



NCN: [2022] UKFTT 00451 (GRC)
Case Reference: EA-2021-0040P

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

Heard in GRC Remote Hearing Rooms, Leicester: on the papers

Heard on: 4 July 2022 and 31 October 2022
Decision given on: 1 December 2022

Before

**TRIBUNAL JUDGE ALEXANDRA MARKS CBE
TRIBUNAL MEMBER KATE GRIMLEY-EVANS
TRIBUNAL MEMBER PAUL TAYLOR**

Between

LIVERPOOL CITY COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

ANIMAL WARDENS LIMITED

Second Respondent

Representation:

For the Appellant: Robin Hopkins, Barrister

For the First Respondent: Nicholas Martin, Solicitor

For the Second Respondent: Weightmans LLP

Decision: The appeal is allowed.

Substituted Decision Notice:

To: Liverpool City Council
Information Team
Cunard Building, Water Street, Liverpool L3 1DS

The Tribunal directs pursuant to Decision reference **EA-2021-0229P** of the First Tier Tribunal, General Regulatory Chamber (Information Rights) no further disclosure or other steps are required of the Council

Dated: 29 November 2022

Alexandra Marks CBE
(Recorder sitting as a Judge of the First Tier Tribunal)

REASONS

Background to the appeal

1. Liverpool City Council (the ‘Council’) has a contract with Animal Wardens Limited (‘AWL’) which provides services to the Council and several other public authorities relating to lost and stray dogs.

The request for information

2. On 1 October 2019, (pages 39-41 Open Bundle (‘OB’)), the requestor (‘R’) wrote to the Council to request information as follows:

“Please can you provide with me all the additional documents held by the council in relation to the contract with Animal Wardens Ltd, including, but not limited to, those documents set out above. I consider that each of these documents forms part of the contract with Animal Wardens Ltd, and that this request ought therefore to form part of my request ref: 608714, which has already been referred to the Information Commissioner's Office. It is not clear however whether Liverpool Council considered those documents to be part of the request and refused disclosure, or if the Council did not consider them to be part of the request.”

The response to the request

3. On 28 February 2020, the Council replied. It disclosed some information but withheld other information, citing the exemptions in sections 21, 40(2) and 43(2) of the Freedom of Information Act 2000 (‘FOIA’).

4. Following an internal review sought by R, on 15 July 2020, the Council wrote to R confirming that it was maintaining its position.

Complaint to the Information Commissioner

5. On 15 July 2020, R complained to the Information Commissioner (the ‘Commissioner’) about the Council’s handling of his request.

6. The Commissioner confirmed to R that her investigation would consider whether the Council had correctly withheld information under section 43(2) FOIA. R confirmed that he was happy for information withheld under section 40(2) FOIA to be excluded from the scope of the Commissioner’s investigation.

The Commissioner’s Decision Notice

7. On 5 January 2021, the Commissioner issued Decision Notice IC-46982-X6R1 (p450-458 OB). In summary, the Decision Notice stated that the Council had failed to demonstrate that section 43(2) FOIA is engaged and therefore directed the Council to disclose the withheld information to R, excluding that withheld under section 40(2) FOIA.

Appeal to the Tribunal

8. On 5 February 2021, the Council sent a Notice of Appeal to the Tribunal challenging the Decision Notice.

9. The parties consent to this matter being dealt with on the papers rather than at an oral hearing.
10. The papers available to Panel and the parties are set out in paragraph 19 of this decision.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

11. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

'1 (1) Any person making a request to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if this is the case, to have that information communicated to him.'

12. However, this duty is subject to various exemptions as set out in sections of Part II FOIA. The relevant parts of those sections pertinent to this appeal provide:

'31. Law enforcement

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) the prevention or detection of crime,

...

38. Health and Safety

(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual...

...

41. Information provided in confidence

(1) Information is exempt information if –

(a) It was obtained by the public authority from any other person..., 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...

43. Commercial interests

...

- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests on any person (including the public authority holding it).*

...'

