



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0073

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50225629
Dated: 10 March 2010**

Appellant: Department for Works and Pensions

Respondent: Information Commissioner

Heard at: Field House London

Dates of hearing: 31 August and 1 September 2010

Date of decision: 20 September 2010

Before

John Angel
Judge

and

Narendra Makanji and Richard Enderby
Members

Attendances:

For the Appellant: Simon Malynicz
For the Respondent: Ewan West

Subject matter: S.43 FOIA trade secrets and prejudice to commercial interests

Cases: *Lansing Linde v Kerr* [1991] 1 WLR 251
Department of Health v. Information Commissioner EA/2008/0018
Hogan & Oxford City Council v IC EA/2005/0026 & 30

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 10 March 2010.

SUBSTITUTED DECISION NOTICE

Dated: 20 September 2010

Public authority: Department for Works and Pensions

Address of Public authority:

**5th Floor
The Adelphi
1-11 John Adam Street
London WC2N 6HT**

Name of Complainant: Peter Collingbourne

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 10 March 2010.

The Tribunal finds the s.43 exemption is engaged in relation to the disputed information and that the public interest in maintaining the exemption for the majority of the information does not outweigh the public interest in disclosure. However the public interest in maintaining the exemption does outweigh the public interest in disclosure for the Financial Model at pages 46 to 86 and clauses 2(1) and (2) and 3.2 to 3.6 of Schedule 2 Annex A at pages 7 to 10 of the closed bundle.

Action Required

The Appellant to disclose to the complainant all of disputed information except the Financial Model and the location and specification of the Atos data centre within 35 days of the date of this notice. The Appellant also to disclose the name of the country in which the data centre is situated within 35 days of this notice.

Signed:

John Angel
Principal Judge

Dated this 20th day of September 2010

REASONS FOR DECISION

Introduction

- 1 The Government Gateway (“the Gateway”) provides an infrastructure for shared services as envisaged by the Transformational Government paper, presented to Parliament in November 2005. It is accredited by CESC (originally Communications-Electronics Security Group) which is the branch of GCHQ that works to secure the communications and information systems of the government and critical parts of UK national infrastructure.
- 2 The Gateway has changed the way in which citizens and business interact with government. At its simplest the Gateway is the website used to register for online government services. It is a secure authentication platform that allows businesses and individual members of the public to communicate and transact with government departments for online services such as filing tax returns (whether these are employer pay related earnings or individuals self-assessment) to tracking cattle movement. There are now over 17 million registrations and over 160 services have been provided, covering 60 public sector service delivery organisations.
- 3 The procurement took place two years after an unsuccessful attempt to create a single data centre to join up the three building blocks of the UK’s e-government push - the Gateway, the information-sharing Knowledge Network, and the content management system, Delivering on the Promise (now known as Directgov) - as part of an £83 million deal with ITNet (now part of Serco). That deal collapsed in 2004 when the Cabinet Office terminated the ITNet contract citing numerous implementation breaches; this was subsequently settled out of court.
- 4 Following the procurement procedure as laid down within the Official Journal of the European Union (“OJEU”), Atos¹ was awarded a contract in September 2006, valued at £46.7 million, for the design, build and operation of the service as well as its ongoing development, for an initial period up to 31 March 2011, with a contract option to extend up to 31 March 2014.
- 5 The Gateway contract involves a hosting and support service. This covers network operating control, connectivity and assurances for performances and availability of systems. The services are based on ITIL; a best practice standard for service-oriented architecture. This is to enable effective support of incident, problem and change. It requires the supplier to have effective operation processes. The service desk uses an industry standard tool set and tracking from initial request to incident or problem resolution. Atos is also contracted to develop the systems with major application releases and maintenance releases each year. The developments are necessary to meet customer business requirements and to keep the application up to date, taking into account industry modifications in line with interoperability standards.
- 6 The Cabinet Office placed an OJEU advert on 11 October 2005 calling for Expressions of Interest in response to which a total of 52 Expressions of

¹ Atos Origin (Atos) is a private sector provider of information technology services to government.

