First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0119

Determined at Cambridge County Court
On 15th February, 2017

Before

DAVID FARRER Q.C.
Judge

and

HENRY FITZHUGH and **MELANIE HOWARD**
Tribunal Members

Between

BRIGHTON AND HOVE CITY COUNCIL ("Brighton")

Appellant

and

THE INFORMATION COMMISSIONER ("THE ICO")

First Respondent

and

JOHN KEENAN

Second Respondent

This appeal was determined on written evidence and submissions.

Date of Decision: 2nd March 2017
Date of Promulgation: 10th March 2017

DECISION AND REASONS

1. The Tribunal allows this appeal and does not require Brighton to disclose any further information.

The Background

2. Brighton boasts a number of important visitor attractions which generate significant revenue and employment. They include the Royal Pavilion, Brighton Dome, Brighton Pier and Sealife Brighton.

3. In 2016 the British Airways i360 (“the i360”) opened to the public. It is a 140m. high observation tower, constructed on the seafront by the West Pier, served by a capsule carrying visitors on a 20 – 30 minute ride round the tower shaft to the top and offering them views along the coast and over the Sussex downs.

4. It cost about £46m., of which £36m. was provided by a Public Works Loan Board(“PWLB”) loan from Brighton to Brighton i – 360 Limited (“the company”), the vehicle formed by British Airways for this development. This is, therefore, a substantial public/ private funded (PPF) venture.

The Request, the Response and the Decision Notice (“the DN”)

5. On 15th. September, 2015. Mr. Keenan emailed the following request to Brighton -

“Brighton i360 rental agreement

Please supply me with a document that sets out the full rental agreement between the council and the operators of the Brighton i360 for the tenancy of the site.
Please supply the complete and un redacted Brightoni360 review carried out by D & J International Consulting”.

6. The freehold of the i360 site was not held by Brighton but by the West Pier Trust so the requested rental document did not exist.

7. On 23rd. October, 2015, Brighton provided a very full and carefully argued response to the second request. It confirmed that it held the D & J International Consulting report. ("the report"). Parts 1 – 5 were available online at a website reference which Brighton provided. That information was therefore already in the public domain, accessible to the public and thus covered by the exemption provided by s.21 of FOIA.

8. Part 6, headed "Financials" was withheld in reliance on the exemptions provided by FOIA ss.41 and 43, that is that the information that it contained was commercially sensitive and that disclosure would prejudice commercial interests, that it was provided to Brighton in confidence and disclosure would be an actionable breach of confidence and that, as to both exemptions, the public interest in disclosure was outweighed by the public interest in maintaining confidentiality. The response explained the background to the submission of the report, namely as part of the application to Brighton for funding, setting out a detailed commercial and financial case for a loan and providing a complete account of the company's business.

9. Following a requested internal review, Brighton wrote to Mr. Keenan on 24th. December, 2015 indicating that it maintained its refusal for the reasons that it had given. Mr. Keenan complained to the ICO.

The Decision Notice ("the DN")

10. The ICO decided that Brighton had failed to show that either exemption was engaged. As to s.41, he concluded that the withheld information had been provided by a third party, namely the company, in confidence and that it was confidential in nature, consisting of financial data and predictions. Similarly, as to s.43(2), he found that the information

related to a commercial interest or interests. However, as to both exemptions, he decided that disclosure would not prejudice nor be likely to prejudice either the interests of the company or those of Brighton. That being so, disclosure would not constitute an actionable breach of confidence for the purposes of s.41.

11. In reaching that conclusion, the ICO asserted that Brighton had failed to identify the supposed competitors who might gain an unfair advantage by obtaining access to the financial data in Part 6 or the prejudice to Brighton i360's or Brighton's commercial interests which would be likely to result from such access. He saw no significant distinction between the disclosed data in Parts 1 – 5 of the report and the disputed information in part 6. The withheld figures in part 6 were insufficiently detailed to assist a competitor. Brighton had not shown how disclosure would benefit or be exploited by a rival attraction.

12. Given those findings, he did not consider the question of the balance of public interests.

<u>The appeal, the evidence adduced and the arguments submitted</u>

13. Brighton appealed. Its grounds of appeal identified three types of prejudice which would or would be likely to prejudice the company's commercial interests.
    (i) The report contained information on pricing, projections of customer numbers, profits, staffing requirements and overhead costs, disclosure of which would offer competitors an unfair advantage and prejudice the company's interests;
    (ii) Disclosure of such projections as to sponsorship and concession revenue and supplier and third party costs would undermine the company's negotiating position in future dealings with providers of such services;
    (iii) Disclosure of the work of D & J Consulting ("D & J") would prejudice the company's ability to obtain consultants in future.

