



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0292

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS 50548392
Dated: 22 October 2014**

Appellant: MINISTRY OF JUSTICE

1ST Respondent: INFORMATION COMMISSIONER

2ND Respondent: Mr CLIVE PALMER

Heard at: FIELD HOUSE, LONDON

Date of hearing: 2 JUNE 2015

Date of decision: 1 JULY 2015

Before

ROBIN CALLENDER SMITH
Judge

and

DAVE SIVERS and NIGEL WATSON
Tribunal Members

Attendances:

For the Appellant: Mr Julian Milford, Counsel instructed by GDL.
For the 1st Respondent: Mr Christopher Knight, Counsel instructed by the
Information Commissioner
For the 2nd Respondent: Mr Clive Palmer

Subject matter: FOIA 2000

Qualified exemptions

- Commercial interests/trade secrets s.43 (2)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal, by a majority, upholds the decision notice dated 22 October 2014 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Clive Palmer - who is the second Respondent in this appeal and the original requestor - wanted information from the Ministry of Justice (MoJ) relating to invoices for the provision of car rental services.
2. The MoJ provided some of the information within the scope of the request but refused to provide the remainder relying on section 43 (2) FOIA, the exemption relating to commercial interests.

The request for information

3. On 24 November 2013 Mr Palmer asked for information about taxi usage at HMP Highdown and Downview:

My request is regarding taxi usage at HMP Highdown and Downview. I would like all details of taxi journeys undertaken during the period 01/01/2012 to present date showing date, pickup point, drop-off point, waiting time and price paid. I believe these journeys were undertaken by Wallington Cars and Cheam Station Cars so it should be quite easy to submit copy invoices received from these two companies. Wallington Cars has no problem at all with this although you can contact the company to confirm this matter. You may decide that the Cheam Station Car invoices are confidential then please just show the totals of

each invoice as surely this is not confidential.... it should be noted however that my request is for a full breakdown of individual prices for each job undertaken.

4. The MoJ responded on 24 December 2013. It denied holding some of the requested information – in relation to waiting times – but confirmed that it held the remainder.
5. It provided Mr Palmer with some of the information it held – specifically the total of each invoice, by taxi firm, within the timeframe specified.
6. It refused to provide the remainder of the information within the scope of the request citing section 43 (2) in respect of prejudice to commercial interests and section 40 (2) in respect of personal information.
7. Mr Palmer requested an internal review on 27 December 2013. He offered to refine his request “to show only a three-month window” for each of the two providers in respect of dates which could be agreed later.
8. The MoJ revised its position during its internal review and, on 12 March 2014, it provided some information it had previously withheld. This related to the dates of each individual journey and the details of pick-up/drop-off points where they related to public buildings.
9. In relation to the request for information to be broken down by individual prison, the MoJ stated that it could not be provided for all the journeys as it was not held on all the invoices within the scope of the request.
10. In his complaint to the Information Commissioner on 16 July 2014 Mr Palmer stated:

In summary, the authority withheld some information from me regarding individual pricing of journeys. However they did disclose the total amount of spend. This revealed maladministration at best or wrongdoing at worst. Whilst I understand the authority’s view on withholding prices under section 43 in this case, I believe the public interest is best served by the release as it will

definitely show mis-appropriation of public funds for either of the reasons mentioned above.

11. In considering the applicable interests, the Information Commissioner considered whether the prejudice claimed related to section 43 (2) and commercial interests. He concluded it did and was also satisfied that the commercial activity involved – a taxi/car rental service – was conducted in a competitive environment.
12. Having reviewed the relevant interests and potential prejudice, the Information Commissioner concluded that the MoJ had failed to demonstrate that the exemption was engaged. As a result he had not gone on to consider the public interest arguments.

The appeal to the Tribunal

13. The MoJ's Grounds of Appeal were lodged on 19 November 2014. They are not set out at this stage of the decision because they were extensively developed in the submissions heard in the oral appeal which took place on 2 June 2015 and which were contained in the Open and Closed written and oral evidence.

Evidence

14. The Tribunal heard oral evidence and submissions in open court and in closed session as well as considering open and closed material.
15. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
16. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
 - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

- iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
 - iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.
17. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:
- i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
 - ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.
 - iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.
 - iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.
 - v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.
18. The closed bundle in this appeal contained the disputed information. There were two written witness statements. One, dated 27 March 2015, was the Closed Statement of Muhammad Hussain of Cheam Cars which ran to 5 pages. The other was the Closed Statement of David Hood. He is the Director of the Commercial and Contract Management Directorate within the MoJ. Portions of their statements – with appropriate redactions were included in the Open Bundle. It was necessary for the Tribunal to see the disputed information and to consider the redacted elements.

19. In the event, Mr Hussain did not attend the oral appeal hearing and, as a consequence, could not adopt his written witness statement and face any cross-examination on it. For that reason the Tribunal attaches little weight to the Closed (redacted) information it contained.
20. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notice of appeal and in its other representations and submissions.
21. It has not, however, been necessary to include any of its reasoning in a Closed Annex. The Tribunal intends the reasons which follow to be self-explanatory without referring to the detail of the closed or redacted elements of the information requested.
22. In terms of Mr Hussain's Open written statement he stated that Cheam Cars, his company, was founded in 1964 and he acquired it in 2005. It provided general and specialist taxi services in Cheam and the surrounding area and it was the biggest taxi company in the Cheam area. The company had 120 cars and drivers to cater for its customer base which included the local authority.
23. Because of the length of time it had been in existence it had substantial experience in the local and surrounding areas. He believed his company was able to offer better geographical coverage compared to its competitors with "minimal to none waiting for customers".
24. He had applied a unique pricing structure for the purposes of his bid which he believed was instrumental in ensuring the success in the tender process. He was confident that no other taxi company could offer the MoJ a better price for the tender and his ability to do that came from the many years of experience and the economy of scale advantage that he had over his competitors.
25. He was confident that he was offering the local council and the MoJ value for money for transport services and that it would be difficult for Wellington Cars or any of his competitors to beat his tender price. He was happy to share his

standard public pricing structure with anyone who wished to know it. It was only the special commercial pricing structure used for tenders and contracts that he felt would put him at a competitive disadvantage if disclosed. His company was able to bid lower prices for particular groups due to its local knowledge of the route network and its extensive number of cars and covering the area.

