



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2015/0021

**GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

SALLY BALLAN

Appellant

- v -

INFORMATION COMMISSIONER

Respondent

Hearing

Held on the papers on 17 July 2015 at Fox Court, London.

Panel

Judge Taylor, G Jones and P De Waal

Decision

The appeal is dismissed for reasons set out below.

Decision Promulgated: 28 July

Reasons

Background

1. In 2012, North East Lincolnshire Council ('the Council') conducted a tender process for a provider to deliver a 'Leisure Management system'. The Appellant works for a company that made an unsuccessful bid. The contract was awarded to another tenderer following a situation where the original front-runner ceased to be in contention.
2. On 30 July 2014, the Appellant requested from the Council information in relation to 'the tender:

"In an effort to try and address where we are going wrong, we are writing to request sight of the winning tender documentation or the tender which was initially first choice which was then found to be non-compliant, as per the attached feedback received from [name redacted], under the FOIA.

We are not really interested in the pricing (which may still be commercially sensitive) it is the overall responses which we hope will help us."

3. On 21 August 2014, the Council refused to provide the information, on the basis that they considered disclosure of the information would, or would be likely to, prejudice their and the relevant bidders' commercial interests such that s43(2) of the Freedom of Information Act 2000 ('FOIA' or 'the Act') applied so as to exempt them from having to disclose the information.
4. The Appellant proceeded with the matter, eventually resulting in the Information Commissioner's Office ('ICO') investigating it. The Decision Notice (FS50554846) dated 9 December 2014 upheld the Council's position.
5. The Appellant now appeals the ICO's Decision Notice.

Issues for this Tribunal

Law

6. Generally, public authorities are under a duty under FOIA to disclose requested information that they hold at the time of the request unless certain provisions or exemptions within the FOIA apply. (See s.1 FOIA).
7. For our purposes, the information is exempt from disclosure if:
 - a. Disclosure 'would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)' (See s. 43(2) FOIA); and
 - b. In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. (See s. 2(2) FOIA.)
8. The ICO explains that:
 - a. While the chance of prejudice need be significant and weighty, the extent of the prejudice need not be (though it will be relevant to the public interest balance). It is sufficient that "some commercial disadvantage" is likely to be suffered (*Newham LBC v Information Commissioner EA/2011/0288*). Whilst other first-tier tribunal decisions are not binding on us, we find no reason and (nor have we been given one), not to adopt this interpretation.

- b. The FOIA does not define 'commercial interests'. The ICO's guidance on the application of s.43 FOIA suggests that "...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."¹ 'Commercial' is an ordinary English word, to be given its natural meaning. It includes, though is not restricted to, "competitive participation in buying and selling goods or services": *Student Loans Company v Information Commissioner EA/2008/0092*. Whilst the ICO's guidance is not binding on us, we find no reason and (nor have we been given one), not to accept its reasoning.

Grounds

9. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the ICO's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.
10. The Appellant did not provide specific grounds of appeal. However, on the facts of this case, it seems to us that an appeal could only be successful if the ICO has made an error of law or ought to have exercised its discretion differently, in making its finding that the Council had rightly relied on s43(2) FOIA so as to exempt it from the requirement of disclosure under the Act.
11. This means that the issues for the Tribunal to consider are:
 - a. Would the disclosure of the requested information be or be likely to prejudice the Council's and/or the relevant bidder's commercial interests? ('Issue 1')
 - b. If so, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. ('Issue 2')
12. We have received a bundle of documents and submissions from the parties, including a confidential bundle of information containing the requested information, which was 'closed' to the Appellant, because it could not be disclosed. We have considered all of the material even if not specifically referred to below.

Issue 1: Would the disclosure of the requested information be or be likely to prejudice the Council's and/or the relevant bidder's commercial interests?

13. The ICO considers that participating in a tendering process is a commercial activity, because the procurement was a competitive process by which the council intended to select a provider to deliver a service. It considers that the requested information falls within the remit of s43(2) FOIA for reasons set out in paragraphs 12 to 16 of its submission of 3 March.
14. The Appellant does not present arguments specifically addressing this issue. However, arguments that she makes that may be relevant include:
 - a. The leisure software contract expires in 2015.
 - b. She was asking for sight of a two year old tender document without prices.