14. It further submitted that the i360 would be in competition with the other visitor attractions available in Brighton and further afield. Visitors had to make choices based on the time that they had and what they could afford. Disclosure of the disputed information would allow competitors to adjust their ticket, merchandise and catering prices to compete more successfully with the i360. It would set benchmark prices across the range of the company's costs bases.

15. It was likely that Brighton's commercial interests would be prejudiced by disclosure because a weakening of the company's competitive position could well affect its ability to maintain repayments of the PWLB loan. Moreover, D & J would lose a potential benefit of its work by the free dissemination of Part 6 to the world at large.

16. All these arguments applied equally to the engagement of s.41

17. As to s.43(2), the public interest favoured the preservation of a competitive market in regional attractions, free of distortions resulting from the unilateral exploitation of sensitive commercial information. A commercial failure of the i360 could put public funds at risk.

18. In his Response the ICO stood by the reasoning of the DN. He submitted that Brighton's case on prejudice was too general and lacked the specific arguments necessary to make good such a claim. He invited further argument or evidence on the issue,

19. Mr. Keenan responded concisely. He did not address the issue as to whether either exemption was engaged but concentrated on clear points relating to the public interest. He pointed out that disclosure would enhance public understanding of Brighton's decision to make a very large loan from public funds and would strengthen accountability. It would dispel any suspicion of wrongdoing and improve the quality of future advice given to local authorities.

20. In its Reply dated 2nd. August, 2016, Brighton took up the ICO's invitation to provide more detail. In summary, it identified the competitors referred to at paragraph 1 above. It acknowledged that its admission price was now public knowledge, hence no longer information to which either exemption applied. It then proceeded to compare each of the significant figures redacted from the published report with any corresponding information published by those competitors. Its conclusion, which was open to challenge or verification by either Respondent, was that no comparable data respecting any such rival was publicly available, whether in published accounts or elsewhere The critical categories as to which these comparisons were made were -

- Admission yield;
- Catering and bar income;
- Minimum rent;
- Merchandise income;
- Other revenue sources, including commission and sponsorships;
- Cost of goods purchased for sale at i360;
- Planned marketing expenditure;
- Operating costs – (The company hired an operating company to run and maintain i360), rent, rates, utility costs, company costs, IT, financing;
- A 10 – year projection as to all the data in the remainder of Part 6.

It submitted that this was not generic information but "a detailed precis" of the business plan which the company intended to follow for the following ten years.

21. These summarised comparisons were supported by extensive documentary evidence exhibited to a witness statement submitted by Craig McCarthy, a senior associate in the firm of solicitors retained by

Brighton. That evidence demonstrated that, as expected, local competitors published the very general financial information required for the annual return and publicity directed at potential customers setting out admission costs and the availability of discounts and concessions in specified cases.

22. Before final submissions, Brighton released Part 6 save as to the critical figures, which were from the outset the real bone of contention. Hence the Tribunal's task focused, not on the structure of Part 6 "Financials", but on the specific numbers projected.

23. Final written submissions followed an agreement for the appeal to be determined on the documentary evidence and arguments.

24. Mr. Keenan repeated with some elaboration his earlier submissions as to openness and transparency. He argued that the need for accountability was particularly acute in the context of private initiatives involving public funds. He asserted that Brighton had failed to demonstrate prejudice such as to engage either exemption. He added a reference to the i360 planning application in 2006 in which the applicant claimed –

"The i360 would be an entirely new attraction which would not compete with existing tourist attractions in the city. . ."

25. The ICO maintained her resistance to the appeal. She denied that requiring greater financial transparency from the company than was provided by its competitors inevitably resulted in prejudice to its commercial interests. She now accepted *"that there may be a plausible causal link between the disclosure of the information in question and the argued prejudice"* However, she observed that Brighton had not demonstrated by suitable witness evidence that competitors were likely to alter their various prices as a result or that visitors would be deterred from patronising the i360, if they did. The same point was made as to

disclosure of information regarding concessions and potential sponsorship.

26. Brighton replied with a detailed submission which covered the range of competitors which could benefit from disclosure, what, it submitted, was the very specific nature of the disputed information, the prejudice in relation to each of the company's commercial interests identified at § 19 by bullet points and the effects of asymmetrical disclosure as between the company and its competitors. The disputed information was "highly sensitive" and *"would or would be likely to be used by competitors to adopt or undercut the company's pricing strategy".*

It described the argument that it should have adduced evidence of the competitors' probable use of the information or the public's likely reaction to price reductions by those competitors as unrealistic. It further dealt with the asserted effects upon Brighton's and other third party commercial interests, such as those of D & J, of the company's equity partners and the secondary funders. It provided a comprehensive review of the relevant statutory provisions and referred to a number of authorities and reported decisions.

