



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

Appeal No: EA/2014/0027

BETWEEN

BRADFORD METROPOLITAN DISTRICT COUNCIL

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

JANETTE SAGAR

Second Respondent

Before

**Brian Kennedy QC
Jean Nelson
Paul Taylor**

Representation:

For the Appellant:

Dermot Pearson Solicitor

For the First Respondent:

Eric Metcalfe of counsel

For the Second Respondent:

Janette Sagar - Respondent

DECISION

The Tribunal refuses the Appeal.

We direct that the requested information should be disclosed in accordance with the First Respondent's Decision Notice.

Introduction:

[1] The appeal is brought under section 57 of the Freedom of information Act 2000 ("FOIA"). The Tribunal and the parties worked from an open Trial Bundle indexed and paginated and from a smaller Closed Bundle also indexed and paginated.

[2] The impugned decision under appeal is the Decision Notice ("DN") from the First Respondent dated 9 January 2014: Reference FS50519880.

Background to the Appeal:

1. The Appellant Council ("the Council") is a local authority. In this appeal, it objects to the disclosure of the criteria it uses to grade employees' positions. By his DN, the First Respondent ("the Commissioner") concluded that the Council was not entitled to rely on the exemption under section 43(2) of FOIA (prejudice to commercial interests).
2. The Council now relies on the exemption under section 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) and has supplied an opinion from its Monitoring Officer expressing the view that disclosure of the requested information would be likely to cause such prejudice. The Commissioner properly accepts that there is a general right to raise new exemptions before the Tribunal and again properly does not object to the Council's late claim under section 36 given that it has been raised at an early stage of the proceedings and in the Grounds of Appeal. The Tribunal accede to the Council's application to rely on an exemption under section 36 (2)(c) FOIA.
3. Again the Commissioner properly accepts that the Monitoring Officer is a "qualified person" for the purpose of section 36(2) and that her opinion as to risk of prejudice is reasonable (as is required for the engagement of the exemption being claimed under section 36(2)). The Tribunal accepts this state of agreement between the parties and the issues arising in this appeal are the balance of the public interest arising on disclosure or non-disclosure.
4. The Commissioner submits that such prejudice to the effective conduct of public affairs that would arise, from disclosure of the requested information, is not sufficiently severe to outweigh the public interest in the disclosure. The Council, on the other hand submit, in general terms, the requested information would have no widespread or significant impact on the public, there is no suspicion of wrongdoing and other than the general public interest in transparency it is not clear there is any interest in disclosure while they argue on a number of grounds that disclosure would cause prejudice as outlined later herein.
5. The Second Respondent, Ms. Sagar, is an Assistant Manager in Service Support for the Council. On 8 May 2013 she requested the following information from the Council concerning its recent re-grading of her job:

- (i) *Full details of the decision & the scheme used to grade the post & any information used to make the decision in respect of the post of Assistant Manager Service Support.*
- (ii) *What are the differences between the other posts in the R & B structure (e.g. Assistant Manager Technical, Assistant Manager Discretionary Payments) that account for the difference in salary?*
- (iii) *What is the appeal process? I have received conflicting information about whether the appeal must be made within 6 months or after 6 months.*
- (iv) *What account in the grading process was taken of the matrix management of staff?*

6. On 1 July 2013, the Council provided partial answers to (iii) & (iv) but refused to disclose the criteria it used to grade employees' posts on the basis that this was exempt under section 43(2). On 12 July 2013, Ms. Sagar requested an internal review and she was notified on 2 September 2013 that the decision had been upheld. She took her case to the Commissioner complaining that the Council had failed to properly respond to (i), (ii) & (iv) above. This led to the DN and this appeal.

The Legal Framework:

[3] Section 36(2)(c) provides materially as follows:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act - - - would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs."

This Tribunal accepts that even where the exemption under section 36(2)(c) is engaged, it remains a qualified exemption and is therefore subject to the public interest balancing test in section 2(2)(b) of FOIA. The role of the qualified person is *"limited to deciding, whether disclosure would, or would be likely, to have any of the effects set out in subsections (a) to (c) included in section 36(2) and is quite distinct from the separate issue of whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.* We also accept the principle that the opinion of the qualified person itself does not carry weight per se in the balancing exercise to be applied to the public interest test.

