



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

Appeal Reference: EA/2018/0133

Heard at Basingstoke Court, on 26 November 2019

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Alison Lowton
Mr Nigel Watson

Between

Martin Paver

Appellant

And

The Information Commissioner

Respondent

The Appellant represented himself.

The Information Commissioner was not represented.

DECISION AND REASONS

BACKGROUND AND CONTEXT

1. On 3 July 2018, the Appellant wrote to the North East Procurement Organisation (NEPO) and requested the following information:-

I am conducting some research into contract awards on major construction projects in the public sector and the associated level of transparency. Although the construction frameworks are published on contracts finder, I am struggling to identify which projects were awarded through the framework and who they were awarded to. Crown Commercial Services have advised me that technically any contract should be published on contracts finder.

In view of this, I would like to submit an FOI request for the following information please, relating to the NEPO207 Building Construction Works (2018/S 068-150309) only:

1. Would you be able to provide me with a copy of the assessment scores for Lot 5 within the framework please. I have attached a copy of a response from another authority and it would be helpful if you could provide information in the same structure please.
 2. Could you advise me of the details of each contract awarded via Lot 5 please. Could you please detail:
 - a. The title of the contract.
 - b. A brief summary of the scope of the contract.
 - c. Planned and actual contract value (highlighting any variance between awarded value and final value).
 - d. Planned and actual dates (highlighting any schedule variance).
 - e. Who is the client for the work and the FOI email address for any follow up.
2. NEPO responded to the Appellant's request on 3 August 2018, providing him with documents relating to the NEPO207 Building Construction Works and withholding other elements, citing the exemption in s43(2) FOIA.

3. There then followed two reviews by NEPO which led to disclosure of further information to the Appellant on 18 September 2018.
4. By that time the Appellant had already contacted the Commissioner on 13 August 2018 to complain about the way his request for information had been handled.
5. On 25 January 2019, NEPO provided the Commissioner with an unredacted and redacted version of an Excel spreadsheet which is the evaluation matrix used by NEPO for scoring and comparing tenders made in respect of Lot 5 of NEPO207 Building Construction Works Framework.
6. The Commissioner's decision notice of 2 April 2019 explains that:-

13. Following the Commissioner's initial enquiry in this matter, NEPO changed its position in respect of the information which is subject to its application of section 43(2). That information is described in the three bullet points at paragraph 16 below.

16. The Commissioner examined the information which NEPO supplied to her and subsequently spoke with NEPO to discuss the information it has withheld from complainant. This discussion led to NEPO amending its redacted spreadsheet whereby it now proposed to withhold the following information:

- The contents of cells D2, F2, G2, H2, I2, J2 and K2. The redacted information from these cells is the name of each company which submitted a bid. Redacting this information prevents a company from being associated with the formative and summative scores ascribed by NEPO.
- Cell E2 and the column below that cell is greyed-out. NEPO has explained that 'bidder 2' had passed the first stage of the tender process and was invited to participate within the second stage of the invitation to tender. Bidder 2 chose to opt out of that tender opportunity and did not submit an Invitation to Tender response. The grey-out column is included in the matrix but no scoring was allocated. As such the greyed-out column does not contain information which has been redacted; it is therefore not subject to the Commissioner's consideration of NEPO's application of

section 43.

- In cell Q30, a reference has been redacted from the commentary relating to supply chain events. In NEPO's opinion, the redacted reference would identify a particular bidder.

7. As the Commissioner explains, the information listed in the bullet points comprises the information which NEPO is withholding from the Appellant in reliance on section 43(2) FOIA. In relation to the first bullet point, the withheld information means that the Appellant cannot link up particular bidders with specific disclosed scoring information.
8. As explained below, the decision notice upholds the reliance on s43(2) FOIA by NEPO in relation to the bidders' names as they correlate to particular scores. The decision notice does not directly address the information described as withheld in the second and third bullet points in paragraph 16 of the decision notice.
9. However, the Appellant's appeal dated 13 April 2019, concentrates on the information in the first bullet point and does not address the other withheld information. His appeal document states that what he wants to achieve from the appeal is 'to release the correlation between the bid scores and the supplier names.... The scores are in the public domain. The bidders are in the public domain. All I am asking for is the correlation between the 2'.
10. The Tribunal will deal with the appeal on the basis that that the Appellant is only appealing against the withholding the information described in the first bullet point in paragraph 16 of the decision notice.