27. The Tribunal takes account of all the written submissions but does not propose to repeat them in their entirety.

<u>The Tribunal's conclusions</u>

28. The relevant statutory provisions are straightforward and their application is neither disputed nor difficult in this appeal. The critical issues are questions of fact.

29. Section 43(2) provides a qualified exemption so that, if it is engaged, the balance of public interest must be considered. It reads -–

"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)".

Here, it is not disputed that the interests identified by Brighton, whether those of the company or its own or those of other third parties, are commercial interests. The first issue, therefore, is whether disclosure would or would be likely to prejudice them.
"Likely" means *"a very significant and weighty chance of prejudice" (R (Lord) v Secretary of State for the Home Department[2003[EWHC 2073 (Admin.) at §100).* The prejudice to be proved is "*real, actual or of substance"* (see *DWP v ICO [2014 UKUT 0334(AAC) at §26*).

30. Section 41 provides –

"(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".

Section 1(a) is plainly satisfied. The tests for determining whether a breach of confidence is actionable were set out in *Coco v A.N. Clark (Engineers) Ltd. [1969] RPC 41 at §45.* Put shortly, they require (i) that the information should be of a confidential nature;(ii) that it should have been imparted in circumstances importing an obligation of confidence and (iii) that there was an unauthorised use of the information to the detriment of the party communicating it. The Respondents accepted, at least implicitly, that both (i) and (ii) were satisfied. The issue was (iii). Furthermore, although s.41, if engaged, provides an absolute exemption, the distinction is of little practical significance since the breach of confidence is not actionable if the defendant shows that it was in the public interest. It may well be that this involves a reversal of the burden of proof applicable to qualified exemptions under FOIA but that will often

be of little consequence, as we find to be the case here. In this appeal, as in many others, either both exemptions will apply, or neither. So, whilst the Tribunal's findings relate expressly to s.43(2), they are readily read across to s.41(1).

31. We are in no doubt that the ICO's continuing rejection of Brighton's reliance on s.43(2) was wrong. Whatever shortcomings there may have been in the presentation of its case for the purposes of the DN (and, having regard to its response to the ICO dated 24th. March, 2016 (OB 111 – 114), we are far from convinced that it was inadequately presented), its further focused and specific submissions, coupled with the documentary evidence produced by its solicitors, emphatically demonstrated the commercial prejudice that the company was very likely to suffer from disclosure.

32. One of the Tribunal members, armed with long experience of commercial competition at a very high level, put the matter thus after reading the papers –

> *"The information will allow any competitors to gain a substantial insight into the business plan of i360. Hence they would be able to work out in the future how i360 could or would respond to changes in competitive parameters, e.g. price, offering, etc.. This is the danger to i360 of disclosure of the requested information."*

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33. We are confident that such competitors would, perfectly understandably, exploit such insights to the competitive detriment of the company by adjusting pricing on a wide range of goods and services, including weddings, conferences and similar events. They would be able to check their own costs bases against those projected for i360. They could pre-empt planned i360 initiatives and use the sensitive advice from D & J for which Brighton had paid. Given the ten – year projection, these would be continuing advantages.

34. It is entirely understandable that the company should treat Parts 1 – 5 of the report quite differently from Part 6 which contains the critical financial information. Equally, it is the specific figures which are sensitive, not the structure of the section. So we see nothing inconsistent in the company's decisions on what to disclose and what to withhold.

35. Asymmetrical disclosure of such information may not automatically result in a competitive disadvantage producing commercial damage but in a highly competitive price – sensitive market, such as tourism, it is highly likely that it will. We find the ICO's fairly perfunctory dismissal of this important point (ICO Further Submissions §15) surprising. Just how asymmetrical the available financial information as to the different attractions would be, if disclosure were required, is vividly demonstrated by the documentary evidence produced by Mr. McCarthy.

36. We agree with Brighton that the criticism of the lack of direct evidence as to how competitors would react to the provision of this data (Further Submissions §16) is quite unrealistic. It is hard to see who but those competitors could give such evidence and scarcely likely that they would be cooperative, if asked to do so. It is simply a matter of commercial reality that a company will exploit any valuable information as to a competitor's business plan that comes lawfully into its hands. It owes a duty to its shareholders to do so. The inference that such exploitation will follow is readily drawn by the Tribunal or by anybody else with any experience of commercial life.

37. Similarly, the suggestion that evidence as to the likely public reaction to price – cutting by i360's competitors required direct evidence (Further Submissions §17) is misconceived. That price will frequently influence purchasing behaviour is a fact of life almost universally recognised. It is all the more obvious in the post - recession era of largely stagnant wages and salaries (in real terms) and in relation to attractions charging relatively high unit prices from the point of view of the average family. In

this case the local competition is clearly identified and we do not think it necessary to look further afield for other beneficiaries of any disclosure, although they may well exist.