13. As regards the phrase in sections 31(1), 38(1) and 43(2) FOIA, '*would be likely to prejudice*', in *R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin)*, Munby J at [100] considered those words in the context of the s.29(1) exemption of the Data Protection Act 1998 saying 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”. (emphasis added)

14. This approach was endorsed by the Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030)* which set out the following steps to take when considering whether disclosure would be likely to prejudice commercial interests:

- (a) Identify the “*applicable interests*” within the relevant exemption,
- (b) Identify the “*nature of the prejudice*”. This means:
 - (1) Show that the prejudice claimed is “*real, actual or of substance*”;
 - (2) Show that there is a “*causal link*” between the disclosure and the prejudice claimed.
- (c) Decide on the “*likelihood of the occurrence of prejudice*” ([28] – [43]).

15. This approach has since been approved by the Court of Appeal in *DWP v. Information Commissioner [2016] EWCA Civ 758*.

16. In relation to the exemptions set out in sections 31, 38 and 43 FOIA, section 2(3) FOIA provides that these are not absolute exemptions but are ‘qualified’ exemptions. This means that a public authority is permitted to withhold the requested information under those exemptions only if the public interest test is met, namely if (as set out in section 2(2) FOIA):

‘2(2)(b)...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’.

The powers of the Tribunal

17. The powers of the Tribunal in determining appeals against the Commissioner’s decisions for the purposes of FOIA are as follows:

‘s.57 Appeal against notices...

(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...

s.58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.’

The burden of proof

18. The burden of proof rests with the appellant, in this case the Council, in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion.

Evidence

19. Before the hearing, the parties had submitted written evidence. This comprised one Open Bundle (‘OB’) of 469 pages (including an Index); and a Closed Bundle (‘CB’) of 190 pages (including an Index).

Submissions on behalf of the Commissioner dated 2 March 2021

20. The Commissioner’s Response dated 2 March 2021 (p. 26-30 OB) to the Council’s Appeal states that the Council’s arguments were before the Commissioner at the time she made her original decision. The Commissioner submits that none of the Council’s arguments is sufficient to alter her findings, nor do they identify any error of law or any incorrect exercise of her discretion. In summary insofar as still in issue in this appeal, the Commissioner states that:

(a) The focus of R’s complaint was the Council’s reliance on section 43(2) to withhold information. The Commissioner’s investigation therefore focused on four documents which comprise the disputed material in this appeal, namely:

- (1) Invitation to Tender (since disclosed so no longer subject to this appeal)
- (2) Method Statement
- (3) Business Continuity Plan
- (4) Managing Subcontractors.

- (b) The Commissioner was not satisfied that sufficient evidence relating to specific information being withheld had been provided to demonstrate that disclosure would be likely to cause prejudice to the commercial interests of the Council or the third party contractor, Animal Wardens Limited ('AWL');
- (c) The Commissioner accepts that the interests identified by the Council are, broadly, commercial in nature but others (such as concerns about staff being harassed, and relating to the contractor issuing proceedings against the Council) are not. Further, there is information within the Method Statement likely to be widely known given the public nature of the contractor's operations and previous disclosures by other parties, or at least not commercially important.
- (d) The Commissioner accepts that - following the approach in *Hogan* - the various prejudices claimed may be '*real, actual or of substance*'. However, the Council has failed to demonstrate that the actual content of the withheld information - which does not appear to be particularly sensitive, and some of which is likely to be in the public domain - would *cause* the prejudices claimed.
- (e) Nor has the contractor precisely set out exactly how disclosure of the specific information withheld would prejudice its commercial interests; undermine its position in the market; be truly commercially sensitive.
- (f) Following the approach in *Lord*, and based on the evidence in this case, the Commissioner considers the prejudices envisaged are not a real and significant risk, nor demonstrate a causal link between the actual information withheld (were it to be disclosed) and the prejudices envisaged.
- (g) The Commissioner, while acknowledging the concerns raised regarding harassment of staff, does not consider this a commercial interest. Given that R does not seek any information withheld under section 40(2) FOIA, it is hard to see how disclosure of the specific information in this case, with personal data redacted, would directly cause harassment.

The Council's submissions in response dated 5 February 2021

21. In summary the Council submits that, contrary to the Decision Notice, section 43(2) FOIA is engaged in this case and that, in accordance with section 2(2) FOIA the public interest weighs in favour of withholding the information rather than disclosing it. The Council argues that, in respect of each item of the withheld material:

Method Statement

- (a) This document sets out very extensive and current information about all aspects of AWL's business model which would very likely harm the commercial interests of AWL were it to become available to competitors (as it could were this appeal dismissed because disclosure under FOIA is to be treated as disclosure to the public at large).
- (b) AWL has no corresponding access to its competitors' detailed business plans and would therefore be unfairly disadvantaged in the market.