LEGAL FRAMEWORK

11. As stated above, the relevant exemption relied on by NEPO is in section

43(2) FOIA which, materially, reads as follows:-

43.— Commercial interests.

(1) ...

(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).

12. In relation to the test for prejudice in s43(2) FOIA, in *Hogan v Information Commissioner* (EA/2005/0026, 17 October 2006) it was stated as follows:-

28. The application of the 'prejudice' test should be considered as involving a number of steps.

29 First, there is a need to identify the applicable interest(s) within the relevant exemption...

30 Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a *de minimis* threshold which must be met. ..

31 When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use.

32...

33 ...

34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there

must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), where a comparable approach was taken to the construction of similar words in Data Protection Act 1998. Mr Justice Munby stated that 'likely': "*connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.*"

35 On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests (considered later in this decision). In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.

13. S43(2) FOIA is a qualified exemption and, even if it is applicable, the public interest in disclosure or withholding the information must also be considered.

THE DECISION NOTICE

14. The Commissioner limits her consideration to application of section 43 FOIA to NEPO's own commercial interests. This was despite the fact that NEPO had claimed that the commercial interests of its 'partner Councils' (there are 11 listed) and those organisations which submitted bids (there are six listed) would, or would likely, be prejudiced if the withheld information was to be disclosed. This restriction was on the basis that 'NEPO has not contacted any third party in relation to the [Appellant's] request'. There does not appear to be any objection to this approach from NEPO, either reported in the decision notice, or in response to this appeal.

15. The following paragraphs from paragraph 22 go on to list NEPO's points in favour for non-disclosure, which can be summarised as follows:-

- (a) All but one of the bidders consider 'aspects of their tender to be confidential and commercially sensitive for timescales ranging between two and twelve years'. NEPO says it has feedback from member authorities and tenderers expressing concern about disclosure, including the possibility that they might be dissuaded from engaging in future procurement exercises.
- (b) NEPO and its member authorities also consider the information requested to be commercially sensitive, and refers to its own guidance on the issue where commercial interests are defined as those that relate to a person's ability to participate competitively in a commercial activity.
- (c) The withheld scores constitute NEPO's evaluation of each supplier's participation in the tendering process
- (d) Disclosing the scores of each tenderer would undermine the tenderers' ability to compete successfully for other contracts and would undermine NEPO's ability, and the ability of its partner authorities, to secure quality services in the future or in respect of on-going procurement exercises.
- (e) The information sought relates to a Framework Agreement which may then require mini competitions to be carried out by NEPO Member Authorities. These assess competition over the duration of the agreement (March 2018- March 2024) (and so could be commenced at any time in that period) and will likely involve the evaluation of the same suppliers identified in the scoring matrix.

NEPO asserts that releasing this information would be likely to prejudice any future mini competitions to be carried out by NEPO Member authorities between the suppliers under the Framework.

- (f) There are likely to be further procurement processes for the civil engineering and infrastructure works in 2019-2020. NEPO is concerned about current and potential future suppliers being able to gain an unfair advantage by amending or preparing their future bids based on information they would not ordinarily be privy to, namely, the feedback information provided to other suppliers.
- (g) Disclosure would undermine NEPO's relationships with the suppliers identified in the matrix, and other suppliers who participated in the same process, and who may participate in future tenders with NEPO.
- (h) NEPO is concerned both about the possibility of identifying the strengths and weaknesses of each supplier's submission 'detailed within their overall tendering position', and of third parties using the information to 'draw potentially flawed conclusions without fully understanding NEPO's governance procedures'.
- (i) The information it is withholding from the complainant would be likely to allow competitors to assess their overall positioning and gain a competitive advantage for any future tenders which NEPO might undertake.

16. On the issue as to whether the exemption in s43(2) FOIA is engaged, the totality of the Commissioner's conclusions is as follows:-

41. The Commissioner has considered NEPO's representations in respect of its application of section 43(2). Additionally, she has considered the nature the information that NEPO is

withholding from the complainant and she is satisfied that, taken as a whole the withheld information is commercially sensitive and engages the exemption NEPO has applied.