Our Finding

¹ See "Freedom of Information Act - Annexe to Awareness Guidance No 5 Commercial Interests"
https://ico.org.uk/media/for-organisations/documents/1185/awareness_guidance_5_annexe_v3_07_03_08.pdf

15. We accept and adopt the ICO's arguments in their entirety.
16. It is our view that disclosing any of the requested information would be likely to prejudice the commercial interests of the Council. The way that a tenderer chooses to present its material and answer tender evaluation criteria and questions posed by the Council is likely to be an important means by which the authority is able to distinguish between and evaluate the commercial and technical merit of competing tenders in order to arrive at the most advantageous bid. Therefore, if tenderers were able to see previous successful bids submitted by competitors during a similar procurement process, it is likely that the competitiveness of this selection process and the authority's ability to achieve best value would be hindered, thus harming the authority's commercial interest.
17. We also accept the reasoning contained in the statements made by the two tenderers who object to disclosing information included in their tender documents as prejudicing their interests. If information about a successful bid previously submitted by it were to be made public so as to show competitors how it had presented its tender proposal in the recent past, it is likely that the tenderer would be placed at a (commercial) disadvantage in submitting future bids for similar services to the same authority and elsewhere.
18. We consider that these arguments alone (*in paragraphs 16-17 above*) would mean that disclosing the requested information would be likely to prejudice the Council's and/or relevant bidder's commercial interests. However we make the following additional points:
 - a. We have considered whether, if the contract held by the successful tenderer or part of it, is due to expire, it might be argued that disclosure would no longer be particularly prejudicial. Having reviewed the requested information, we do not think this reasoning would be valid. In fact, we consider tender documents such as those we have reviewed to fall squarely within the category of s43(2) and that their commercial sensitivity is unaffected by the remaining duration of the current contract held by the successful tenderer..
 - b. Likewise, we do not consider the fact that the documents may be two years old to be of relevance. It is clear to us that even with pricing redacted, disclosure of the requested information would be likely to prejudice the commercial interests of the tenderers and/or the Council.
 - c. Additionally, if a prospective tenderer were to be able to review its competitor's previous bid documents including trade secrets, this could inhibit competitive tendering and reduce the number of bidders willing to participate which would not be in the Council's interest. (It would be even less in the Council's interest if, as the Appellant appears to indicate, there are few competitors in this field.)
 - d. Even if trade secrets were not disclosed, the Appellant's arguments for wanting the information relate to her desire to assist her company in making a more successful future bid, to the direct disadvantage of the competitive interests of the other tenderers.
19. In short, we have no hesitation in concluding that disclosure of the requested information would be likely to prejudice the Council's and/or the relevant bidder's commercial interests.

Issue 2: Whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

20. The ICO sets out factors tending towards public interest in disclosure as:
 - a. Enabling the public to understand the Council's activities; becoming informed as to its decision-making; allowing decisions and actions of the Council to be challenged, and participating in debate;

- b. Ensuring that the Council can be held accountable for its decisions; □
 - c. Ensuring that the Council is providing value for money. □ This being of particular general interest here as the public body is procuring services from individuals. Open competition and best value are central to the procurement regime, which serves “important public interests of promoting competition and fairness in the use of public resources”: *Edenred (UK Group) Limited v HM Treasury and others* [2014] EWHC 3555 (QB) at [17] per Leggatt J. □
21. However, in this case, the ICO considered that disclosure of the requested information would be unlikely perceptibly to advance these general interests. What is requested is, essentially, an ‘example successful tender’. One example of such documents in isolation would provide only very limited material so as to hold the Council accountable or challenge its decisions (even assuming that there were reason to do so, which we have not seen any strong reason to believe here). Without comparator tender documentation, little could be gleaned from one ‘example successful tender’ in isolation. □
 22. The ICO thought that any concerns about transparency had been substantially assuaged, in this case, by the Council’s provision of detailed feedback to unsuccessful tenderers including the Appellant. While the Appellant complained that the feedback it received was not useful, the ICO considered it detailed and helpful, and identified paragraphs to substantiate this.
 23. The Appellant’s motive in making the request appeared to be to enable it to improve the quality of its own tenders for leisure management systems contracts. The ICO considered this to be in the Appellant’s private interest, but only in the public interest to the extent that it would result in an improvement of the overall quality of tenders in this area. It considered it unlikely that the Appellant’s private interest significantly enhanced the public interest in disclosure, especially if there might be many potential competitors. □
 24. Again, the Appellant does not present arguments specifically addressing this issue. However, arguments that she makes that may be relevant factors tending towards public interest in disclosure include:
 - a. The interest in encouraging small and medium size businesses, such as the one she works for, to bid for Council work, which Central Government apparently supports. She claims that every contract in the past two years had been awarded to their larger competitors.
 - b. The Appellant seemed to be suggesting that the tender process may have been unfair given that (a) the firm she worked for had software that was feature rich and developed over a longer period than their competitors; (b) selection may have been more to do with the way the Council scored the responses than the successful competitor’s product being superior; and (c) the Appellant’s company had been told that the successful company’s bid had been very detailed, but so was theirs.
 25. The ICO sets out factors tending towards public interest in not disclosing the information as:
 - a. The exemption having been found to apply, there is an inherent public interest in the maintenance of the exemption. The public interest is particularly strong in relation to private companies’ participation in public authority tenders. While such companies tender for public contracts in the knowledge that FOIA applies to public authorities, that knowledge encompasses the fact that FOIA provides exemptions for, inter alia, the protection of a company’s commercial interests. □
 - b. There is an important public interest in ensuring that potential tenderers are not discouraged from tendering for public contracts by a justified fear that their commercially confidential information, bearing on their market positions and

