

FOIA s.43 – Qualified exemption: commercial interests/trade secrets

FOIA s.41 – Absolute exemption: confidential information

FOIA s.29 – Qualified exemption: the economy

Derry City Council v IC

EA/2006/0014

11th December 2006

Cases:

London Regional Transport v The Mayor of London [2001] EWCA Civ 1491

Facts

Derry City Airport was operated by the Council and had entered into an agreement with Ryanair in 1999 for a scheduled service to and from London, Stansted airport. In 2005 the original complainant requested information about the agreement and had been provided with a copy in which financial information had been redacted. The Council contended that the financial information was exempt information under FOIA s.29 (prejudice to the interests of the UK or a part of it), s.41 (confidential information obtained from a third party) and s.43 (prejudice to commercial relations). In respect of ss.29 and 43, it was said that the public interest in maintaining the exemption outweighed the public interest in disclosure.

The IC had decided that the financial information should have been disclosed and the Council appealed that decision.

Findings

Section 43

The Tribunal firstly needed to consider the relevant commercial interests of each of the Council and Ryanair. If satisfied that there was a commercial interest, they would then have to consider if disclosure of the Ryanair Financial Information would be likely to prejudice that commercial interest. If the Tribunal found in favour of the Council on those questions then they would consider the public interest test.

In the absence of any evidence on the point, the Tribunal was unable to conclude that Ryanair's commercial interests would be likely to be prejudiced by disclosure and concentrated on those of the Council. It concluded that, because of the potential impact of disclosure on the Council's bargaining position with other airlines, and the competitive advantage that competing airports might have gained, the Council would have been likely to have suffered prejudice to its commercial interests had the information been disclosed in 2005. However, it went on to decide that the risk of prejudice by the time the Complainant made his request (6 years after the agreement had been entered into) was not sufficient to outweigh the public interest in having the information disclosed. A report of the local government auditor had already disclosed much of the financial information and the desirability of an informed public debate on

the financial support provided to the Airport (which might have constituted unlawful state aid) meant that the risk of prejudice to the Council's commercial interests at that time was not sufficient to outweigh the public interest in having the information disclosed.

Section 29

The Tribunal found that any prejudice to the Council's commercial interests in relation to the Airport would also prejudice the economic interests of the region and that on this issue, also, the exemption was engaged. However, the public interest arguments were the same under s.29 as under s.43 and accordingly did not justify withholding the information.

Section 41

The Tribunal decided that a written agreement between two parties did not constitute information "obtained" from a third party, so that the agreement in question did not fall within the absolute exemption provided by s.41. It was not the purpose of s.41 to protect the confidentiality of the terms of a contract to which a public authority was a party (although technical information obtained from the other contracting party and recorded in the contract might be covered by the exemption and other exemptions, such as s.43, might apply to the contract as a whole).

In case it was held to be wrong on that issue the Tribunal went on to consider whether disclosure, other than under FOIA, would have constituted an actionable breach of confidence. It decided that the nature of the information and the relationship between Ryanair and the Council meant that an obligation of confidence arose and that, absent any defence, the Council would have been vulnerable to a claim for breach of confidence if it were to have disclosed the information. However, it decided that the Council would have been entitled to the public interest defence, as established in the case law on breach of confidence and reinforced by Article 10 of the European Convention on Human Rights, as applied by the Court of Appeal in *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491. In considering the potential defence the Tribunal applied the same factors for and against disclosure that it had taken into account under the balance of public interest test under s.43 (acknowledging that its consideration had a different starting point - the assumption here was that confidentiality should be preserved unless outweighed by countervailing factors, whereas the test under FOIA section 2 was that information should be disclosed unless the public interest in favour of maintaining a qualified exemption outweighed the public interest in disclosure). The Tribunal decided that the public interest in having an informed public debate on the agreement in question was sufficient to outweigh the competing public interest in maintaining confidentiality and that the public interest defence would therefore have defeated any claim for breach of confidence.

Conclusion

The IC had been right to decide that the financial information should have been disclosed to the Complainant when requested.