17. In relation to the public interest test the Commissioner makes general points about transparency and accountability of the procurement process being in the public interest, and also knowing whether NEPO has carried out full and fair evaluations and is achieving best value. The Commissioner also summarises points that the Appellant has made to the Commissioner (at paragraph 46 of the decision notice). These are worth repeating in full as they also provide part of the basis for the Appellant's appeal to be considered by us:-

- Disclosure would enable suppliers to understand the variance in how different authorities approach frameworks, which may favour specific suppliers at the expense of SMEs. This is because all frameworks are very different.
- Disclosure would enable an analysis to be made of the extent to which experience is favoured over technical ability, which the complainant asserts precludes new entrants from joining the framework.
- Disclosure would enable the public to identify trends across frameworks which may favour specific organisations at the expense of others.
- Construction companies work on very small margins, and in the current climate some will go to the wall if they bid on wrong contracts. As the cost of bidding is expensive and the probability of a win is very low, the complainant argues that suppliers have a right to have access to NEPO's insights.
- Analysis of the withheld information would enable government to improve consistency across framework contracts and enable the 'playing field' to be levelled for new entrants.
- The complainant asserts that some authorities share all feedback scores with other suppliers, some only share the scores of the winning bidder and some only provide the bidders scores. He argues that this creates a lack of policy which implies there is no policy obstacle to releasing the withheld information.

- The complainant points to ‘some data on lessons learned’ from a different request for information which he had published. He says that his data received approximately 40,000 views and therefore demonstrates an unequivocal public interest in this sort of information.
18. The Commissioner asked for NEPO’s views on these points. Essentially, NEPO denied that release of the information would achieve the aims identified by the Appellant and/or claimed that sufficient evidence had already been disclosed to meet those aims. There is also information in the public domain which provides insight for potential bidders, which NEPO has contributed to, and which is shared with the Local Government Association to help steer Local Authorities and central government policies where there is potential for this. The information already disclosed illustrates NEPO’s approach to evaluation under the Framework, and the positioning of bidders within that matrix would not further this public interest. There is no legal requirement that requires NEPO to share additional information. In NEPO’s view, the number of views an article receives to be a measure of how relevant it is to the public interest.
19. The Commissioner notes that NEPO says that it has a detailed feedback process for tenderers ‘by sharing details which confirm all of the suppliers who have been successfully appointed to the Framework, whether the tenderer is successful or not’, and where tenderers can request further information from NEPO.
20. The Commissioner concludes by finding that the public interest factors in favour of disclosure, as set out above, have been at least partially met by the information already disclosed by NEPO. In relation to the Appellant’s additional submissions, the Commissioner concludes that:-

52... she is persuaded that greatest weight must be given to the potential harm that would be done to the commercial interests of

NEPO and its Member Authorities should the withheld information be disclosed. The Commissioner accepts that disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises.

21. Thus, the Appellant was entitled to disclosure of the spreadsheet provided by NEPO with the information redacted as detailed in paragraph 16 of the decision notice (as set out above).

THE APPEAL

22. The Appellant filed an appeal on 13 April 2019. The grounds of appeal essentially disputed the Commissioner's conclusion that s43(2) FOIA was engaged, and the public interest met by non-disclosure, and re-iterated the points initially made to the Commissioner, as listed in the decision notice.
23. The Appellant disputed that disclosure would provide any bidders with a competitive advantage as everyone would have the same information. The feedback currently provided to bidders does not include the requested information. The Appellant is not seeking details of the bids or the details of the feedback given. The Appellant noted that NEPO had not been asked to provide evidence that potential tenderers might be dissuaded from bidding in future, and that NEPO had said that it had not contacted any third parties. Disclosure would assist statistical analysis of the tender process and the comparison of construction frameworks. The Appellant complained that the decision notice was one-sided in favour of NEPO, and referred to a decision notice in another, similar, case (in which he was the complainant) where the Commissioner had reached a notably different conclusion on disclosure.
24. That case is decision is decision notice FS50771669 dated 12 March 2019 (and so pre-dates the decision notice in this case), and concerned information about a procurement framework held by the Cabinet Office.

In effect, the Commissioner decided that the Cabinet Office should disclose the kind of information sought in this case which would link feedback scores with successful bidders for a place on the framework in question. The Commissioner had decided that the s43(2) FOIA exemption was engaged but that the public interest favoured disclosure, albeit 'by a narrow margin'. The Commissioner noted:-

'49...that where commercial entities bid for access to public contracts, they must expect greater openness about their business model and their operations generally. The information is still at a high level rather than especially detailed. The damage to [the procurer's] reputation as a confidential arbiter of commercial information would not be severely prejudiced by disclosure'.