The Issues:

[4] As explained above, the Council does not challenge the Commissioner's rejection of its arguments under section 43(2) but, through their Grounds of Appeal, now relies on the exemption under section 36(2)(c), submitting that disclosure of the requested information would give rise to prejudice in the following ways:

- (a) In the absence of independent verification of applications by human resources staff, disclosure would *"create a risk that a proportion of applicants will exaggerate the responsibilities of the post which could then result in an undeserved higher grading"* (para 14).
- (b) Disclosure would also produce an *"incentive for a significant proportion of the 3000 or so authority staff to whom the Professional Scheme does apply make fresh grading applications based on the newly available criteria"* (Para 15), including causing *"some staff to make applications they would not otherwise have made"* (Para 16).

- (c) The resulting applications would *“themselves place a significant burden on the authority’s resources and would be likely to thereby prejudice the effective conduct of public affairs”* (Para 17).
- (d) As to the balance of the public interest, the requested information *“consists of internal procedural documents which would shed a very limited amount of light on the question as to whether staff are paid too much or too little”* (Para 20. There is also a public interest *“in maintaining the integrity of the authority’s pay and grading system”* (Para 21) as well as in *“the authority’s staff to be treated fairly”* - disclosure would create a divide between those graded on the basis of closed material and those graded on the basis of open material (Para 22).

The Council therefore argues that the balance of the public interest favours non-disclosure.

[5] The Commissioner relies generally on his findings and reasoning in the Response dated 6 March 2014 and as argued further before this Tribunal. As indicated, he properly accepts the opinion of the qualified person, in this case Suzan Hemingway, the Council’s Monitoring Officer, both as meeting the requirements of being a qualified person and as reasonable for the purposes of engaging section 36(2)(c). The Commissioner argues against the Council’s grounds of appeal as follows:

(a) **The risk of applicants exaggerating their responsibilities:**

The Council relies on the concern that disclosure of the requested information would give rise to a risk that applicants for re-grading would exaggerate their responsibilities and thereby achieve a higher grade that was not deserved. The Commissioner submits, however, that the risk of applicants exaggerating their responsibilities in order to achieve higher pay grades is an inevitable part of all grading systems, whether or not the relevant criteria are disclosed. Even where applicants do not know the criteria upon which their posts will be graded, it is still open to them to speculate or, indeed, make educated guesses as to what the relevant criteria might be. Non-disclosure cannot, therefore, sensibly be said to prevent exaggeration by applicants. At most, disclosure simply enables would-be applicants to exaggerate their responsibilities by reference to known criteria, as opposed to supposed criteria. Nor has the Council put forward evidence to show that the risk of exaggeration is in fact greater under grading systems where the criteria are made public. Instead, this is merely a hypothesis that it advances.

Even if it were correct that there is a greater risk of exaggeration in grading systems where the criteria are transparent, rather than closed, the Council has also failed to undertake any assessment of the likely prevalence of exaggerated applications, e.g. whether it is liable to occur in 1 in 100 cases or merely 1 in 10.

The Council refers to the absence of the resources necessary for human resources officers to investigate and independently verify the contents of applications (Grounds, 14) as a factor increasing the risk of prejudice. However, the Council does not indicate whether there are any other measures which maybe adopted to counter the risk of exaggerated applications besides having human resources officers investigate and independently verify the contents of applications. Given that exaggerated applications are bound to occur regardless of whether the criteria are disclosed or not, it is apparent that the Council will have likely already had procedures in place in order to diminish the risk of such applications. Indeed, the opinion of the Monitoring Officer refers to the possibility that the presence of line managers at job evaluation panels and the role of Job Evaluation Panels would mitigate the mischief referred to & by subjecting the contents of regarding

applications to sufficiently rigorous scrutiny (Open Bundle, p74).

Nor does the Council appear to take into account the likelihood that applicants acting in good faith are more likely to make accurate applications where the relevant criteria are known as opposed to where the criteria are not disclosed. Although it is concerned about the misallocation of resources caused by exaggerated applications, no consideration appears to have been given to the possibility that failure to disclose the grading criteria may itself result in misallocation of funds (i.e. because applicants in good faith are not able to make properly targeted applications but are instead taking blind shots at a hidden target (Roberts v Parole Board [2005] UKHL 45 at §18).

For these reasons, the Commissioner submits that any increase caused by disclosure in the number of exaggerated applications is likely to have only a negligible impact on the re-grading process and is highly unlikely to result in significant misallocation of resources.