- Interest were received. Pre-Qualification Questionnaires (“PQQs”) were sent to all 52 suppliers and ten suppliers returned completed PQQs. Following PQQ evaluation the recommendation to shortlist Atos, CapGemini and EDS was ratified by the Steering Committee on 9 December 2005.
- 7 Invitation To Negotiate (“ITN”) documents were sent to Atos, CapGemini and EDS. Bidder workshops were held throughout the week of 23 January 2006. The purpose of the workshops was for an exchange of views on the “bids”, confirm understanding of overall requirements, the structure and timetable of the bid process and how to raise questions during the ITN phase.
 - 8 CapGemini and EDS did not want to negotiate their bids and withdrew on 30 January 2006 and 3 February 2006 respectively. The Steering Committee was formally told at an emergency meeting on 2 February 2006. There was unanimous agreement to proceed with the procurement following the process already laid out. The model terms being demanded for Gateway were challenging (in that they would be negotiated in detail) and considerable (particularly the requirement to flow down contract remedy provisions to service delivery organisations using the Gateway). The risks of continuing with Atos as the “last man standing” were discussed and mitigations put in place. Mitigations included a separate negotiation team, independent assurance of value for money measures, and additional criteria in the evaluation methodology.
 - 9 As part of the due diligence to confirm Atos could deliver the contract, bearing in mind the previous failed contract with ITNet, a contract commercial review was carried out by Partnerships UK (part of the Treasury), two independent financial assessments were carried out by Forensic Accounting LLP and a legal review by Simmons and Simmons LLP.
 - 10 Atos submitted its updated proposal on 17 March 2006 and updated the financial schedule in April 2006. The deal agreed and subsequently signed on 7 September 2006 was for £46.7 million (not subject to indexation i.e. the charges absorb inflation) (“the 2006 Contract”). The deal represented a substantive improvement to the Cabinet Office on structure of remedies for Atos failure to perform the contract as agreed. This was confirmed by an Independent Forensic Accounting report.

The request for information

- 11 On 27 December 2007, Peter Collingbourne, (the complainant) submitted an information request to the Cabinet Office which, at the time, had responsibility for the body of work to which the request related. However, under a Machinery of Government change, responsibility for that work subsequently transferred to the Department of Works and Pensions (“DWP”). The request in question read:

1. The full text of any and all contracts or agreements between the Cabinet Office and Atos Origin regarding the provision of the Government Gateway service;

2. The full text of any and all risk assessments carried out by the Cabinet Office regarding the provision of the Government Gateway

service by the private sector;

3. A list of any and all bidders competing for the Government Gateway provision contract, and the price offered by each bidder;

4. A description of how Atos Origin was chosen as contractor for this service;

5. Any and all costs, broken down by year and type of cost, incurred by the Cabinet Office in relation to the provision of the Government Gateway service:

(a) before provision of the service was handed over to Atos Origin;

(b) after provision of the service was handed over to Atos Origin.

- 12 On 29 January 2008 the Cabinet Office wrote to the complainant, confirming that it held information covered by his request and extending the time limit for response in order to consider public interest arguments. The Cabinet Office subsequently issued a refusal notice in respect of the request on 12 February 2008. It stated that the information covered by points 1, 2 and 5 of the request was exempt under s.43 FOIA. However, it made a partial disclosure in respect of point 3 of the request, providing the names of the bidders but withholding price information, again citing s.43 FOIA.²
- 13 The Cabinet Office also made various points regarding its analysis of the balance of public interest in withholding the information in question.³
- 14 On 12 February 2008 the complainant requested that the Cabinet Office's decision to be reviewed. On 7 July 2008 the Cabinet Office advised the complainant that as part of a recent Machinery of Government change, the information that he sought access to, together with his request for an internal review, had been transferred to the DWP and that his request for a review of the decision to withhold the information had been transferred accordingly.
- 15 On 11 September 2008 the complainant wrote to the DWP to ask for a response to his request for an internal review. On 17 October 2008 the DWP wrote to the complainant upholding its decision to withhold most of the information. It directed him to complain to the Information Commissioner if he was not happy with the outcome.

The complaint to the Information Commissioner (IC)

- 16 Mr Collingbourne complained to the IC on 12 December 2008.
- 17 During the course of the IC's investigation, the DWP forwarded to the IC a document which it referred to as the Redactions Matrix, which is annexed to the IC's Decision Notice dated 10 March 2010 ("DN"). The Redaction Matrix sets out which exemption under FOIA (if any) the DWP was seeking to apply to which elements of the information which was subject to the original request.

² See Decision Notice pages 6 & 7

³ See Decision Notice page 8.

- 18 The full details of the IC's investigation are set out in the DN which contains a redaction matrix provided by the DWP as to its position on the terms. In brief, the IC concluded that the DWP had failed to show that the exemption at s.43 FOIA was engaged by the information requested. Further, the IC found that the DWP had breached ss 1(1)(b) and 10(1) and 17(1)(b) of FOIA.
- 19 During the course of the IC's investigation the DWP agreed to make further disclosures so that points 2,4 and 5 of the Request had been satisfied
- 20 The IC ordered disclosure of the remainder of the requested information.