commercial standing, will be released publicly (and so released to their competitors): If tenderers were discouraged, this may adversely affect the quality of tenders for public contracts and so risk the discharge of those contracts by the eventually successful tenderer. That would not be in the public interest. □

- c. There is a public interest in maintaining an efficient competitive market for leisure management systems. If the commercial secrets of one market entity were revealed, its competitive position would be eroded and the whole market would be less competitive. As the Court of Appeal put it in ***Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council and others*** [2012] P.T.S.R. 185² at [111], a company's confidential information is often "the life blood of an enterprise". The ICO argued that this is particularly so in an industry such as the provision of leisure management systems because such systems are a complex amalgam of technologies, customer support networks, and user interfaces, which involve elements individual to particular companies. Those individual elements drive competition to the benefit of □public authorities and consumers.
- d. In relation to the 'time value' of the commercial information, it is relevant that the tender information sought is likely to remain relevant to future tenders and to a possible tenderer for the same or similar contractual services to the Council in the short to medium-term. Commercial relevance was unlikely to be diminished by the short elapse of time (ie two years) between the tender award and the time of the request. □

Our Finding

- 26. In reviewing the factors tending towards public interest in disclosure, we accept the points made in paragraph 20. In terms of the weight to be given to those factors, we accept that the factors do not carry strong weight for the reasons given by the ICO in paragraphs 21 and 22.
- 27. We did not accept the ICO's arguments set out in paragraph 23. The Appellant works for a small to medium sized firm ('SME'), and there would appear to be a public interest in such firms being encouraged to bid for public contracts, and improved quality bids from SMEs would then be in the local authority's interest also. (See *paragraph 23(a)*). We consider this to have some moderate weight.
- 28. We accept a public interest in disclosing information to test if the tender process was unfair. (See *paragraph 22(b)*). We give some weight to this. However, we agree with the ICO that we have no reason to believe the process was in fact unfair in this case, and the feedback given to the Appellant's employers appears to have been extensive. If they considered it to be inadequate or contain substantive errors, we would think there would be other avenues to explore to pursue an appropriate remedy instead of disclosing a competitor's bid and potentially damaging the tender process.
- 29. In terms of factors tending towards public interest in not disclosing the information, we accept and adopt all points made by the ICO in paragraph 25 above. An additional factor would include an interest in not disclosing any information to the extent that it contained trade secrets of the relevant tenderers.
- 30. When weighing the factors favouring disclosure against those favouring non-disclosure in this case, we find the cumulative weight of factors favouring non-disclosure very strongly outweigh the cumulative weight of those favouring disclosure. We would note that whilst we accepted as a factor the public interest in SMEs being encouraged to bid for public contracts, and being able to improve the quality of their bids, we do not consider that this should come from disclosing the requested information because of the list of factors set out in paragraphs 25 and

² Applied in the s. 43(2) FOIA context, in ***Visser*** at [22].

29. We note there might be scope for SMEs to be encouraged to ask authorities what further information and feedback might be able to assist them in the tender evaluation process at a more generic level.

31. In conclusion, we unanimously find in favour of the ICO and dismiss the appeal.

Judge Taylor
28 July 2015