25. In his written submissions, the Appellant made it clear that one of his aims was to achieve consistency between Commissioner decisions. We understand that the Cabinet Office has appealed this decision notice to the Tribunal.
26. The Commissioner's Response re-iterated points already made in the decision notice. The Commissioner pointed out that different conclusions could be reached on similar cases, as each case had to be considered on its merits and facts: there may be different public interest factors to put in the balance, depending on the particular facts of a case. Comparing the Cabinet Office case with the present case, the Commissioner pointed out (a) that NEPO had identified further mini-competitions and future procurement processes; and (b) NEPO had confirmed that most of the suppliers had said as part of the procurement process that they considered information about their bids to be commercially sensitive.

THE HEARING

27. The Appellant attended the hearing in person, but the Commissioner did not attend and was not represented. The Appellant explained to us why

he thought it was important and in the public interest for the information to be disclosed. He emphasised that it was important both for tendering companies and the general public that the procurement process is made more efficient, and that the disclosure of information such as that sought in this case enabled a fuller picture to be drawn, which was to the advantage of everyone involved in the process. Although disclosing information could be described as a 'hassle' for organisations such as NEPO as it would lead to closer analysis of their processes, this was not the same as being prejudicial to commercial interests, and would in fact assist in achieving best value from the procurement process.

28. We asked the Appellant to comment on the reasons set out in the decision notice which support NEPO's case that disclosure will be likely to prejudice their commercial interests. The Appellant's central point was that, while details of a bid were undoubtedly confidential and should not be disclosed, the disclosure of information allowing the correlation between bidders and scores was beneficial for everyone, including NEPO.

DISCUSSION AND DECISION

Is the exemption in s43(2) FOIA engaged?

29. For the purposes of the tests in *Hogan*, in essence what we have to decide is whether the disclosure of the information requested gives rise to a real and significant risk (as defined in *Hogan* and other cases) of prejudice to the commercial interests of NEPO.
30. For the reasons set out below, we are unable to see how the 'prejudice' test in s43(2) FOIA will be met if disclosure of the information is made to the Appellant.

31. As mentioned above, although the decision notice sets out a number of possible prejudices as advanced by NEPO, and although the Commissioner says she has considered them and says she is satisfied that the s43(2) FOIA exemption is engaged, there is no analysis of the arguments advanced by NEPO, or the assertion that the points made do amount to a real and significant risk to the commercial interests of NEPO.

32. We make the following specific points about the arguments advanced by NEPO:-

(a) Although NEPO has argued that bidders consider that 'aspects of their tender' are confidential and commercially sensitive, the information sought is not part of the tender, and there is no evidence that, even if it was, this is the aspect that bidders consider to be commercially sensitive or confidential.

(b) Although the decision notice states at paragraph 21 that 'NEPO has not contacted any third party in relation to the complainant's request', NEPO also claims it has feedback from tenderers expressing concern about disclosure, 'including the possibility that they might be dissuaded from engaging in future procurement exercises'. No further evidence has been presented about this, and it is not explained how the information was obtained if not by contact with third parties. No explanation is given as to why disclosure would cause tenderers to be dissuaded from engaging in further procurement exercises.

(c) Likewise, there is no analysis of NEPO's assertion that disclosing the scores of each tenderer would undermine both a tenderer's ability to compete successfully for other contracts, and NEPO's ability to secure quality services. There seems to us to be no particular reason

why this should be the outcome if all parties have access to this information.

- (d) This extends to mini competitions within the current framework. It has not been explained why or how correlation of the scores would prejudice future mini competitions, where there may be a range of factors to be considered in any event.
- (e) It has not been explained how or why disclosure of the correlation of the scores will provide an unfair advantage to current or future suppliers in future procurement processes, or why disclosure would undermine NEPO's relationships with suppliers. Again, what would be the advantage if everyone has the same information?
- (f) NEPO is concerned about third parties using the information to 'draw potentially flawed conclusions without fully understanding NEPO's governance procedures', but has provided no information to the Commissioner, it seems to us, to allow the Commissioner to consider what these flawed conclusions might be and how they would affect NEPO's commercial interests.

33. Thus, we are faced with a series of assertions from NEPO that there are certain risk consequences if the information sought is disclosed, but without an evidential basis for establishing the likelihood that these consequences will come to pass, if at all, and no explanation as to why they should. In that situation we find that the evidence falls a long way short of establishing that there is a real and significant risk of prejudice to the commercial interests of the Appellant, and we find that it has not been shown that the exemption in s43(2) FOIA is engaged.