The appeal to the Tribunal

- 21 The DWP lodged an appeal with the First-tier Tribunal (Information Rights) ("FTT") on 7 April 2010.
- 22 In its grounds of appeal the DWP maintained that the s.43 FOIA exemption was engaged in relation to each of the items sought to be withheld by it in the Redactions Matrix and that disclosure of each item would prejudice the commercial interests of the DWP briefly because:
 - a. It would reduce the DWP's ability to obtain the best value for money for future contracts;
 - b. If competitors had detailed pricing and service terms then it might result in Atos no longer wishing to be a potential bidder;
 - c. Although the contract was a few years old the commercial interests of the DWP were still current and pressing.
- 23 It further claimed that disclosure amounted to a trade secret of Atos under s.43(1) FOIA and/or would prejudice the commercial interests of Atos under s.43(2) and gave a number of reasons.
- 24 Finally the DWP claimed that disclosure of information, including its location, relating to Atos' data centre engaged s.40 (personal data) as well as s.43(2).
- 25 Following the IC's response dated 6 May 2010 the DWP lodged an amended grounds of appeal dated 25 June 2010 which the IC responded to on 16 July 2010.
- 26 Following Directions and a Pre-hearing Review the DWP disclosed further information and now the only items in dispute are:
 - a. Some clauses and schedules in the Government/Atos contract, in particular
 - i. Liability caps
 - ii. Performance requirements – KPIs, service levels, service credits and hosting service levels
 - iii. Benchmarking model
 - iv. Charges
 - v. Atos' financial model ("Financial Model")
 - vi. Change control notifications
 - vii. Information relating to Atos' data centre

- b. Part of point 3, namely the price offered by each bidder which had competed for the Gateway contract.
- 27 It was also established that the publication of the names of key personnel and the organisation chart were never at issue as this was not required to be disclosed by the IC in his DN.
- 28 By the time of the hearing Atos only objected to its Financial Model being disclosed.
- 29 The DWP gave evidence that it did hold the price offered by each bidder. Mr Malynicz for the DWP gave an undertaking at the hearing that the DWP would use its best efforts to find out who might hold the information and to contact the complainant within a week to provide Mr Collingbourne with advice and assistance as to whom he might contact to provide the information, if it still existed.

The law

- 30 S. 43 FOIA provides in material part 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)..."

- 31 S.43 FOIA is a qualified exemption. That is, pursuant to s.2(2)(b) FOIA, even if the information that is the subject of a request engages s.43 FOIA, it will still need to be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
- 32 It follows that where information is requested that may potentially fall within the exemption in s. 43 FOIA a two-part approach is required.
- 33 First, the authority must consider whether s. 43 FOIA is in fact engaged. That will only be so where the information constitutes a trade secret (s.43(1)) or where its disclosure would, or would be likely to prejudice the commercial interests of any party (s.43(2)). Unless one of those conditions is met, s.43 FOIA will not be engaged. S.43 FOIA is not engaged merely because the requested information relates to commercial interests, or has been generated in the course of commercial activity.
- 34 Secondly, even if s.43 FOIA is engaged, it provides only a qualified exemption, so the public authority must proceed to apply the public interest test set out in section 2(2)(b) FOIA, i.e. to determine whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption.
- 35 Although s.40 was being claimed in relation to key personnel and the organisation chart as this information is no longer in dispute it is no longer an exemption the Tribunal needs to consider.

- 36 The FTT's powers under s.58 FOIA provide that where the Tribunal considers the DN is not in accordance with the law then the Tribunal can allow the appeal in full or in part and if appropriate substitute its own notice or dismiss the appeal. In order to do so the Tribunal can review any findings of fact on which the notice was based.

