IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0188
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's

Decision Notice No: FS50375679

Dated: 18 July 2011

Appellant: **Mr Willem Visser**

First Respondent: **Information Commissioner**

Second Respondent : **The London Borough of Southwark**

Heard at: Field House, London

Date of hearing: **1 February 2012**

Date of decision: 1 March 2012

Before

Christopher Hughes

Suzanne Cosgrave

Roger Creedon

Appearances:

The Appellant represented himself,

Mr Capewell instructed by Mr Sowerbutts for the First Respondent,

Mr Cornwell instructed by the Director of Communities, Law and Governance for the Second Respondent.

Subject matter: FOIA S.43(2) commercial interests
Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and others [2010] EWCA Civ 1214, [2011] BLGR 95 CA.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal for the reasons stated.

Signed: Christopher Hughes

Tribunal Judge

Dated: 1 March 2012

REASONS FOR DECISION

1. On 12 July 2009 Mr Visser ("the Appellant") requested from the London Borough of Southwark ("the Council") certain information:-

   "Would you therefore please let me have a copy, under the Freedom of Information Act, of Fusion's business plan for the current financial year that was approved by the Council."

2. Fusion Lifestyle ("Fusion") manages various leisure facilities on behalf of the Council and carries out similar functions for other public bodies. This was not the first occasion upon which the Appellant had sought information about the Council's relationship with Fusion and in response to a previous request he had received a redacted version of the contract. At the time of the July 2009 request there was a hiatus because at least one of the leisure centres which Fusion managed for the Council was closed and there was not, in formal terms, a business plan for the year 2009/10. Following inquiries the First Respondent ("the Commissioner") determined on 4/11/2010 that since the relevant business plan for Fusion's activities for the London Borough of Southwark was in 2009/10 an uprated version of the business plan for 2007/8 the business plan for 2007/8 should be considered the relevant business plan for the purposes of the request.

3. In the light of this determination by the Commissioner the Council considered the request, consulted Fusion to determine the views of that company and following

receipt of those views issued the Appellant with a redacted version of the 2007/8 business plan which did not include certain information which was considered commercially sensitive and therefore, in the Council's view, exempt under S43(2) FOIA.

4. The Appellant was dissatisfied and complained to the Commissioner again. On 18 July 2011 the Commissioner concluded that the Council was correct to apply section 43(2) with respect to the withheld part of the business plan since the disclosure of that information "Would, or would be likely to prejudice the commercial interests of any party". In this case the Commissioner was satisfied that the commercial interests of Fusion in relation to its existing contracts with local authorities and its ability to successfully compete for other public sector contracts would be prejudiced. The disputed information was a one page Profit and Loss account.

5. On 11 August 2011 the Appellant appealed against this finding to the tribunal. In his appeal and during the course of this case the Appellant has made a large number of statements about the Commissioner's decision in support of his view that the decision is wrong and should be overturned. In his appeal he stated that he did not consider that the Commissioner had dealt with his request objectively, he argued that the decision notice was misleading in that it implied that the information under consideration was year 2009/10 when in fact it was for the year 2007/8 and *"any economical sensitivity would have all but disappeared in the intervening period."* He argued that since Fusion is a not for profit organisation there was a greater public interest in disclosure. He also argued that the decision notice wrongly states that the majority of the requested information was released. He argued that the Council was defending its own interests and not just those of Fusion. He stated "*the Commissioner has given no weight to the interest the council itself had in withholding information and the public interest arguments that are linked to this in releasing information."* He set out at length his concerns about the management of the leisure centres and further concluded "*I do not feel the decision notice correctly reflects the balance between the public interest in disclosing the requested information and maintaining exception. I feel the Commissioner has been working towards a decision to maintain the exception rather than evaluate the arguments objectively."*

6. In his witness statement dated 10 January 2012 of the Appellant stated that his first Ground of Appeal was that the decision notice was written in a biased way and did not correctly reflect the history of his complaint and the second Ground of Appeal was that the Council were protecting their own undeclared interest when refusing the information under section 43 (2) FOIA.

7. In his evidence he argued that the Council had not acted in good faith with respect to this matter and had attempted to mislead. The second part of his witness evidence headed "My concerns about the leisure facilities in Southwark" set out in great detail specific complaints he had made and went into considerable detail regarding his allegations of poor staffing policies, fraudulent monitoring, poor staff training, poor management of the facilities and similar matters. One exhibit to his witness statement which is perhaps of more significance than he realised is a statement from another individual who is a member of the user group (which raises and comments on issues concerning the leisure services to the management of Fusion):-
"there will always be improvements required, decisions questioned and given the economic climate these improvements may always be wanting, but overall since July 2010 I have not seen a significant deterioration-quite the opposite."