38. We therefore find that disclosure would almost certainly prejudice the company's commercial interests. For the purpose of s.43(2) that amounts to a finding that disclosure would be likely to prejudice the company's interests, although, when we consider the public interest, it is at the top of the range of degrees of likelihood.

39. That suffices to engage s.43(2) in relation to the company's interests and the s.41(1) exemption also, subject to the question of the balance of public interests.

40. We consider the threat to Brighton's commercial interests to be substantial but further from certain than in the company's case. The exemptions are therefore engaged in this context also although, were these the only commercial interests involved, the public interest in maintaining the s.43(2) exemption would be measurably weaker.

41. Given these findings, we shall not further investigate the issue of prejudice to other third parties. If the public interest requires disclosure despite the effects on the company and on Brighton, it is inconceivable that prejudice to the interest of other parties could alter the position.

42. The ICO 's stance did not involve an assessment of public interests but Mr. Keenan concentrated on this element of the request. We acknowledge the force of the points that he makes with attractive style and economy.

43. There is always a significant public interest in transparency, especially where the expenditure or lending of large sums of public funds is involved.

44. Public/private financing of projects is a sensitive political issue on which strong opinions are widely held. This is a large – scale venture on a prominent site and local council tax payers, indeed all local residents, have a considerable stake in its success.

45. The desire for public access to the financial planning of such a project is therefore entirely legitimate.

46. Whether the informed observer without access to the disputed information would treat this refusal to disclose as suspicious is far from clear. If there were indeed evidence suggesting wrongdoing in relation to this project, that would vastly strengthen the public interest in disclosure of the financial details of the business plan. There is none, however.

47. In assessing the public interest in maintaining confidentiality, it is necessary first to consider the value to the public, as distinct from commercial competitors, of what has been disclosed. The amount of the PWLB loan and the capital cost of the i360 development are known to the public. Parts 1 – 5 of the report evidently reveal its nature and scale as well as the type and extent of employment involved and the ancillary services and facilities that it offers. Part 6, as redacted, identifies expected revenue streams and costs and enables the reader to understand what factors underpin the case for funding and indicate that a respected consultant persuaded Brighton that this was a development that justified a large loan. That is significant, albeit not comprehensive, information for the purpose of assessing the wisdom of lending public money.

48. When communicated to a public authority, sensitive commercial information, like information of the kinds covered by ss. 41 and 42 (legally privileged information), is generally communicated in the legitimate expectation that it will remain confidential. Here, D & J's requirement for confidentiality on the part of the company was

expressly included in the General and Limiting Conditions attached to the report (OB 125). The company, in turn, provided the report to Brighton in confidence in support of its application for a loan. (Letter of 18th. March, 2016 from British Airways to Brighton OB 119). Respect for that confidence is, in itself, a significant factor supporting the public interest in maintaining these exemptions, albeit all such confidential information is imparted in the knowledge that its disclosure may be ordered as a result of a FOIA request. There is a strong public interest in fostering confidence within the business community that commercially sensitive information will be exposed only in compelling circumstances. Without such confidence, commercial activity may be seriously impeded. This is a general principle corresponding in some degree to the Tribunal's concern for the preservation of legal professional privilege. It is based, not so much on the class of information, as on the trust with which it is communicated and a proper public aversion to a breach of that trust, save where plainly necessary.

49. Here, there are are, however, powerful public interests specific to the facts outlined above. We have found that the company would very probably suffer significant prejudice to its commercial interests over many years, if the figures were publicised. It may be that i360 would fail as a long – term project with serious financial consequences, not only for the company but for Brighton itself. Competition among public attractions in the Brighton area and possibly more distant venues would be seriously distorted to the prejudice of the general public. Requiring one but not others of a number of competing concerns to disclose the financial details of its business plan offends many people's concept of fairness and there is a strong public interest in preserving fair and equal treatment of business competitors. This is a recurring problem in s.43(2) cases.

50. In summary, the Tribunal acknowledges the significant public interest in full disclosure and unqualified transparency in relation to this important development. It is, however, clearly outweighed by

the interests in preserving confidence, in treating competing concerns equally and fairly and, most importantly here, in protecting the company from grave financial disadvantage through disclosure of critical information to its rivals and protecting the integrity of the large loan from public funds.

51. For these reasons we allow this appeal.

52. This is a unanimous decision.

Signed

David Farrer Q.C.

Judge of the First-Tier tribunal

Date: 2nd. March, 2017