Questions for the Tribunal

- 37 Bearing in mind the limited amount of information now in dispute the Tribunal needs to decide:
- i. Whether s.43(1) is engaged for any of the disputed information;
 - ii. Whether s.43(2) is engaged for any of the disputed information and if so whether the information would, or would be likely, to prejudice the commercial interests of DWP or Atos;
 - iii. If s.43(1) or (2) are engaged then whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

The evidence

- 38 In order to protect the disputed information evidence was given in closed as well as open sessions. The Tribunal has attempted to provide all of this decision in an open document without the need for a confidential annex.
- 39 Roger Burke-Hamilton was the first witness to give evidence on behalf of the DWP. He is a senior civil servant and head of commercial management for the Gateway since 2009. He oversaw the team responsible for OJEU procurement, commercial arrangements and the negotiation strategy with Atos in 2005-06. He was Deputy Director for the Gateway responsible for commercial strategy and charging models during the period 2000-2009. With the first 5 years of the 2006 Contract coming to an end he was now involved with the process of deciding whether to grant Atos a one, two or three year extension of the contract or to go out to tender for a possible new supplier.
- 40 The other DWP witness was Geoff Dervin who is currently employed by Atos as the Commercial Director for the DWP account including the Gateway. He has held this position since July 2009 and was not involved in the procurement process.
- 41 The DWP are now prepared to disclose most of the 2006 Contract. However Mr Burke-Hamilton gave evidence as why the DWP did not want to disclose the information set out in paragraph 26a. above. In contrast Atos is now happy for all the terms of 2006 Contract to be disclosed except their Financial Model (§ 26v.).
- 42 Mr Burke-Hamilton gave evidence as why the DWP's commercial interests would be prejudiced if the information under paragraph 26 was disclosed. Taking each in turn.

Liability caps

- 43 Where something goes wrong with an outsourcing contract the supplier could be liable for any losses arising unless it limits its liability. The supplier will usually seek to limit or cap its liability. Following negotiations this is what happened with the 2006 Contract.
- 44 The caps cover a number of situations including the maximum aggregate liability for all losses. The cap that the DWP is prepared to disclose is the Third Party Actions cap under clause 17 which is limited to the contractor's warranties.
- 45 The extent of a cap will be tied to the other terms of the contract including the overall price. So the higher the cap the higher the risk to the supplier and the likely higher the overall price.
- 46 The DWP does not want to disclose the caps because Mr Burke-Hamilton says it would affect the actual amounts of liability cap that could be achieved for future procurements of shared services and would deter small and medium sized enterprises from bidding for public sector contracts. The reduction in the number of bidders would negatively impact on the commercial interests of the DWP.

Performance requirements

- 47 All outsourcing contracts have performance requirements built into the contract and the ultimate price will be influenced by KPIs⁴, service levels, service credits and other performance criteria. These are contained in Schedule 4 to the 2006 Contract.
- 48 Again the DWP is worried that if these performance criteria are disclosed this will prejudice its position with future procurements of the Gateway or similar shared service systems because the next supplier may be prepared to offer only the same, or slightly better, terms next time, whereas without sight of these terms the supplier may be prepared to offer better terms.
- 49 The DWP are prepared to disclose some of the information in the Schedule - all columns in the matrices in Annexes A and C except the last 4 columns which contain figures, and the text in Annex B but not clauses 5.3 to 5.5.

Benchmarking model

- 50 Benchmarking is a means by which the supplier assures the customer that it will not charge its services at rates above those supplied to other customers for similar services. So if the supplier starts to provide a service to many customers enabling it to buy in the service at a lower cost, then the DWP will be able to benefit from the lower rate. This is a prudent provision in any outsourcing contract.
- 51 Schedule 9 Annex A contains a benchmarking model.

⁴ Key Performance Indicators.

- 52 Mr Burke-Hamilton says that the disclosure of this annex would prejudice the DWP's commercial interests in any future procurement.

Charges

- 53 The DWP seek to withhold the charging schedule (15). This contains the charges for services including rates for particular skills. Mr Burke-Hamilton considers that in order to ensure the next contractor or supplier does not just offer the same or slightly better prices this information must be withheld. The Government procures under a "sealed" bid process which means that each supplier has no knowledge of the other bids or pricing assumptions. This is standard practice in the public sector and provides for proprietary and fairness. If the information is released the DWP would be less able to scrutinise costs of delivery and fewer suppliers might come forward to bid for work at competitive or affordable prices to the public sector.
- 54 The DWP only seeks to withhold financial information in the tables in Schedule 15 and any percentages in the text.