8. There were two witnesses who gave evidence on behalf of the Council. Mr Coombe is a principal lawyer with the Council. He gave detailed evidence concerning the

history of the request and how it was handled by the Council. In particular he addressed the difference in view between the Council and Fusion as to what parts of the requested information could and should be disclosed under FOIA and what should properly be considered as protected by section 43(2). The Council and Fusion had disagreed and the Council had concluded that since public money was being expended the amount that the Council was paying Fusion ought to be in the public domain and open to scrutiny to ensure that public money was being used effectively. However the Council accepted the position of Fusion that disclosing the profit and loss schedule was not in the public interest. He went on to explain how the Council had committed an error in not explaining why the redaction was carried out when it supplied information to the Appellant. The tribunal was satisfied by his evidence and his explanation that the Council had endeavoured to carry out its duties under FOIA and that its mistakes had been inadvertent and not occasioned by any desire to improperly conceal information or mislead the Appellant.

9. The second witness on behalf of the Council was the chief executive of Fusion Lifestyle, Mr Kay. He gave evidence with respect to the organisation and business of Fusion and who its main competitors were. The key evidence was that:-

"disclosure of the Fusion approach and methodology to income projections and managing costs would be of significant and material interest to Fusion's competitors and could prejudice Fusion's ability to win other local authority contracts. Fusion's business model for sustainability and viability is predicated on winning 1-2 new local authority contracts per year and on retaining its existing partnerships. Disclosure of this information could therefore fundamentally undermine Fusion's overall business plan and thus jeopardise Fusion's stability and ultimately the long-term viability of Fusion. This is a real and present threat to Fusion and arguably each of Fusion's existing public sector parties. It directly relates to Fusion's competitive position and where applicable, its added value to a potential local authority client."

He argued that the fact that the account was for 2007/8 was irrelevant since the profit and loss account demonstrated Fusion's approach and methodology to determine income and managing risks:-

"including its ratios and allowances for all expenditure items including staff costs, overhead, surplus and contingency, which approach continues in large part to the present."

10. He gave evidence that during 2008 the Council sought a variation of the contract in order to get earlier access to certain facilities to carry out works. There was a renegotiation of the contract carried out within the framework of a Gateway Review in which a leading firm of accountants advising the Council benchmarked and analysed Fusions's proposals and prepared a shadow bid using their knowledge of the market. It was a diligent process. As a result of this process the contract was extended.

11. In response to questioning from the Appellant, Mr Kay (while he was not able to go into the great detail which the Appellant expected concerning his individual complaints) showed a proper concern for responding to the complaints and views of users of the leisure centres. The Appellant was anxious to know about bonus schemes, Mr Kay informed him that such information was not included in the disputed material, which was a one page P/L account.

12. The role of the Tribunal is laid down by s.58 of FOIA:

"

(1) If on appeal under section 57 the tribunal considers-
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved in exercise discretion by the Commissioner, that he ought to have exercised his discretion differently,
the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
(2) On such an appeal, the tribunal may review any finding of fact on which the notice in question was based."

13. In his arguments the Appellant suggested that the determination by the Commissioner of 4/11/2010 should be seen as the request rather than his original request of 12/07/2009. The Tribunal was satisfied that this was an unsustainable position – the Commissioner's determination clarified the identity of the document that was the subject of the request, it was not and could not be a request in itself.

14. The provision of FOIA of specific relevance to the issues in dispute in this case is section 43 (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)."

15. This provision is not however an absolute exemption, it is therefore necessary to consider the public interest test laid down in s.2(2)(b) of FOIA this provides:-

"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

16. In challenging the Commissioner's Decision Notice the Appellant appears to raise four grounds of challenge in addition to arguing that the overall balance of public interest lies in disclosure by reference to his own specific concerns with respect to the management of the leisure centres. It is appropriate to address those four issues before considering the balance of public interest as a whole. The four grounds are:

1) The DN was not written objectively;

2) The Council was acting to protect its own interests;

3) The age of the disputed information means it is no longer commercially sensitive; and

4) As Fusion is a non-profit organisation the public interest favours disclosure;

17. The first of these four grounds may be dealt with quite briefly. The Decision Notice gives a very brief history of the request and its handling and focuses on the reasoning of the Commissioner in coming to his conclusions that the public interest would not be served by disclosing all the information requested. This is an entirely proper way of approaching the problem and does not disclose any absence of

objectivity; the Appellant has not produced any proper evidence to support allegations of bias by the Commissioner.