Managing Subcontractors

- (c) The redacted information represents a small subset of information that reveals details about this crucial aspect of AWL's business, and would likely assist those wishing to disrupt AWL's business.

Business Continuity Plan

(d) This document details AWL's plans for ensuring that any disruptions to its service delivery can be successfully managed. AWL has experienced very significant attempts to disrupt its business by those opposed to its activities, apparently motivated by animal rights concerns.

(e) Disclosure of the Business Continuity Plan would likely exacerbate the frequency and effectiveness of these attempts because it would provide disruptors with new, additional insights into how better to disrupt AWL's business.

22. For the above reasons, disclosure of the particular withheld information would likely prejudice AWL's commercial interests as well as impact the Council's commercial interests in the procurement of services due to likely reluctance by similar service providers to provide detailed information.

23. The Council submits that the Commissioner is incorrect in her characterisation of the likely consequences of public disclosure of the withheld information, in particular, contrary to the Commissioner's position:

(a) the information here is '*still current and commercially important*' and '*not widely known*' including (despite the Commissioner's assertion to the contrary) in relation to the Method Statement.

(b) the risks of staff harassment are 'commercial' if it translates into the less effective conduct of a business or even a risk of frustrating a contract (as would be the case here).

(c) as well as the prejudicial consequences of disclosure being real, actual and substantial there is a causal link as demonstrated by AWL's evidence.

24. The Council therefore submits that section 43(2) FOIA is engaged and the Commissioner erred in concluding otherwise.

Public interest balance in favour of maintaining the exemption

25. The Council submits that factors in favour of withholding the information include:

(a) preventing unfair commercial prejudice to a private sector company that provides services to assist local authorities discharge their statutory functions;

(b) prejudice to the Council's procurement processes;

(c) avoiding the likely exacerbation of the criminal disruptive efforts aimed at AWL and the harassing conduct already suffered by its staff – which would likely spill over to Council staff involved with the AWL relationship.

26. The factors in favour of disclosing the information include:

(a) **Transparency:** the Council has already delivered extensive transparency about AWL and the services it provides to the Council, including disclosure by the Council of the majority of the contents of the 15 documents that fell within the scope of R's FOIA request.

(b) **Public interest in disclosure:** there is little or no genuine public benefit in the disclosure of the particular information at issue in this case, namely details of AWL's business model. However, this information would be of interest and assistance to AWL's competitors and those wishing to disrupt its services.

(c) **Alleged malpractices/failings on AWL's part:** those concerns are misplaced. The Council, and other local authorities that use AWL's services, monitors and evaluates AWL's performance and has found no objective evidence of any material malpractices and/or failings.

(d) **Disclosure would not shed light on any concerns:** even if, as the Council does not accept, there were any concerns about AWL, disclosure of this particular information would not shed light on those matters and/or would be a disproportionate means of addressing them.

27. If the Tribunal agrees that section 43(2) FOIA is engaged, the Council submits it should also agree that the public interest balance comfortably favours maintaining that exemption.

AWL's representations dated 13 August 2021

28. A statement in these proceedings by a director of AWL says on the company's behalf that:

(a) Since 1984, AWL has worked for over 100 local authorities.

(b) Since 2019, AWL has been targeted by '*social media hate campaigns*' by people who have used FOIA to gain information about the director and the organisation.

(c) AWL '*works with animals, mainly dogs, some neglected, some aggressive, others banned breed. Not all cases have happy outcomes.*'

(d) AWL '*often engage with people who are emotionally involved with dogs...and become aggressive...*' towards the director and their staff.

(e) The '*current level of information disclosed allows the public to understand the service, what it does and the outcomes...*'.

(f) The director believes that disclosure of further information '*will expose further the health and safety risks to me, my family and staff...*'.

(g) They have had '*police place my home address and car registration number on rapid response if an incident is reported*'; their '*family must be vigilant all the time against possible threats from Animal Activist*'; and they have '*lost staff because of intimidation and stress*'.

(h) The level of exposure over the past few years through FOIA disclosures has '*made me nervous about the future and direction of my organisation. It would be irresponsible to place my family and staff at risk of personal harm if we could not rely heavily on the FOIA exemptions*'.