Financial Model

- 55 The Financial Model at Schedule 15 Annex 5 Appendix 1 of the 2006 Contract is extremely detailed and provides information relating to the pricing structure, treatment of costs, profit margins, overhead recovery rates and a balance sheet. It is contained in the 2006 Contract to provide a means by which Atos can demonstrate to the DWP in a somewhat transparent way that its services are being provided on a commercial and value for money basis which is fair to both parties. The information it contains is largely confidential to Atos.
- 56 In Mr Dervin's view this model amounts to Atos' trade secret and would put it at a considerable disadvantage in future procurements as against competitors as it would enable them to undercut an Atos bid. It could be argued that over time this information would become less important and less commercially sensitive but due to the nature of the model, according to Mr Dervin, competitors could apply indexation over the years which the 2006 Contract had been running to then extrapolate to the present time. This would enable them to come to a reasonably accurate view of Atos' present day pricing. Even if services and prices change over time some of the main pricing principles would continue to apply.
- 57 Mr Dervin informed us that a significant amount of time and cash investment went into the detailed preparation of the Financial Model. By the time the 2006 Contract had been secured hundreds of thousands of pounds had been spent at arriving at the model. It would be unfair if competitors could obtain access to such valuable commercial data at no cost to themselves.
- 58 Mr Burke-Hamilton thought the Financial Model was unique to the 2006 Contract but Mr Dervin informed us that this type of model is now becoming a regular requirement for public sector procurement. It allows government departments to more fully understand the guiding pricing principles and afford them the opportunity to perform a thorough evaluation to help ensure over-charging does not occur.

- 59 When asked whether disclosure of the model would result in Atos withdrawing from government procurement Mr Devin answered candidly that Atos would not “walk away”, but in view of the 2006 Contract expiring on 31 March 2011 it would put Atos at a commercial disadvantage in any new tendering process.

Change control notifications (“CCNs”)

- 60 During the course of the 2006 Contract the parties have sought a number of changes such as the addition of new services or performance criteria. Such changes are required to go through a change control process and where appropriate the Financial Model is used to provide a price for the new services based on the charges and other disputed information. Once a change is agreed a change control notification is signed by the parties to the 2006 Contract specifying the requirement and price.
- 61 The DWP is withholding a number of CCNs from the date of the 2006 Contract to March 2008. Mr Burke-Hamilton maintains that disclosure of these would prejudice future procurements of the Gateway or similar shared service systems because the next contractor may be prepared to offer only the same, or slightly better, terms next time, whereas without sight of these, the contractor may have been prepared to offer even better terms.
- 62 The DWP are only seeking to withhold the figures in the CCNs.

Data Centre

- 63 Finally the DWP does not wish to disclose the location or specification of the centre where Atos is processing Gateway data because of the possible security risk to the centre and the data which Mr Burke-Hamilton argues would prejudice the commercial interest of both Atos and the DWP.
- 64 Mr Devin accepted that if a competitor wanted to find out the location it would not be impossible bearing in mind the information already in the public domain. However it would be difficult for the ordinary citizen.

Legal submissions and analysis

- 65 We are only dealing with one exemption in this appeal, s.43 FOIA. The section provides for exemptions for trade secrets and where the commercial interests of the public authority or others would or would be likely to be prejudiced.
- 66 There is no definition of what is a trade secret in FOIA. Therefore we must first look to the common law for a definition.
- 67 Mr West on behalf of the IC draws our attention to the case of *Lansing Linde v Kerr* [1991] 1 WLR 251 where the court referred to “*information, which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret*” provided it was used in a trade or business and the owner had either limited the dissemination of the information or at least not encouraged or permitted widespread publication.

68 Mr Malynicz on behalf of the DWP draws our attention to a differently constituted Tribunal's decision in *Department of Health v. Information Commissioner*,⁵ where the Information Tribunal held that the concept of a "trade secret" was one that related to a particular kind and quality of information.⁶ As regards kind, it stated that "[t]he ordinary understanding of the phrase usually suggests something technical, unique and achieved with a degree of difficulty and investment."⁷ As regards quality, the Tribunal indicated that the term "trade secret" suggested the "highest level of secrecy".⁸ In a case where some of the information was "commercially sensitive" but it was unclear whether it would rise to the level of a "trade secret", the Tribunal indicated that it was simplest to deal with the matter under sub-section (2).⁹ As a consequence, it is not quite clear what independent role, if any, exists for sub-section (1), and it may be simpler in this case to subsume any considerations of that sub-section under (2).

69 We find both these decisions helpful in our analysis.

70 In relation to the second limb of s.43 FOIA there is much jurisprudence on the "prejudice" test. Counsel on both sides have provided us with detailed submissions on the case law.¹⁰ We are not bound by decisions of other Tribunals. However there is a consistent approach and we adopt the approach largely developed in *Hogan & Oxford City Council v IC* EA/2005/0026 & 30.