18. The second ground of challenge is also without merit. This is for two reasons. If the Council wished to protect the information for its own commercial reasons it would be entirely at liberty to do so-section 43(2) makes it clear that a public body may act in such a way-its own commercial interests are explicitly protected by this provision. It is therefore irrelevant whether the interest being protected is that of the Council or of Fusion. However it is much easier for an organisation to put forward a case protecting its own existing commercial interest than to try and create an argument based on another's commercial interest. The argument put forward by the Appellant on the point involves a degree of complexity and conspiracy which is simply not sustainable on the actual evidence. From the evidence it is clear that the Council was essentially indifferent, on its own account, to the question of the disclosure of the information. However it consulted Fusion and Fusion were considerably more concerned and argued with the Council as to the extent of information which should be disclosed. The Council then disclosed more information than Fusion wished. It is entirely clear that the commercial interest being protected by nondisclosure in this case is that of Fusion; and that this interest is being protected to a lesser extent than Fusion would wish, is in part is due to the desire of the Council to disclose as much information as possible. This ground of appeal is wholly lacking in merit.

19. The third ground of appeal is that the information requested is now so old it is no longer commercially sensitive. The tribunal has to apply the test laid down by the Act at the time the request was made - that is in July 2009. The 2007/8 business plan was then approximately 2 years ago. The evidence before the tribunal from Mr Kay was that even in 2012 there was a continuity of approach to its budgeting and business processes by Fusion which would be revealed by the disclosure of the 2007/8 business plan. This knowledge would be of value to Fusion's competitors in future tendering processes relating to similar facilities and services. The tribunal was satisfied that the evidence of Mr Kay was cogent and compelling and gave a clear picture of the potential competitive advantage which would be given to others if this information was in the public domain. The tribunal was therefore satisfied that the age of the information was largely irrelevant, the commercial sensitivity of this specific information did not diminish over time and so the information remained commercially sensitive.

20. The fourth specific issue raised in the appeal is the nature of Fusion as a not-for-profit organisation and the impact that this has on the decision of whether or not to disclose the information. In his reasoning the Commissioner explored the issue in terms of the not-for-profit status increasing the public interest in transparency about its accounting operations because any inefficiencies would diminish the surpluses which are generated and which, as a not-for-profit organisation, it had to be invested in services to the public rather than in the payment of dividends to shareholders. While there may be some substance in this argument the Commissioner went on to conclude that since the disclosure of such information if it were requested in the context where the contracting party with the Council was an ordinary commercial company would not occur, it should not be disclosed in this case. The tribunal was satisfied that the Commissioner was right to emphasise the importance of the functioning of a fair market in this case. The evidence before the tribunal was that the provision of management services for leisure facilities owned by public authorities is a competitive market with a significant number of strong players within it. If the commercial secrets of one of the players in the market were revealed then its competitive position would be eroded and the whole market would be less

competitive with the result that the public benefit of having an efficient competitive market would be to some extent eroded.

21. It is now appropriate to consider the broader question of the balance of public interest. The Appellant has clearly demonstrated his own personal and deep concerns about the performance of Fusion in its management role. This appears to be intimately associated with his own direct unsatisfactory experience of using the facilities managed by Fusion. While he made a number of allegations the Appellant was able to adduce no evidence to support his claims of misconduct. Furthermore he has not been able to produce any evidence showing a wider public concern about the management of these leisure centres. Indeed the independent evidence incorporated in his own witness statement (alluded to above) shows, if anything, that there is a degree of satisfaction with what is being provided. While he argued that Fusion did not have a complaints policy, the evidence of Mr Kay demonstrated that it did. The evidence of Mr Kay pointed to increasing use of the leisure centres. Beyond the general public interest of transparency there seems to be little or no public interest in the specific issues raised by this request for information.

22. In the balance however there is clear and compelling evidence that the disclosure would be likely to cause significant commercial harm to Fusion in its ability to compete and that this would also harm the public interest by making the competition to provide these management services less effective. There is moreover a significant public interest in maintaining commercial confidences as was identified in *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and others [2010] EWCA Civ 1214, [2011] BLGR 95 CA*.

23. The tribunal is therefore satisfied that the disclosure of the disputed information would be likely to prejudice the commercial interests of Fusion and accordingly the exemption set out in section 43(2) of FOIA is engaged. The public interest balance clearly favours the maintenance of the exemption. The tribunal is therefore satisfied that the decision notice produced by the Commissioner was in accordance with the law and therefore the appeal is dismissed.