(i) The director states they are '*reluctant to engage further with Government Outsourcing until I can be assured of proper protection under the FOIA exemptions*'.

(j) They add that '*the loss of staff due to the harassment and intimidation fuelled by FOIA requests has damaged the company's ability to recruit and retain appropriate staff which threatens the viability of the business. Further disclosures will in my view inevitably damage this further and... have a considerable impact on our business*'.

(k) They say finally, '*we will have to consider carefully increasing our pricing to reflect the difficulties in delivering the contracts...which will damage the commercial interests of the Council and increase costs to the public purse.*'

Preliminary matter

29. Having carefully reviewed the parties' submissions and the contents of the Closed Bundle (CB) to identify the withheld information in question, the Panel considered as a preliminary matter that exemptions other than 'commercial interests' under section 43(2) FOIA might apply.

30. The decision in *Birkett v The Department for the Environment, Food and Rural Affairs [2011] EWCA Civ 1606* decided that the Commissioner is not limited in her consideration to exemptions raised by the parties.

31. *Information Commissioner v. Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC)* decided that, in accordance with section 58(2) FOIA and *Birkett*, the First-tier Tribunal:

'...exercises a full merits appellate jurisdiction and so stands in the shoes of the Commissioner and decides which (if any) exemptions apply...' (paragraph 90)

32. In *Malnick*, the Upper Tribunal stated at paragraph 102:

"...the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away. It cannot be open to the FTT to remit consideration of new exemptions to the Commissioner..."

33. In *NHS England v. Information Commissioner and Dean [2019] UKUT 145 (AAC)*, Jacobs UTJ said at paragraph 12 that:

"...the tribunal was right to be concerned that there could be exemptions that had not been considered by either NHS England or the Information Commission. But it was wrong to deal with that issue by remitting the case back to the authority. What it should have done was to give directions to the authority to identify any other exemptions that might apply, to consider whether or not any did, and then to make the decision accordingly."

34. In the instant case, therefore, the Panel adjourned its consideration on the papers on 4 July 2022 and directed the Council to (a) make brief written representations on whether or not exemptions other than section 43(2) (commercial interests) might apply to the withheld material; (b) if other exemptions were claimed to provide any further supporting evidence relied on; (c) highlight in a revised version of the Closed Bundle what information is claimed to be subject to which exemption; and (d) briefly represent whether, and if not why not, such information could not be withheld by means of redaction.

35. The Panel also directed the Commissioner and AWL to deliver to the Tribunal (and copy to the Council) any brief written representations and further evidence they may respectively wish to submit in response to the Council's representations.

36. The Council delivered representations dated 22 August 2022. These in summary explained the Council's position on the application of additional exemptions:

(a) The Council considered the interests of AWL that were likely to be prejudiced by the disclosure of the withheld information were primarily commercial in nature, and the Council therefore continues to rely on section 43(2) FOIA.

(b) The risks of the withheld information being used to harass and intimidate AWL and/or its employees and/or to cause criminal damage have, however, been integral to the Council's reasoning in relying on section 43(2) FOIA.

(c) AWL has now provided sufficient evidence to establish that those risks are real and significant, including not just the director's statement referred to at paragraph 28 above but also screenshots (p. 460, OB) of the kinds of communication that bear out the concerns of harassment, intimidation and criminal damage.

(d) The Council submits that there is a sufficient evidential basis to conclude that, more likely than not, disclosure of the withheld information, or parts of it, would provide additional insight about AWL and its practices that would assist and encourage those minded to undertake such harassment etc. as part of their opposition to AWL's work.

(e) The Council submits both section 31(1)(a) FOIA (prevention of crime) and section 38(1) FOIA (endangering health or safety) are engaged since AWL's submissions and evidence show that the threshold of '*would be likely to..*' would be met if the withheld information were placed in the public domain.

(f) In particular, the harassment AWL and/or its employees are likely to receive is not only a criminal offence but is also aimed at pressuring AWL and/or the Council to cease their work. Thus the increased risk of crimes being committed would prejudice the prevention of crime, hence engaging the exemption in section 31(1)(a) FOIA.

(g) Also, there would be risks of physical danger and danger to safety which would engage the exemption in section 38(1) FOIA.

(h) There is weighty public interest in preventing criminal harassment as well as criminal damage, and endangerment to individuals' physical and mental health. This comfortably outweighs the public interest in disclosing the particular information at issue in this appeal.