71 First, it is necessary to identify the applicable interests within the relevant exemption. Here there is only one, namely the commercial interest of a party, albeit that the person in question can be "any person", including the public authority itself. It therefore follows that in any given instance, the interests of several different parties might potentially be caught (*Hogan*, §29).

72 Second, the nature of the prejudice being claimed must be considered. Critically (*Hogan*, §30):

"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 Thoronton 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."

73 Third, consideration must be given to the likelihood of occurrence of prejudice. Referring to the Tribunal's earlier decision in *John Connor Press Associates Ltd v Information Commissioner* (EA/2005/0005) and *R (on the application of*

⁵ *Department of Health v. Information Commissioner* EA/2008/0018.

⁶ The Tribunal cited *Lansing Linde v. Kerr* [1991] 1 W.L.R. 251 (per Staughton LJ), as well as the Commissioner's Awareness Guide No. 5.

⁷ *DoH* para. 52.

⁸ *DoH* para. 53.

⁹ *DoH*, paras. 53-54.

¹⁰ *Hogan & Oxford City Council v IC* EA/2005/0026 & 30; *John Connor Press Associates Ltd v IC* EA/2005/0005; *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin); *Derry City Council v IC* EA/2006/0014

Lord) v Secretary of State for the Home Office [2003] EWCA 2073 (Admin), the Tribunal in *Hogan* noted (§34) that "...the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk". Where reliance was to be placed not upon potential but actual prejudice, the Tribunal noted that there was "...a much stronger evidential burden on the public authority to discharge" (*Hogan*, §36).¹¹

- 74 Only once this three-part test has been undertaken, can an authority determine whether the exemption in s.43(2) FOIA is engaged. As the Tribunal noted in *Hogan* (§35), there are effectively two possible bases upon which a prejudice-based exemption might be engaged: either the occurrence of prejudice to the specified interest (in this case, the commercial interest of any party) is more probable than not, or 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.
- 75 The first part of the two-part approach is therefore to establish that s. 43 FOIA is engaged, whether because the requested information constitutes a trade secret (s. 43(1)), or because the "prejudice" test is fulfilled (s. 43(2)). If that part of the test is not fulfilled, the requested information must be disclosed.
- 76 Even if s. 43 FOIA is engaged, it provides only a qualified exemption, so the public authority must proceed to apply the public interest test set out in section 2(2)(b) FOIA, i.e. to determine whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption.
- 77 Where the engagement of s.43 has been triggered by application of the "prejudice" test, there is an obvious overlap between that test and the application of the public interest test that follows: see *Hogan*, §27. As the Tribunal noted in that case (§35), 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.
- 78 The correct operation of the public interest test has been set out by the Tribunal on several occasions, including in *Hogan* (see §§53-61). According to those principles, the public interest test must be applied to the specific information requested in the specific circumstances of the case. Whatever general policy a public authority may have, it must not be applied inflexibly and the authority must always be willing to consider whether the circumstances of the case justify a departure from it. Furthermore, where the competing interests are equally balanced, the authority must disclose the information sought.

¹¹ See also *Reith v Information Commissioner and LB Hammersmith and Fulham* (EA/2006/0058) and the need for a casual link, not mere assertion of prejudice.

Whether the exemption is engaged?

- 79 The IC argues that because of the way the Cabinet Office and then the DWP handled the request and then the complaint during the investigation that the exemption was never engaged.
- 80 However following substantial disclosures and the narrowing of the disputed information and on hearing the evidence before the Tribunal where the DWP was much more forthcoming as to the nature of the prejudice involved Mr West seemed to appreciate that the IC's original stance may no longer be sustainable.
- 81 We find in relation to all the disputed information, except the Financial Model, that there "would be likely to be prejudice" to the commercial interests of the DWP. We find that there is a causal relationship between the disputed information and future government procuring of IT services and that there is a real risk to the competitive environment particularly in relation to the future of the Gateway. However we do not go as far as the DWP to find that it "would prejudice" their commercial interests as no evidence was provided to show that it was more probable than not and the only evidence was the conjecture of Mr Burke-Hamilton however genuinely held. Originally he had argued that the commercial interests of Atos would be prejudiced but was no longer pursuing this argument following Atos' withdrawal of their opposition to disclosing the disputed information, other than the Financial Model.
- 82 As far as the Financial Model is concerned having considered all the evidence and taken into account the common law definition we find that the model is equivalent to a trade secret of Atos. Even if we are wrong we find that it "would prejudice" the commercial interests of Atos if it was disclosed because it contained the confidential financial information of Atos and its unique model for calculating prices, rates of return etc and which would put competitors at an unfair advantage if disclosed in relation to any future procurement exercise.