(b) Disclosure as an incentive to seek re-grading:

The Council claims that disclosure would create an incentive for a significant proportion of the 3000 or so authority staff to whom the Professional Scheme does apply to make fresh grading applications based upon the newly available criteria (Grounds, §15). The Council does not identify which proportion of its staff is likely to seek fresh grading. However, the evidence of Mr Hammond, the Council's Single Status Project Manager, is that:

- (i) a single job evaluation may apply to a number of individual post-holders;
- (ii) 644 posts have been subject to job evaluation under the Professional Scheme since April 2009; and
- (iii) significant numbers of posts will be evaluated as part of the restructuring process being undertaken across the Council (Statement of Richard Hammond dated 7 May 2014, §3).

Even if it is correct, therefore, that disclosure would create an incentive for individual employees to seek re-grading, it is also apparent that a single evaluation may apply to a number of individual post-holders. It is therefore unlikely to be the case that each individual application would need to be dealt with separately. It is also apparent that significant numbers of posts are due to be evaluated in any event as part of the restructuring process, which means that disclosure will not create any additional incentive to seek fresh grading in those cases. The likely burden caused by applications for re-grading

The Council complains that the fresh applications triggered by disclosure would place a significant burden on its resources and, thereby, prejudice its effective operation. As noted previously, however, a large number of positions are due to be subject to fresh evaluation as part of the restructuring process. It is also possible for a single job evaluation to apply to a number of post-holders. In addition, the Council has not indicated which other steps may be open to it in order to restrict the number of applications for re-grading.

In the first instance, it is not clear from the available evidence that disclosure would in fact result in a significant number of applications for re-grading. Even if it did, however, it is equally unclear that such an increase would result in an administrative burden sufficiently severe to prejudice the effective operation of the Council. The Commissioner therefore submits that this is not a factor that can be given substantial weight in assessing the balance of the public interest.

(c) **Fairness as between employees graded under different schemes:**

The Council also relies on the public interest for its staff to be treated fairly, and suggests that disclosure of the requested material would create a divide between those staff re-graded on the basis of closed criteria and those applying in future. As the Council itself concedes, however, it would apparently be open to all staff re-graded on the basis of closed criteria to submit fresh applications for re-grading once the criteria were made public. In the circumstances, therefore, the Commissioner invites the Tribunal not to attach any great weight to these concerns.

(d) **The nature of the requested information and the broader public interest in transparency:**

The Council suggests that any public interest in disclosure of the requested material would be relatively weak since it consists of internal procedural documents which would shed a very limited light on the question of whether staff are paid too much or too little (Grounds, §20).

The Commissioner submits, however, that the Council clearly misunderstands the importance of transparency in relation to grading schemes. As the guidance of the Equality and Human Rights Commission makes clear, transparency is the cornerstone of a non-discriminatory pay structure (EHRC, High risk grading and pay practices, Equal pay in practice checklist¹⁹). It cites the judgment of the Court of Justice of the European Union in Case 109/88 *Handels-og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* (acting for Danfoss) (17 October 1989), in which the Court held as follows:

The Equal Pay Directive must be interpreted as meaning that where an undertaking applies a system of pay *which is totally lacking in transparency*, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (§16, emphasis added).

The guidance of the EHRC goes on to reiterate the importance of transparency in preventing discrimination, including in the context of grading:

Transparency is a key feature of tackling equal pay problems: A transparent pay system is one where employees understand not only their rate of pay but also the components of their individual pay packets. A transparent pay system avoids uncertainty, perceptions of unfairness and reduces the possibility of individual claims.

Grading structures: A grading structure provides a framework for managing a pay system. Used properly a grading structure should ensure jobs of equal value are paid equally (EHRC, *“Grading and equal pay”, Equal Pay in Practice Checklist 4, emphasis in original*).

The Commissioner therefore submits that the value of transparency in relation to the Council’s pay arrangements are a weighty factor when assessing the balance of the public interest in disclosure of the grading criteria, both in terms of (i) ensuring the equal treatment of applicants and (ii) ensuring that the public money is not misallocated.

[6] The Second Respondent, in her response to the grounds of appeal, describes the two schemes used by the Council, the Professional Scheme and the Single Status Job Evaluation Scheme (“SSJES”). She indicates that the professional scheme, which applies to her, is

scheduled to be abolished. She claims this should have happened a number of years ago. In short she indicates, with significant experience of the systems in use by the Council, the following pertinent points.