(i) Moreover, the harassment of staff risks less effective conduct of business or even frustrating a contract which would obviously constitute a prejudice to a commercial interest, namely conducting a legitimate business effectively. Thus AWL's evidence reinforces the Council's case in respect of the 'commercial interests' exemption in section 43(2).

(j) Further, the withheld documents were obtained by the Council from AWL and are subject to duties of confidence. Disclosure would contravene those duties – and would be actionable because disclosure would give rise to the risks of harassment/intimidation and knock-on damage to AWL's legitimate business and also the Council's commercial interests. The Council therefore considers that the section 41(1) FOIA exemption of information provided in confidence is also engaged. No public interest defence to any action for breach of confidence would succeed in relation to the information at issue in this appeal.

37. The Council did not adduce any further evidence. However, despite the Panel's directions, nor did the Council provide a revised version of the Closed Bundle or by other means identify what withheld information is claimed to be subject to which exemption. Nor did the Council address whether or not such information could be withheld by means of redaction. The Council merely maintained its previous position that the documents at issue in the Closed Bundle '*continue to engage the exemptions set out in our original submission*'. The Panel regarded this approach as constituting a failure to comply with the Tribunal's express directions and considered this regrettable because it failed to assist the Panel in its decision-making.

38. The Commissioner did not submit any further representations or evidence.

39. AWL made representations dated 26 September 2022 which in summary state as follows:

(a) it fully supports the Council's submissions.

(b) it highlights the evidence it has provided of the risks to health and safety of its staff: the threat to its employees is real and would be significantly increased if the information requested were disclosed. Hence the exemptions in sections 31(1)(a) FOIA (prevention of crime) and section 38(1) FOIA (health and safety) are engaged.

(c) the exemption in section 41(1) FOIA (information provided in confidence) is also engaged.

Discussion

40. The Panel resumed its consideration of the case on 31 October 2022 in light of the supplementary representations summarised at paragraphs 36 and 39 above.

41. The Panel first considered all the evidence before it in order to make findings of fact relevant to its decision-making.

42. The Panel found - on the basis of all the evidence and submissions before it, and on the balance of probabilities - the following matters of fact:

(a) AWL's Business Continuity Plan includes AWL's assessment of various identified risks to its business model and to the continuity of its business;

(b) That information is not just sensitive and non-trivial but it is also not otherwise accessible: if publicly disclosed, it would be likely to advantage any competitors;

(c) When combined with other information which may be in the public domain, on the 'jigsaw' principle, withheld information on AWL's business risks and mitigation would be of value to anyone wishing to disrupt AWL's business as well as anyone wishing to compete with it;

(d) AWL's Management of Subcontractors document includes information which - being non-trivial and not otherwise accessible - would likely advantage not just AWL's competitors because it specifies AWL's working model with subcontractors but also negatively affect AWL's ability to negotiate competitively with future would-be subcontractors because it specifies AWL's selection priorities for subcontractors;

(e) AWL's Method Statement contains information about locations, metrics, partner organisations, business activities, timelines, goals, management systems all of which would be of value to both competitors and anyone wishing to disrupt AWL's business as well as anybody intending to compete with it. None of this information is trivial, otherwise accessible or unworthy of protection;

(f) AWL's personnel have already been targeted both in person and on social media with threats of violence, and by harassment and intimidation on numerous occasions and in a variety of ways, specific instances of which include:

(1) masked protestors outside AWL's vet's premises with billboards labelled "Murderers";

(2) in public places, Fox Hunting Saboteurs aggressively challenging individuals involved in AWL; and

(3) staff returning lost dogs to their rightful homes being subjected to aggression and violence due to adverse social media posts;

(g) Damage has been caused to premises and arson threatened, incidents including:

(1) threats of copycat arson of the Manchester Dogs Home fire in 2014; and

(2) fences at one dogs' home being damaged to create 'walk throughs';

(h) Police and fire services have visited to assess both the risks to premises and steps taken to mitigate those risks;

(i) Those steps include the installation of increased fire alarms; a lock on the letterbox to prevent the pouring of petrol through it; and the presence of fire extinguishers in various locations at the property.