The public interest test

- 83 The Tribunal having found that the s.43 exemption is engaged now needs to decide where the public interest balance lies with respect to each part of the disputed information.
- 84 There is a clear difference between s.43(1) and (2). Where the Tribunal has found that the information is a trade secret there is a strong public interest in protecting such a secret because of the investment likely to be involved and that the disclosure of such a secret could undermine the owner's business and give competitors a commercial advantage.
- 85 As found in *Hogan* where the Tribunal finds that disclosure would prejudice the commercial interests of an organisation then the inherent public interest in the exemption is likely to be stronger than where there has only been a finding of likely prejudice because it implies a greater certainty of prejudice.

- 86 Therefore there is a clear difference between the sub-sections and between the two prejudice tests within s.43(2).
- 87 There have been a long line of Tribunal decisions which have established that the Tribunal should consider the public interest at the time of the request or certainly no later than the completion of the internal review.¹² In this case the request was made on 27 December 2007 but the internal review was not completed until 17 October 2008. In view of the fact that the public authority did not seem to appreciate that there was a two part test to s.43 and that the DWP seemed to develop its case against disclosure over the 10 month period we have decided that we can consider the public interest up to the time of the completion of the review.
- 88 Does that mean we cannot consider factors after that time? Yes to the extent that they did not exist. However where they were known about although not actually happening at that time these may in certain circumstances be taken into account. The main such factor in this case is the option to renew or not after March 2011. It was a provision of the 2006 Contract. Although no action was being taken in relation to it in October 2008, the public interest around the contract's extension or otherwise was a live issue by the time of the hearing in this case. We find the public interest in the 2006 Contracts extension or renewal is a factor we can take into account when considering the public interest.
- 89 Mr Malynicz sums up a number of findings from the Tribunal's case law which are applicable in this case:
- a. Although there is no general presumption in favour of disclosure, if competing interests are finely balanced, disclosure should be ordered;
 - b. The "default setting" in the Act is in favour of disclosure;
 - c. There is always at least some public interest in disclosure, but it is a question of weighing it in the particular circumstances of the case in question;
 - d. The Act was designed to shift the balance in favour of greater openness;
 - e. In order to apply the relevant tests, one has to consider all the particular, relevant circumstances of the case in question;
 - f. Public authorities have to take a "granular approach" to the items of information in question, i.e. consider them individually rather than treat them according to some blanket approach;
 - g. Redaction is an acceptable way of disclosing documents in appropriate cases;
 - h. The public interests involved in each exemptions may vary and, in general, those in favour of disclosure are broader than those against;
 - i. Disclosure of information serves general public interest in the promotion of better government through transparency, public debate, accountability, i.e. what may be called "good governance factors", but the particular weight to be given to these will vary and, in particular the extent to which the

¹² For example *Bellamy v IC & Secretary of State for Works & Pensions* EA/2005/0023 and *DBERR vi IC & Friends of the Earth & CBI* EA/2007/0072.

information will contribute to public's understanding of the issues affects the weight to be given to the good governance factors.¹³

Financial Model

- 90 We have already found that this is a trade secret of Atos or alternately its disclosure would prejudice the company's commercial interest for the reasons given above. We also note that the OGC FOI (Civil Procurement) Policy and Guidance version 2.0 ("OGC Guidelines")¹⁴ recognises financial models and that up to the contract date its working assumption is that it should not be disclosed. It is not mentioned again in later stages of contract delivery but it seems to us that there is a strong public interest in such models being protected though the life of a contract particularly where the model continues to be used. The Financial Model in this case contains confidential information which if disclosed may very well reduce the competitiveness of Atos. Although Mr Dervin would not walk away from public procurement if the model was disclosed he was clearly very concerned if it was disclosed and indicated that Atos would be less inclined to offer such models as part of future contracts.
- 91 If this was the case then we find that it would not be in the public interest that suppliers would in any way be reluctant to provide financial models in large IT outsourcing contracts. There is strong public interest in knowing that a financial model exists so that the public authority can scrutinise the financials in an outsourcing contract and that there is transparency for example in the pricing of modifications to the contract under the change control process. In our view this factor does not require the disclosure of the model itself only the knowledge that it is part of the contract which has been subject to independent scrutiny and that the financials are at least transparent between the parties so that there is every possibility that the public authority can ensure that the public is receiving value for money.
- 92 Therefore we find that the public interest is satisfied by the disclosure already made as to the nature of the model and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Information relating to Atos' data centre

