closed bundle we accept that on balance it is in the public interest in this case that this exemption applies to protect HLS's commercial interest. We are of the view that this information could be useful to competitors and is only in scope because of the unusual circumstances of this case. We are of the view that competitors probably would not have to release such sensitive information.
13. The Respondent also considered the application of s. 43(2) in respect of part 5 of the request. This part of the request sought information about insurance claims and pay-outs.
14. It was accepted that the disclosure of this commercially sensitive information would prejudice HLS future commercial negotiations with customers and

suppliers, and damage its position in relation to competitors. This information is not public and is not known by competitors. The Respondent further noted that the only reason BIS has this information is due to the circumstances which led BIS to facilitate the provision of insurance services to HLS. Section 43(2) FOIA is engaged. [DN§§44-47]. Having heard the evidence presented by the parties and considered their respective submissions the Tribunal finds no reason to refute this reasoning and accepts it in the circumstances of this case.

15. The Respondent went on to consider the public interest balance for the application of s.43(2) for part 5 of the request.
16. The Respondent noted factors in favour of disclosure which include the general promotion of transparency and accountability. However, BIS confirmed that any insurance payments made to HLS would not have been made from public funds. In the circumstances of the case, the fact there was no public funds involved and that BIS only held the information as a result of the need to facilitate insurance services, there was very little public interest in disclosure. [DN§48, 51]. Having heard the evidence presented by the parties and considered their respective submissions the Tribunal finds no reason to refute this reasoning and accepts it in the circumstances of this case.
17. By contrast, the Respondent gave significant weight for factors in favour of maintaining the exemption. Revealing details of insurance claims would be highly detrimental to HLS's commercial interest compared with competitors who would not be required to disclose similar information. The fact that any claims would not be paid out of the public purse which would not assist in transparency. That there would be a commercial detriment to HLS as a result of the circumstances that led to the government facilitating provision of insurance services to HLS, which is the reason BIS hold the requested information. [DN§§49,53-54]. This Tribunal accepts this reasoning as sound in the circumstances of this case and has not been persuaded to the contrary by the submissions of the Appellant or her evidence herein.

18. The Appellant sets out her grounds of appeal over 4 pages. The Respondent considered there 3 Grounds of Appeal advanced to challenge the DN and this Tribunal broadly agrees with this summation.

19. The Appellant disputes the disclosures from DBIS and its responses to the request for information. The Appellant states that none of the letters she has received from DBIS is signed. While it is correct that the correspondence is not signed by any individual, the correspondence has been sent from DBIS and responds to the request for information made to DBIS. There is no evidence to support any contention that the responses the Appellant received are not genuine responses from DBIS. This ground does not in provide any challenge to the reasoning or decision of the Respondent as set out in the DN. This Tribunal has considered carefully all the documentation in this case including the closed bundle of the disputed documents and is satisfied that there is nothing of concern arising from the fact that there is not a personal signature on the documents referred to and we agree that in any event this fact does not impinge on the reasoning of the Respondent herein in relation to this appeal in all the circumstances.

20. The Appellant argues that she has not had the opportunity to “rebut” the explanations put forward by DBIS, and that she has not been provided with the precise practical mechanism of how HLS commercial interests would be likely to be prejudiced. The Respondent did provide the Appellant several opportunities to put any arguments she wished to do so before the DN was finalised. On 31 May 2012, the Respondent offered the Appellant an opportunity for any final submissions she wished to make. The Appellant replied on 6 June 2012, reiterating some points previously made. A large amount of analysis of the DN is contained in confidential annexes does mean the Appellant is not as fully aware of the Respondent’s reasoning for his decision as would be preferred. However, the nature of the withheld information and the submissions concerning that information is of such a nature that much of the detail cannot be referred to in the open DN without disclosing the withheld information.

21. The Appellant further argues that the Respondent erred in his balance of the public interest test. The grounds of appeal and further submissions provide narrative of various allegations against the government, mainly relating to allegations that HLS is implicit in the death a large number of individuals, there is corruption and the government is perversely artificially sustaining HLS.
22. The Respondent maintains that his analysis of the public interest test is correct for ss. 35(1)(a) and 43(2) FOIA. The Appellant does not specify which section she challenges for the public interest analysis. Each factor considered by the Respondent in the balance of the public interest was stated and an indication of the weight attributed to that factor was given, along with the reasons for such weight. This Tribunal considered carefully the submissions of the Appellant at the hearing, and subsequently, and is not persuaded that there is any matter raised by the Appellant to rebut the Respondents cogent arguments.
23. The Respondent confirmed to the Appellant early on in the investigation (a letter dated 25 October 2011) that it was outside his powers to investigate whether an organisation is implicated in the deaths of any individuals. The investigation is confined to a consideration of the exemptions relied upon by the public authority under FOIA. The discounting of the Appellant's allegations (at DN§24-26) the Respondent specifically noted the Appellant had not provided any independent evidence supporting the allegations she made concerning HLS [DN§27]. The Appellant did supply some general leaflets and other material relating to animal testing, but nothing specific relating to the factors to be considered for the withheld information. This Tribunal similarly is restricted in the scope of its investigative powers and can only consider the appeal within the limits of FOIA, as we have done. We can give no significant weight to the evidence provided by the Appellant.
24. The Tribunal wishes to express concern that neither the Respondent nor the Tribunal were given the disputed information. This we find highly unusual and it meant we could not ask questions on it at the oral hearing which detracted from that hearing and necessitated reconvening at a later date to consider carefully what should have been provided in a closed bundle.

25. Having now read carefully the material relating to the disputed information at DBIS the Tribunal agree, with the submission made by DBIS to the Respondent that it is not in scope for the answer to question 1. We consider that the information requested in question 1 was accurately and fully provided to the Appellant by DBIS and was also provided in the answers to the four parliamentary questions to which DBIS provided links.
26. Having considered carefully the disputed information on examination at DBIS, the Tribunal can give comfort to the Appellant and confirm that there is nothing in those documents which in any way casts doubt on the accuracy or comprehensive nature of the information provided by DBIS in response to question 1.
27. Accordingly we must dismiss the appeal.

Judge Brian Kennedy QC
8th March 2013.