(j) Information about AWL has previously been disclosed in response to FOIA requests: release of further information risks fuelling campaigns by protestors who harass and intimidate individuals working at AWL;

(k) This compromises the safety of both AWL's premises and especially people working there;

(l) This in turn damages AWL's business because the stress and anxiety of the workforce makes it difficult to recruit and retain staff, thus affecting the organisation's viability;

(m) There are implications for the outsourcing industry as a whole: small businesses who contract with public authorities and are thus exposed to the risk of commercial and personal information being disclosed in response to FOIA requests may fear that the health and safety of individuals who work in those businesses and their families is inadequately protected by the exemptions provided by FOIA;

(n) A number of organisations no longer provide animal-related services to local authorities: increased harassment and intimidation is likely to lead to others considering withdrawing from the market;

(o) Even those remaining in the market will have to consider increasing their pricing to reflect the difficulties in delivering their contracts, thus damaging the commercial interests of public authorities and increase costs to the public purse.

43. In the light of these findings of fact, the Panel then went on to consider which, if any, exemptions to disclosure of information under FOIA might apply to AWL's Business Continuity Plan; Management of Subcontractors document; and Method Statement.

44. Taking the following exemptions in the order in which they appear in FOIA, the Panel considered that:

Information whose disclosure might prejudice the enforcement of criminal law (section 31(1)(a))

45. In its supplementary submissions on behalf of the Council (at paragraphs 10 and 11), the Council says that 'harassment aimed at pressuring AWL and/or the Council to cease their work' is a criminal offence pursuant to the Protection from Harassment Act 1997 ('PHA').

46. Section 1(1A) PHA provides that a harassment offence occurs where the alleged perpetrator harasses two or more individuals with the intention of persuading any person (1) not to do something that they are entitled or required to do; or (2) to do something that they are not under any

obligation to do. This provision was introduced to the PHA by the Serious Organised Crime and Police Act 2005 and was intended to capture behaviour that causes alarm or distress to individuals, or groups of individuals, to the extent that they are deterred from carrying out lawful activities.

47. The Panel understands that this amendment to PHA was introduced to quell the rise at that time in extremist activity by prolonged campaigns for example against biomedical research at Oxford University and against Huntingdon Life Sciences.

48. Based on the Panel's findings of fact in this case, the Panel considers that the evidence of harassment and intimidation of individuals involved in AWL could well constitute criminal behaviour and that disclosure of the withheld information in this case might well result in further such behaviour. Consequently, such disclosure '*would be likely to prejudice*' enforcement of the law within the meaning of section 31(1)(a) FOIA even though there is no suggestion in this case that any specific investigation or criminal proceedings are currently ongoing.

49. The Panel considers that while the withheld information in this case may itself appear innocuous, it nevertheless falls within the exemption because, when combined with other information already in the public domain or otherwise accessible, its disclosure may result in the relevant prejudice. This follows the approach taken by this Tribunal in *Hemsley v. IC and Chief Constable of Northamptonshire IT*, 10 April 2006 at [23].

50. The Panel therefore considers that the exemption in section 31(1)(a) FOIA is engaged in this case.

Health and Safety (section 38 FOIA)

51. When considering the 'health and safety' exemption, the Panel was mindful of the Tribunal's approach in two previous cases: *People for the Ethical Treatment of Animals Europe v. IC and University of Oxford*, FTT 18 January 2010 and *British Union for the Abolition of Vivisection v. IC and Newcastle University* FTT 11 November 2011. In the former case where the applicant sought information upon experiments on a macaque monkey, the Tribunal accepted the University's evidence that disclosure would likely endanger the safety of University staff. In the latter, the evidence established only a '*relatively low level of risk from extremists*' and the exemption was held not to be engaged.

52. Based on the evidence and the Panel's findings of fact in this case, the Panel considers that disclosure of the withheld information may – albeit indirectly - endanger the health or safety of an individual (who has been identified to the Tribunal) because of the likely use that will be made of the disclosed information. On the usual principles of causation, the Panel considers that the evidence in this case shows it is readily predictable that the withheld information, once disclosed, will be used in such a way as would risk harming the health and safety of an individual.

53. The Panel therefore concludes that disclosure of the information will endanger the health or safety of that individual, and the exemption is thus engaged.

Information provided in confidence (section 41 FOIA)

54. In the context of this case, the Panel had no difficulty in concluding that the withheld information was obtained by the public authority from another person – namely by the Council from AWL as part of the former's invitation to the latter to tender for the provision of services to the Council. The Panel considers that the first limb of section 41(1) FOIA is satisfied.