The public interest lies, she argues, in disclosure of the requested information. She points to the fact that the process relating to the Single Status Job Evaluation Scheme is published for all employees to access freely. She argues that such openness and transparency should apply to both grading schemes currently in use so that all employees have equal opportunity to understand the factors that contribute to the grading of their post. She indicates the lack of transparency and accountability in the Professional Scheme is divisive amongst employees and staff generally.

She indicates that the number of re-grade requests made in the past 5 years is relatively low and most were allowed. This she argues should have been taken into account by the qualified person in the formulation of her opinion. Further that opinion should have been made with regard of the financial constraints that all managers face, which are a disincentive to the artificial inflation of grades. She is of the view that the qualified person failed to make adequate enquiries before making her conclusions and opinion.

Dishonesty is not likely to be a significant factor and should be dealt with through Corporate Fraud procedure, it is not she argues a reason to withhold information from all concerned.

The Council paid £18.75 million in equal pay claims up to 29 April 2014 band the majority of this was due to claims for posts at lower grades at a time when they were assessed using the Professional scheme. It is her belief that the lack of transparency contributed to the inequality in these cases and demonstrates the flaws of the Professional Scheme. HR and even managers are not familiar with senior or professional job profiles. There is a significant lack of knowledge and understanding and this is exacerbated by the lack of transparency and accountability in the way the Professional Scheme is operated..

The Oral Evidence:

[12] The Tribunal had the benefit of evidence from Mr. Richard Hammond who is employed by the Council as the Single Status Project Manager, in this post since 2008. He had been previously employed by the Council as a Principal Industrial Relations Manager and has worked for the Council since 1982. He holds a post graduate diploma in employment law and industrial relations. He was subjected to comprehensive cross examination.

He adopted his witness statement dated 7 May 2014 which encompasses the Grounds of Appeal and adds in particular concerns about disclosure in the following ways:

If the Professional Scheme were in the public domain during the restructuring process, he argued, employees would tend towards exaggeration. He argued that restructuring needs to be timely and fair. He felt disputes would cause expensive delay and cause pressure on relationships between the Council and the trade unions.

He gave a careful, detailed and interesting history and account of the two different ways of applying the schemes in operation. He effectively adopted the arguments made in the grounds of appeal and the later submissions made on behalf of the Council.

Inter-alia, under cross examination he provided the following relevant information:

The Council had approximately 15,000 employees. Eventually the Council will move all re-grading posts to the system now being used in the SSJES. He conceded that there were not

many cases of fraud or deceit in applications but he felt most people exaggerated and he felt this would be exacerbated as a result of disclosure of the disputed information because applicants would know what is expected. He gave no evidence to support his concerns or the extent of resulting damage, if any, that might be caused in the public interest.

He agreed the Council should be transparent and that transparency in this process would be reassuring for the workforce involved. He confirmed the Professional Scheme pre-dated his employment with the Council and was in need of change. He confirmed that it was to be changed to the new scheme or SSJES, sooner rather than later.

He told the Tribunal that he felt it would take between 12 -18 months to start the new scheme and they would anticipate more appeals. However he gave no evidence of the burden of costs, delays or the creation of a division between staff that might or even could arise.

The disputed information was discussed in more detail after the luncheon break.

Reasons:

[13] The Tribunal agrees with the Commissioner and the second respondent in their analysis of the Public Interest Test as stated above. We too recognise a significant public interest in favour of disclosure of the disputed information based on factors discussed above.

[14] Further we are not persuaded that there will be any significant damage to the public interest by disclosure. In particular we are not persuaded that such risk of exaggeration by applicants as does occur is either increased or altered in any way that cannot be dealt with in the normal scope of the Human Resources work. Mr. Hammond conceded that exaggeration is commonplace in any event.

We find little tangible evidence of the nature or extent of the perceived increase in applications or in difficulties that would arise in dealing with any increase in the number of applications as a result of disclosure. Again we find little evidence about the increase in the financial burden that the Council might suffer over and above that which will be incurred in the transfer that is already planned.

Conclusion:

[15] For the reasons given above the appellant has failed to persuade this Tribunal that the Commissioner was wrong in directing the disclosure of the disputed information in this case and we refuse the appeal.

Brian Kennedy QC

24th July 2014.