



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: **EA/2016/0089**

**Heard at Alfred Place, London,
Decided without a hearing
On 28 September 2016.**

Before

JUDGE BRIAN KENNEDY QC

**AND
ANNA CHAFER
PAUL TAYLOR**

Between

ALAN JONES

Appellant

and

INFORMATION COMMISSIONER

Respondent

Date of Decision: 4 November 2016
Date Promulgated: 7 November 2016

DECISION AND REASONS

The Tribunal Dismisses the Appeal.

Introduction:

[1]. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 14 March 2016 (reference FS50604095) which is a matter of public record.

[2]. The Tribunal Judge and lay members sat to consider this case on 28 September 2016.

Factual Background to this Appeal:

[3]. Full details of the background to this appeal, Mr Jones' request for information and the Commissioner's decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether details of a cost of living allowance paid to Ministry of Defence staff overseas is exempt from disclosure under s43(2) FOIA..

CHRONOLOGY:

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|-----------------|---|
| [4]. 8 May 2015 | Appellant's request for details of how the cost of living allowance is calculated with comparators between years. |
| 16 June 2015 | MoD disclosed some documents relating to Local Overseas Allowance and explained that the Cost of Living Addition (COLA) was calculated by an external company ('ECA'), thereby declining to disclose the calculations |
| 17 June 2015 | Appellant expresses dissatisfaction to MoD at non-disclosure |
| 1 July 2015 | MoD explains the aim of COLA but explains why the information could not be disclosed. |
| 16 July 2015 | Appellant informs MoD that his contact of 17 June should be taken as a request for an internal review |
| 18 Aug 2015 | MoD review finds that detailed rates and methodology for COLA rates were not held by MoD as they were owned by the external company. The MoD held the final output but this was exempt under s43(2). |
| 5 Nov 2015 | Appellant complains to the Commissioner |
| 14 March 2016 | Commissioner upholds the MoD's refusal to disclose |

RELEVANT LEGISLATION:

[4]. ***s41 Information provided in confidence.***

(1) Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

s43(2) Commercial interests

(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).

COMMISSIONER'S DECISION NOTICE:

[5]. In order s43(2) to be engaged the Commissioner considers that three criteria must be met:

1. That the anticipated harm actually relates to the applicable interests within the relevant exemption;
2. There is a demonstrable causal relationship between disclosure the prejudice. Furthermore, the resultant prejudice must be real, actual or of substance;
3. Where the authority alleges that prejudice is 'likely', this must be more than a hypothetical possibility; rather there must be a real, significant and evidenced risk. Where the authority argues that prejudice 'would' result, there is a stronger evidential burden on the authority to discharge.

[6]. Where a public authority advances arguments about the commercial interests of third parties, they must not be speculative about how prejudice may occur but rather should be based on its prior knowledge of the third party's concerns.

The Commissioner was satisfied that the request would amount to disclosure of the company's methodology and service delivery processes, which would cause prejudice to the interests of ECA by providing its competitors with an advantage. The MoD's interests would be harmed by ECA withdrawing from the government contract in light of the disclosure, thereby compelling the MoD to re-tender the contract, potentially at a higher cost. Whilst the Commissioner was sceptical about the MoD's wider assertion that companies would no longer tender for public contracts, he accepted that in this instance there was a demonstrable and well evidenced risk that ECA would consider disclosure to be a breach of contract and would therefore withdraw its services.

[7]. In his consideration of the public interest, the Commissioner concluded that there is an interest in transparency regarding the spending of public funds, especially to allow individuals in receipt of allowances to know whether they are being paid a fair allowance. Nevertheless, in this instance this interest is outweighed by the public interest in protecting fair competition, ensuring that a third party company's interests will not be undermined simply by entering into a contract with a government department and protecting the MoD's commercial interests. Accordingly the

Commissioner concluded, albeit narrowly, that public interest favoured maintaining the exemption.

APPELLANT'S GROUNDS OF APPEAL:

[8]. The Appellant disputes the Commissioner's findings in two ways:

1. The MoD implied that they have significant data requirements for its contractors, and so the commercial impact of disclosure would be reduced;
2. The Commissioner failed to give sufficient weight to the public interest in ensuring parity of allowance payments across the personnel categories and in ensuring that a government department spends public funds appropriately.

THE COMMISSIONER'S RESPONSE:

[9]. The Commissioner stands by the factual conclusions regarding the three-limb test, namely that a demonstrable prejudice would be caused to the MoD and ECA by disclosure. The fact that the MoD has certain contractual specification requirements does not mean that the prejudice in the disclosure of ECA's processes is diminished; there may be a variety of approaches possible within the MoD's specification parameters.

[10]. The Commissioner also maintains his conclusions regarding the public interest test. He emphasised in his Decision Notice that the public interest in transparency to ensure fair and reasonable payments is not a consideration to be dismissed lightly, but that in this particular instance it was narrowly outweighed by the demonstrable commercial prejudice caused to ECA and the MoD.

REASONS:

[11] This Tribunal has not been persuaded that the Respondent has erred, either on the facts or in his application of the Law.

[12]. We accept and adopt the Respondents interpretation of the facts and his reasoning as clearly set out in paragraphs 10 to 21 of the DN.

[13]. We accept and adopt the three-part test applied by the Respondent to determine whether the prejudice based exemption at s43(2) FOIA was engaged. We accept and adopt his reasoning as applied in paragraphs 18 to 26 of the DN.

[14]. Similarly, we accept and adopt the reasoning and conclusions derived therefrom in paragraphs 27 to 32 of the DN.

[15]. In particular, and of wider significance, while we accept that fairness in competition in public commercial contracts is of significant public interest, it was against public interest that the commercial interests of a third party would be undermined simply because they entered into a contract with a government department on the facts of this case. As the Respondent found on the facts in this case, the public interest came down finely in favour of non-disclosure. Each case must be determined on its merits. As we have indicated above, we are not persuaded that the Respondent erred on the facts or on the Law in this case and accordingly we dismiss the appeal.

Brian Kennedy QC

4 November 2016.