- 93 DWP argue that the location of the centre will make it easier for terrorists or other criminals to locate Gateway data. Also if security specification and other information on the layout of the centre is disclosed it will make it easier for the premises/data to be penetrated or attacked. Therefore there is a public interest in keeping the information secret.
- 94 In evidence Mr Dervin acknowledged that it would not be difficult for a committed competitor or well resourced criminal to locate the centre and that is why he was not opposing disclosure.
- 95 However there is a strong public interest in at least knowing that the location is in a country where the applicable laws give appropriate protection to citizens

¹³ *Scotland Office v. Information Commissioner* EA/2007/0070, paragraph 89.

¹⁴ This document provides guidance to government departments as to what procurement and contract information should be disclosed under FOIA.

in relation to their personal data. At the hearing the DWP accepted this factor and agreed that the country in which the centre is located should be disclosed.

- 96 In view of this concession we find that the public interest balance favours maintaining the exemption for this disputed information. In particular we find the public interest in reducing the possibility of an attack on the centre, even if not guaranteed, tips the balance so that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Other disputed information

- 97 The public interest test relating to the rest of the disputed information can, in our view, be dealt with together.

- 98 The DWP has reduced the amount of information in dispute by largely agreeing to disclose text but not figures/percentages.

- 99 The DWP's main argument is that by disclosing this sort of information it will reduce competition and discourage incumbent suppliers and other suppliers particularly small and medium sized enterprises ("SMEs") from bidding for extensions, renewals or new contracts. If they are correct this would clearly be a strong public interest factor for maintaining the exemption. Mr Dervin considered SMEs would not have the resources to bid for large IT contracts.

- 100 Mr Burke-Hamilton did not provide evidence of such a factor. It relates to future competitive behaviour which Mr Dervin seemed less concerned about despite the fact under Mr Burke-Hamilton's view Atos would be adversely affected by disclosure. We consider this is possibly because any extended or new contract for the Gateway in 2011 is likely to be different and therefore the disputed information will be less relevant in the future.

- 101 Also we noted that Mr Burke-Hamilton's view on the public interest was not always directed at the Gateway but to future procurement generally.

- 102 If we turn to the OGC Guidelines service levels, performance measurement procedures, incentive schemes, criteria for recovering sums and pricing mechanisms are all types of information which it advises are generally disclosable between the start of work and completion.

- 103 Therefore it would appear that this factor should be given less weight.

- 104 In contrast the public interest in knowing that there are adequate service levels and performance measures etc would seem to be a much weightier factor when considering the importance of the Gateway to citizens and organisations who use the public services which it hosts.

- 105 Also because the original contract failed, there is a strong public interest in knowing of any increased costs of the 2006 Contract which can be found in the change control notices.

- 106 We also find there is a strong public interest in being open about the Benchmarking Model. It is important for the public to know that there is a means by which the DWP will not be paying higher prices for services than Atos' other customers. The model in the disputed information is for illustrative purposes only and there seems to be no equally strong public interest in keeping the information confidential, particularly because Atos has no objection to disclosure.
- 107 The liability caps are a product of contract negotiations and represent a risk/cost balance to the parties. There is a strong public interest in knowing what caps exist and their quantum so that the DWP can demonstrate that it is able to protect the public purse if anything goes wrong. Again as Atos has no objection to the disclosure of the caps we cannot see what public interest would justify maintaining the exemption.
- 108 Having considered all the circumstances in this particular case, including the fact there was ultimately only one bidder for the 2006 Contract, we therefore find that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and that
- i. Liability caps
 - ii. Performance requirements – KPIs, service levels, service credits and hosting service levels
 - iii. Benchmarking model
 - iv. Charges
 - v. Change control notifications

should all be disclosed.

- 109 We have taken into account that the IC consider that all the disputed information needs to be disclosed to allow public scrutiny of the 2006 Contract but for the reasons given above we do not consider the public interest balance favours disclosure of the Financial Model and data centre information.

Conclusion and remedy

- 110 As a result of our findings we allow the appeal in part and substitute a new decision notice to the effect that the whole of the 2006 Contract and CCNs should be disclosed, except for the Financial Model at page 46 and clauses 2(1) and (2) and 3.2 to 3.6 of Schedule 2 Annex A of the closed bundle.
- 111 Our decision is unanimous.

Permission to appeal

- 112 An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and

state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed:

John Angel

Principal Judge

Date: 20 September 2010