Public interest

34. In the light of those findings we do not need to go on to consider the application of the public interest test. However, for completeness, if we had concluded that there was a real and significant risk of prejudice for the purposes of s43(2) FOIA we would have approached the public interest test as follows.
35. In relation to the previous Commissioner's decision, we accept the Commissioner's point that even if cases are similar, then a different conclusion can be reached by the Commissioner when assessing the public interest on a particular set of facts. The Appellant wants to achieve a consistent approach to whether this sort of information should be disclosed or not. That is a laudable aim but it is unlikely to be possible. It is noteworthy that the Commissioner in the Cabinet Office case decided only by a 'fine margin' that disclosure was in the public interest, which means that it would not have taken much more in the balance against disclosure for a different conclusion to have been reached,
36. That said, it does not seem to us that the two factors mentioned by the Commissioner in her Response (the existence of mini competitions and further procurement processes, and the fact that suppliers had said that their bids contained confidential information), are convincing factors for reaching a different conclusion in the current case.
37. Thus, it is clear that in the Cabinet Office case points were made to the Commissioner about potential problems caused by disclosure within the structure and life of the framework and also in relation to new contractual opportunities (paragraphs 18-22 of the decision notice). And in relation to confidential information, 'maintaining the commercial confidences of potential suppliers' is specifically mentioned in paragraph 45.

38. This does not mean that a different conclusion cannot be reached on the public interest in this case, but the reasons put forward for doing so by the Commissioner do not seem to us to be good reasons.
39. We agree with the general points made by the Commissioner about the public interest in transparency and accountability of the procurement process being in the public interest, and also knowing whether NEPO has carried out full and fair evaluations and is achieving best value. But it also seems to us that some weight should be given to the wider picture about which the Appellant is interested. In general terms it seems to us to be right that disclosure of the information sought will enable all those involved in the procurement process to proceed on a more informed basis in future in relation to both mini-competitions within the current framework and in future contracting processes, and that this is a public interest factor in favour of disclosure.
40. If the information the Appellant seeks is available from many procuring organisations (of which NEPO is one), then more detailed analysis and research can be done on the effectiveness and efficiency of procurement processes nationwide which is potentially in the interest of everybody. We are aware that there may be countervailing views on the benefits or efficacy of such analysis and research, but they have not been expressed strongly in this case.
41. Even if there is a real and significant risk to the commercial interests of NEPO it does not seem to us that this would be of the scale asserted by NEPO. We do not agree with the Commissioner (at paragraph 52 of the decision notice) that 'disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises' and NEPO did not produce evidence to support this assertion. The requested information is relatively high level and does not disclose operational or commercial detail, which the Appellant accepts should not

be disclosed. Neither the Commissioner nor NEPO have explained why disclosure of the information will not, in fact, benefit similar and future procurement exercises, as additional information will be available to all bidders.

42. Our decision, therefore, is that the public interest is firmly in favour of disclosure in this case.

CONCLUSION

43. For all these reasons, this appeal is allowed.

MINORITY DECISION

44. This was a decision by a majority. The Tribunal member in the minority would have dismissed the appeal.
45. This was on the basis that the Commissioner was justified in accepting the NEPO arguments and concluding that disclosure of the detailed information by company name would erode the competitive advantage in similar and future procurement exercises. The information was provided to NEPO on the basis that it was commercially sensitive and would therefore only be put in the public domain in certain special circumstances. That would apply not only the detailed wording of the submissions made by tenderers, but also how these are interpreted by the scoring system used by NEPO. On that basis the Commissioner was justified in finding that S43(2) FOIA was engaged, essentially for the reasons advanced in the decision notice.
46. In relation to the public interest test, the minority member of the Tribunal agreed with the Commissioner who had accepted in paragraph 52 that

‘disclosure of the withheld information would erode the competitive advantage in similar and future procurement exercises’. The Commissioner’s reasons set out in paragraph 52 are as expected bearing in mind the predictable response from NEPO who see the whole point of their exercise as collating and evaluating information, some of which is commercially sensitive, to produce data for their members.

47. Disclosure of the scores without the name of the individual companies would place considerable detailed information in the public domain and permit a high level of transparency without breaching the confidentiality assurances. In releasing the detailed scores, but without the link to individual companies, NEPO has moved to the correct balance and it is not in the public interest to take the step of ordering disclosure of company names.

DIRECTIONS

48. The Tribunal directs the disclosure of the spreadsheet provided by NEPO to the Appellant, but with the contents of cells D2, F2, G2, H2, I2, J2 and K2 (the information from these cells is the name of each company which submitted a bid) unredacted.

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 29 November 2019

Promulgation date: 6 December 2019

