



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights  
Decision notice FS50870072**

**Appeal Reference: EA/2020/0135**

**Considered on the papers 14 January 2021**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**SUZANNE COSGRAVE & JOHN RANDALL**

**Between**

**UNIVERSITY HOSPITALS OF DERBY AND BURTON  
NHS FOUNDATION TRUST**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**DECISION ON THE APPEAL, SUBSTITUTED DECISION NOTICE**

The appealed is upheld in part. The Appellant is directed to disclose within 35 days all the information in the lines "Total Income" "Total Cost" and "Gross Profit" from the withheld document "Concert Business Plan and all the information in the line "Total" from the document "Cost by Category Table".

**REASONS**

1. This request arose out of the commercial activities carried out by a company owned by the Appellant University Hospitals of Derby and Burton NHS Foundation Trust ("the Trust"). On 2 July 2019 a freedom of information request was made to the Trust:-

*'I write to request information concerning D-Hive, a subsidiary of UHDB, which meets the definition of a "publicly-owned company" as per the Information Commissioner's Office guidelines.*

*I would like to request the following information:*

- 1. The business plan proposed to UHDB when D-Hive was conceived, in its current form, three years ago.*
- 2. The business plan proposed by D-Hive, and presented to UHDB, regarding the music festival Derby Sound.*
- 3. The costs to D-Hive to date, broken down by category if possible, of organising Derby Sound*
- 4. The losses incurred by D-Hive as a result of the cancellation of Derby Sound*
- 5. Any market research undertaken by D-Hive in connection with Derby Sound'*

2. The Trust initially did not accept that D-Hive was subject to FOIA, but disclosed some redacted information in response to 1, stated that no information was held with respect to 5 and relied on s43(2) of FOIA to withhold information relevant to 2,3 and 4. S43 provides:-

**43 Commercial interests.**

*(1) Information is exempt information if it constitutes a trade secret.*

*(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).*

*(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).*

3. The requester complained to the Respondent Information Commissioner ("the Commissioner") on 30 August 2019 who investigated. She concluded that no information within the scope of part 5 was held. In her decision notice she established that the withheld information was (DN paragraph 30):-

*'Concert 2019 Business Case Costings' (Q2) was the final version and showed the entire forecasted income and costs. The spreadsheet 'Derby Sound Cost by Category' (Q3 and Q4) was 'manufactured out of ledger data to show the costs ultimately incurred... This represented total loss and in the way it was presented, answered 2 of the points.'*

4. The Commissioner accepted that s43(2) FOIA was engaged for third parties. In considering where the balance of public interest lay she considered the arguments of the requester and the Trust:-

**Public interest arguments in favour of disclosure**

*37. The complainant argued that as the information requested relates to Derby Sound, a historical commercial project which has now ended, it is not clear how releasing the information would prejudice the commercial interests of D-Hive or UHDB:*

- *The release of the information would enable the public to better scrutinise the public monies spent*
- *The release of the information would inform the public of the activities carried out on their behalf*

### **Public interest arguments in favour of maintaining the exemption**

*38. The Trust 'concluded that the information would likely be used for an opinion based article that would be negatively slanted towards the failure of this particular project (and its impact on public finances) without reference to the full benefits provided by the Trust and its subsidiaries wider commercial activities. A recent board paper submitted towards the end of 2019 states the total annual benefit to the Trust of its subsidiary network of £2m per annum. It is clearly not acceptable to withhold information based (sic) of not wanting a negative article published but on balance, it was agreed that disclosure was not in the public interest as it would give rise to putting at risk the annual benefit the Trust currently derives.'*

- 5. In evaluating the arguments she noted the interest in transparency, but also the commercial interests of third parties, "companies should not be disadvantaged as a result of doing business with the public sector." She weighed "the benefits of disclosure against the prejudice to the private third- party organisations" and concluded that "the public interest in maintaining the section 43(2) exemption does not outweigh the public interest in disclosure", stating in the Decision Notice (DN44) "It is also clear that the cancelled event ended up as a cost to the Trust. This is significant to the balance of the public interest test and strongly increases the public interest in favour of disclosure.". The Commissioner ordered disclosure of the withheld material.*
- 6. The Trust appealed. It argued that the level of detail and granularity in the Business Case costings was such as "would allow any reader to understand with some specificity the prices planned for – and negotiated – with the venue, the artists and for assorted other associated costs such as marketing and equipment hire Given that the Commissioner, rightly, accepted in the DN the clear evidence that the venue regularly holds similar music events, and it is obvious that the artists booked to appear regularly do so at other similar events, this aspect of the Disputed Information would be both informative to a commercial enterprise and harmful to the third party organisations whose interests the exemption has been applied to protect. The Commissioner failed to distinguish in her consideration of the public interest balance between different aspects of the Disputed Information".*
- 7. Darren Riley, the Director of D-Hive provided evidence explaining the working of the company, its relationship with the Trust and with its commercial partners in the concert. He argued;-*

*"53 Taking all of this into account, I do not understand why the Commissioner feels there is particular value in the wider public as a whole having access to the withheld information, particularly when balanced against the harms disclosure would be likely to cause. For the reasons explained above, I can see it being of interest only to those*

*organisations in competition with the partners we engaged with, or those seeking to organise similar events and having "inside information" about the underlying costs they could expect to incur or be able to negotiate with the partners we worked with."*

8. The Commissioner resisted the appeal. She accepted the arguments with respect to the potential impact of disclosure of specific amounts of money in respect of the various commercial entities engaged in the project, however there was significant public interest in the public knowing what the actual sums involved in the project were. She noted in her Final Submissions of 26 November 2020:-

*"There can be no commercial prejudice arising out of disclosing the losses D-Hive incurred in circumstances where the requestor has no way of knowing how those losses are attributed. There is simply no commercial advantage in knowing that £ x sum was lost in relation to a cancelled music festival, in circumstances where the reader is not informed as to which of the many costs involved in putting together a music festival these sums relate to and in what proportion."*

#### Consideration

9. The two withheld documents within the scope of the request are brief summaries recording the financial information underpinning the decision-making around this project. There is substantial information in the public domain which would enable the various private sector parties involved in the project to be identified. The extent to which a competitor may be able to extract information of commercial value from outline financial data is a matter in respect of which some weight should be given to evidence from a witness with knowledge of the industry concerned. In this case, and on this issue, the Tribunal attaches weight to the witness evidence of Mr. Riley (paragraph 7 above) concerning the value of 'inside information' about underlying costs to competitors seeking to negotiate contracts with the suppliers who are D-Hive's commercial partners. Significant commercial information about them could be extracted from the single sheets of paper. The public interest in disclosure about the project lies in understanding the potential impact of the project on the financial resources available to the Trust, - the income it might have derived and the financial detriment it experienced. These can be isolated from the withheld material with no detriment to the commercial entities involved.

10. The appeal is allowed in part

Signed Hughes  
Judge of the First-tier Tribunal  
Date: 2 June 2021