Chris Hughes
Information Judge
1 March 2012

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

Appeal No. EA/2011/0188

BETWEEN:-

MR W VISSER

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE LONDON BOROUGH OF SOUTHWARK

Second Respondent

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

---

1. The Appellant in this matter has applied for leave to appeal to the Upper-tier Tribunal against the decision of the First-tier Tribunal issued on 1.3.2012. In the voluminous documents submitted as part of the appeal the Appellant has structured his application as seven grounds ostensibly derived from his skeleton argument from the hearing and one ground relating to procedural irregularities. I deal with these grounds in turn.
2. Argument 1 – that the Commissioner did not deal with the issue on its merits - is an allegation of bias by the Commissioner which is not justified on the facts.
3. Argument 2 - that the Commissioner did not deal with his request in accordance with S.50 - is a compendium of arguments as to the public interest and primarily an argument that the Commissioner may not define the public interest differently from the public body. This as a proposition of law is unsustainable. The further points are hypothetical and/or misinterpretations and also unsustainable.
4. Argument 3 – The public interest test – is a detailed discussion of evidence and does not establish any error of law by the Tribunal but simply re-iterates arguments as to the weight to be given to evidence.

5. Argument 4 – The age of the information – this issue in the application for Permission to Appeal is an argument that a previous Decision Notice by the Commissioner functioned as to reset the date of the request for information. This proposition of law – that a Decision Notice is to be treated as a request for information is clearly wrong.
6. Argument 5 – lack of detail in the information – this is an argument as to the evidence, its evaluation and the weight to be given to it and not a valid ground of appeal.
7. Argument 6 – the Council's own interest – The Tribunal found as a fact that the Council was not striving to protect its own interests and further found as a matter of law that had it wished it was entitled so to do by the explicit provisions of the statute. The arguments under this heading are not a valid ground of appeal.
8. Argument 7. – that departments' commercial activities, including the procurement process, are conducted in an honest and open way – this ground is partially a general argument as to the benefits of transparency and partly unsubstantiated allegations against the public body. It is without merit.
9. Argument 8 – Procedural irregularities. The Appellant has started from a factual error. As a matter of transparency I notified the parties that in the early 1990s I was for four years a member of the Council of the London Borough of Southwark and that I formerly (although no longer) lived in the borough. These were matters which could not properly give rise to concerns as to bias and no such concerns were raised at the time the Appellant. I deny any bias.
10. Within Argument 8 there are 10 substantive sub-points. Points 1-4 were routine giving of information to the Appellant and other parties and the handling of bundles and documents to ensure an effective hearing. Point 5 was an explanation to the Appellant of his rights. Point 6 and 7 reflected the extent of the need for clarification of issues and the extent that further exploration was likely to shed light on matters of substance. Point 8 cannot amount to a procedural irregularity. Point 9 is a repetition of the unfounded allegation of bias addressed at paragraph 9 above. Point 10 is unfounded and all substantive points of appeal of any weight were considered. None of these issues amounts to a procedural irregularity.
11. The Appellant has not correctly identified an error of law or judicial bias and is seeking to argue various factual issues raised by the evidence. His appeal therefore has no realistic prospects of success and accordingly I do not grant permission to appeal to the Upper-tier Tribunal.

C Hughes
Tribunal Judge
16 April 2012

HM Courts & Tribunals Service

Upper Tribunal (Administrative Appeals Chamber)
5th Floor Rolls Building
7 Rolls Buildings, Fetter Lane
London EC4A 1NL

Tel:	**020 7071 5662**
Fax:	**0870 324 0028**
Typetalk:	**18001 020 7071 5662**
Email:	**adminappeals@hmcts.gsi.gov.uk**
Website:	**www.justice.gov.uk**
DX:	**DX 160042 STRAND 4**

First-tier Tribunal (Information Rights)
PO Box 9300
Leicester
LE1 8DJ

Our Ref: GIA/1645/2012

17 August 2012

Dear Sir/Madam,

Application to the Upper Tribunal for Permission to Appeal

Re: [redacted]

The Upper Tribunal has made a decision in the Appellant's case. A copy is enclosed together with an information sheet.