55. The Panel carefully considered the second limb of section 41(1) FOIA, namely whether the disclosure of such information (otherwise than under FOIA) would constitute a breach of confidence actionable by that person, or any other person.

56. For this second limb of section 41 to be satisfied:

- (a) The disclosure of the information must constitute a breach of confidence;
- (b) A legal person must be able to bring an action for the breach of confidence to court;
- (c) That court action must be likely to succeed.

57. In respect of (a) above, the test of confidence the Panel applied was that set out by Megarry J in *Coco v A M Clark (Engineers) Limited [1968] FSR 415* that:

- (1) The information must have the necessary quality of confidence;
- (2) It must have been imparted in circumstances importing an obligation of confidence; and
- (3) There must have been an unauthorised use of the information to the detriment of the confider.

58. Information possesses the ‘*necessary quality of confidence*’ if it is more than trivial, is not otherwise accessible and is worth of protection in the sense that someone has a genuine interest in the contents remaining confidential.

59. Based on its findings of facts in this case, the Panel considers the information contained in the three withheld documents do possess ‘*the necessary quality of confidence*’.

60. In considering the second element of Megarry J’s test, the Panel notes that the confider, AWL, provided to the Council the three withheld documents as part of its response to the Council’s invitation to tender. Given the context in which they were supplied to the Council (namely as part of a commercially competitive bidding exercise), the Panel is satisfied that this element is met.

61. On the third element of Megarry J’s test – detrimental impact on the confider – the evidence clearly demonstrates the nature of the detriment were the withheld information to be disclosed: see paragraph 42 above.

62. As for element (b) set out at paragraph 56 above, it is clear to the Panel that the confider, AWL, is a legal person entitled to enforce the Council’s duty of confidence in relation to information in the three withheld documents.

63. The final part of the test for engaging section 41 is whether the action for breach of confidence is likely to succeed. Although section 41 is an absolute exemption so there is no public interest balancing exercise to be carried out under FOIA, the Panel considered whether the Council would have a public interest defence for the breach of confidence.

64. Caselaw since the early 2000s – such as *London Regional Transport v. The Mayor of London [2001] EWCA Civ 1491* and *Derry City Council v. ICO (EA/2006/0014, 11 December 2006)* - have modified this ‘public interest defence’ into a test of proportionality. In other words, does the public interest in disclosure outweigh the public interest in maintaining the confidence?

65. Considering public interest defence arguments, the Panel acknowledges that there is a general public interest in ensuring that public authorities remain transparent, accountable to scrutiny where, for example, disclosure would:

- (a) further public understanding of, and participation in the debate of issues of the day;
- (b) enable individuals to understand decisions made by public authorities affecting their lives and (in applicable cases) assist individuals in challenging those decisions; or
- (c) facilitate accountability and transparency in the spending of public money.

66. On the evidence in this case, the Panel considers that none of these factors apply because it has not been suggested, nor does the Panel believe, that disclosure of the three withheld documents would achieve any of the above objectives.

67. On the other hand, the Panel's findings of fact in this case (especially at paragraph 42 (m)-(o) above) weigh in favour of maintaining the confidence because of the wider public interest in preserving the principle of confidentiality and the impact of disclosure on the interests of the confider, AWL.

68. Having carried out the above analysis, the Panel is satisfied that the exemption in section 41(1) FOIA applies to the withheld material in this case.

Commercial interests (section 43(2) FOIA)

69. In considering whether section 43(2) FOIA applies, based on its findings of fact in this case, the Panel considers that the applicable 'commercial interest' includes AWL's ability to participate competitively in a commercial activity. It also includes AWL's ability to remain viable by recruiting and retaining staff in the context of intimidation and threats of violence exerted by those objecting to AWL's business activities. Further, the Panel considers that the *Council's* commercial interests are at stake because concerns which AWL has expressed are likely to be shared by other bidders for services such as those which AWL provides, leading to a likely reduction in the number of bidders, and/or an increase in the cost of providing such services.

70. When considering whether disclosure of the withheld information would be likely to prejudice someone's commercial interests, the Panel notes that the Council did not merely speculate about this but sought AWL's views on the matter and reflected them in their response to R. AWL expressed awareness and acceptance of the Council's statutory obligations under FOIA, and the Council has indeed already disclosed in this case a considerable volume of information which AWL had provided to it.