Yours sincerely,

Paul Cichosz
Clerk to the Upper Tribunal

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. GIA/1645/2012

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name:	Mr Willem Visser
Tribunal:	First-tier Tribunal (General Regulatory Chamber) (Information Rights)
Tribunal Case No:	EA/2011/0188
Tribunal Venue:	Field House, London
Decision Date:	01 February 2012

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS

1. In principle anyone unhappy with the result of a First-tier Tribunal (the FTT) may appeal to the Upper Tribunal. However, the right of appeal is not open-ended. The law provides that a dissatisfied party may appeal only on a point of law (see section 11(1) of the Tribunals, Courts and Enforcement Act 2007). So if it is arguable the tribunal got the law wrong or the process was inadequate or unfair in some way, so that the party concerned did not have a fair hearing, there is a potential right of appeal. However, disagreeing with the tribunal's conclusions on particular facts or with the overall outcome is not itself a point of law.

2. The applicant's original grounds of appeal extended to some 27 pages, about 5 times as long as the FTT decision being challenged. I issued directions on 8 June 2012 requiring the applicant to provide a concise summary of the grounds of appeal extending to no more than 4 pages of A4. The applicant has helpfully provided such a document (dated 14/07/2012). In reaching this determination I have considered this summary, the original ICO decision (and I note in passing that there was an earlier ICO decision notice under reference FS50295557, while the present appeal is concerned solely with the decision notice ref FS50375679), the FTT decision and, where appropriate on particular points, the original and more extensive grounds of appeal. There are four main heads to the grounds of appeal.

3. The first refers to section 2(2)(b) of FOIA. This requires "all the circumstances of the case" to be considered in the public interest test. The applicant argues that the FTT failed to do this. I disagree. The public interest test is by definition a balancing exercise. The ICO considered the various arguments for and against – see FS50375679 at [28]-[44]. The FTT did likewise – see [16]-[23]. The applicant obviously disagrees with both their assessments, but he has not shown any arguable error of law by the FTT. The public interest test necessarily involves weighing competing considerations, and the weight to be attached to

particular factors is quintessentially a question of fact for the FTT to evaluate. An appeal to the Upper Tribunal is not an opportunity simply to rehearse those arguments again. The applicant's summary grounds also misunderstand certain passages of key documents. For example, it is said that at [40] the ICO "would probably have decided in favour of release of the information if Fusion had been a private company". This is not strictly accurate. The ICO was actually pointing out that disclosure of the overall cost of the contract (rather than the P&L account) would probably be directed and that in this case in any event this information had already been disclosed.

4. The second ground of appeal relates to sections 51 and 58 of FOIA. As regards section 58(1)(b), the issue about the distinction between a private company and a not for profit body was considered by both the ICO and the FTT (the latter at [20]). Again, the applicant is really seeking to re-argue the original appeal on its facts, rather than identify any error of law by the FTT in its approach. Moreover, as section 58(1)(b) is concerned with issues of discretion, by definition the FTT (and the ICO) have considerable leeway in forming a judgment. As regards sections 51 and 58(1)(a), it seems that the ICO's decision notice was concerned with the request made in July 2009 and the complaint of January 2010, not any complaint in February 2011. In any event both the ICO and the FTT gave careful consideration to the various public interest factors.

5. The third ground of appeal is simply a further attempt to re-open the factual matters relevant to the section 43(2) exemption. These were analysed by the FTT and no error of law is disclosed.

6. The final ground of appeal is an allegation of judicial bias and/or procedural irregularities. I have read the papers carefully and can see not a shred of hard evidence to support the allegation of bias or irregularity. Just because the outcome is not the one that the applicant has convinced himself is the right result does not mean that the hearing was unfair. As Rimer J (as he then was) once said, this type of argument is in essence "no more than the deployment of the fallacious proposition that i) I ought to have won; ii) I lost; iii) therefore the tribunal was biased" (see *London Borough of Hackney v Sagnia* [UKEAT0600/03, 0135/04, 6 October 2005] at paragraph 63).

7. I should add that the applicant has the right to apply for a reconsideration of this decision refusing permission to appeal at an oral hearing before the Upper Tribunal, usually in front of a different judge. Any such application must be made in writing and within 14 days of the date that this determination is sent out – see Tribunal Procedure (Upper Tribunal) Rules 2008, rule 22(3)-(5).

(Signed on the original)

Nicholas Wikeley
Judge of the Upper Tribunal

(Dated) **16 August 2012**

HM Courts & Tribunals Service

THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Information Note for respondents

Where the appellant has been refused permission to appeal without an oral hearing.

1. The decision of the Administrative Appeals Chamber of Upper Tribunal is attached. A copy has been sent to all parties.

2. The appellant has a right to apply within 14 days (or longer if time is extended) for the refusal to be reconsidered at an oral hearing.

3. If the appellant does apply for reconsideration you will be notified and told the listing arrangements.