71. AWL's evidence is that other public authorities have in the past disclosed other information about it pursuant to FOIA requests too.

72. On the facts found in this case (especially at paragraph 42 (b)-(e) above), the Panel concludes that there is a real and significant risk of harm occurring to AWL's commercial interests by disclosure of the withheld information in this case.

73. Moreover, given the Panel's factual findings (see paragraph 43 (f)-(l) above), the Panel is satisfied that there is a causal link between disclosure of the withheld information and the claimed prejudice at the time the request was made: the information withheld is not in the public domain and if disclosed could be used to disrupt the legitimate activities of the business.

74. Finally, the Panel is satisfied – based on the evidence and its factual findings – that the likelihood of the occurrence of prejudice is more likely than not: AWL has given examples of previous harassment, intimidation and damage to property by protestors objecting to its activities (see paragraph 42(f)-(g) above).

75. Overall, the Panel is satisfied that the exemption in section 43(2) FOIA applies to the withheld material in this case.

Public interest test

76. Having found that the qualified exemptions in sections 31(1)(a), 38, and 43(2) are all engaged in this case, the Panel went on to consider for each exemption individually whether the public interest in maintaining such exemptions outweighs the public interest in disclosing the information requested.

77. The Panel acknowledges that there is usually a strong public interest in openness, but this does not necessarily override all other arguments. For example, in favour of disclosure it could be argued (as per *Hugh Mills v Information Commissioner EA/2013/0263 (2 May 2014)*):

- (a) it would inform the public of the activities carried out on their behalf, allowing for more user involvement and collaborative decision-making.
- (b) it would enable the public to better scrutinise the public monies spent.
- (c) it would ensure an open and transparent tender process.
- (d) it would show that the bidder followed a fair and transparent process to calculate its pricing.
- (e) it would help to ensure clarity around fairness, equity, value for money and quality of care in the overall tender process.
- (f) disclosure of the disputed information to potential bidders would lead to better value for money for the Council.

78. However, the Panel considers the factors in favour of maintaining each of the exemptions include:

- (a) the protection of individuals from the risk of criminal harassment and property from the risk of criminal damage;
- (b) reducing the risk of harassment of individuals by campaigners aiming to disrupt the legitimate activities of a legitimate business providing a lawful service to a public authority;
- (c) protecting the workforce and viability of organisations providing legitimate services to public authorities;
- (d) the protection of the mental health and/or physical safety of individuals liable to deliberate targeting with behaviour intended to dissuade them from engaging in lawful activity;
- (e) maintaining the confidentiality of material supplied to a public authority by a private company bidding to provide services to that public authority; and

(f) reducing the risk of additional cost to the public purse because competition amongst privately-owned businesses for providing animal-related services to local authorities is further diminished or the pricing is increased as a result of the difficulties in delivering on such contracts.

79. The Panel considers that for each of qualified exemptions in this case, the factors referred to in paragraph 78 above outweigh those in favour of disclosure.

80. Overall, the Panel notes that there has already been considerable disclosure of materials in this case – most recently the Invitation to Tender itself – and considers that the withheld information if disclosed would add little additional transparency, ability by the public to scrutinise public monies spent or protect the public from dubious practices. There would, on the other hand, on the Panel’s findings of fact be a real and significant risk of: increasing intimidation and harassment of individuals working for AWL; damage to AWL’s property; and damaging the commercial interests of both AWL and the Council.

Conclusion

81. For the above reasons, the Panel finds that the Appellant has discharged the burden of satisfying the Tribunal that the Commissioner’s Decision Notice was wrong in law in that:

(a) it failed to consider exemptions other than section 43(2) FOIA which could have been - and in the Panel’s view are - relevant to the consideration of whether or not the Council had complied with its legal obligations under FOIA;

(b) the exemptions in sections 31(1)(a), 38 and 41(1) as well as section 43(2) FOIA are engaged in this case; and

(c) for each of those exemptions which are qualified, the public interest in favour of withholding the requested information outweighs the public interest in disclosing it.

82. Accordingly, in accordance with s.58(1)(a) FOIA, we substitute for the Commissioner’s Decision Notice that set out at the top of this decision.

83. The appeal is allowed.

Signed:

Date: 29 November 2022

Promulgated:

Date: 1 December 2022

Alexandra Marks CBE
(sitting as a First-tier Tribunal Judge)