26. He was concerned that if his competitors became aware of the details of his tender prices for each route then the company's dynamic approach would be seriously undermined. If the information on the agreed pricing structure was disclosed to the Second Respondent it would cause harm to his business interests by revealing his unique bidding and pricing strategy. That was likely to give his competitors an unfair advantage in future tendering exercises.
27. If the information on the agreed pricing structure was disclosed it was very likely that he would have to pull out from the tendering process as it would not be financially viable for him to provide a lower bid for the MoJ contract.
28. He believed that all small businesses had their own secret "recipe" or trade secret for securing work or business which should not be revealed to competitors. If the information was released it would inevitably mean that his company's business would be affected and the revenue reduced.
29. Mr Hood adopted his written witness statement and the documentation that was exhibited with it. He described the elements of the 2011 Procurement Process. It began with an advertisement placed in the Official Journal of the European Union dated 18 June 2011 seeking providers of specialist transport services to 45 establishments in London and the south-east. The competition had been advertised under the "restricted procedure" in accordance with the Public Contract Regulations 2006 and was divided into a number of lots reflecting different geographical areas. The advertisement stated that the award criterion was to be on the basis of the "most economically advantageous tender" and would be concluded in two stages. Stage I was a preliminary stage where bidders responded to a request for information. Stage II was an electronic auction.

30. A total of 82 bidders registered their interest across all lots. 54 bidders across all lots met the commercial, operational and technical criteria and would deem compliant to progress to Stage II, the electronic auction. Eight bidders were invited to participate in the electronic auction for Lot 13 which was the specialist transport services to and from HMP Highdown and Downview.
31. Following the conclusion of the first electronic auction which had been won by Cheam Station Cars – and after MoJ personnel met with representatives from Wallington Cars and Couriers – the auction was rerun with the same eight bidders and concluded on 30 May 2012.
32. Cheam Station Cars was ranked first and Wallington Cars and Couriers was ranked second.
33. Cheam Station Cars' successful bid price was £12.00 lower than that of Wallington Cars and Couriers. The contract began on 2 January 2013 with an extended term that would expire 1 January 2016 after which the MoJ intended to re-tender the contract for a new service provision effective from that date. An electronic option would be used again and the timescale for completing the competition – from developing a strategy to contract award – was expected to take six months beginning in the summer of 2015.
34. The contract set out a fixed price for each specified journey, fixed rate per mile for unspecified journeys, a “per hour” waiting time charge (with the first 15 minutes being free), a fixed cancellation charge and a fixed overnight stay charge (for instance in the case of a prison “lockdown”). The prices reflected the prices which were used by Cheam Station Cars to calculate its bid price submitted during the electronic option. The invoices for the service detail the pickup and drop-off point and the charge for that individual journey and the associated waiting time. To disclose Cheam Station Cars invoices would disclose its detailed pricing structure.
35. He believed that there was a prejudice both to the interests of the MoJ and Cheam Station Cars in the withheld information being revealed. The services

were specialist services and the way in which they were priced was complex. The pricing for specialist transport services differed from the pricing that was available to the general public for taxi services. The MoJ enjoyed a fixed pricing structure with a price per mile that was lower than the price that the general public would pay. That was due to the anticipated journey demand requirements that the MoJ would have. Cheam Station Cars was able to account for this in its pricing structure and to offer a more favourable pricing structure and more favourable prices.

36. Further, Cheam Station Cars (and other bidders) were likely to attach considerable value to the securing of the contract with the MoJ and would price accordingly. The contract had a tangible value which Cheam Station Cars used when bidding for other contracts with other Government bodies and non-Government bodies. That was a factor that had to be considered in how far any prospective bidder would go to offer favourable pricing in order to secure a contract.
37. By disclosing the unique pricing structure used by Cheam Station Cars all prospective bidders in the future competition would know the pricing structure that won the last competition and could take a view on what a winning bid price would be likely to be. Competitors knowing in detail the prices their rivals had applied in recent tenders would fundamentally undermine the competitive tension achieved through an electronic auction. By disclosing Cheam Station Cars' pricing structure it could cause competitors to seek narrowly to undercut Cheam Station Cars to win the business rather than "offering substantial betterment".
38. The competition would be distorted as it would no longer be on a level playing field since one bidder's detailed pricing structure would be known by the other bidders. If the information was made public there was the possibility that Cheam Station Cars would not bid for the new contract because they might feel their position in the competition was prejudiced and fear that their detailed pricing structures might be made public in the future.

39. In cross-examination by Mr Knight, Counsel for the Information Commissioner, Mr Hood agreed that clauses 19 and 20 of the existing contract emphasised the application of the Freedom of Information Act to the process.
40. Mr Hood stated that he did not believe people understood the application of the Freedom of Information Act to the process. Often the attitude was to win the work and to deal with the consequences of that afterwards because “bid teams” whose aim was to get work and “operational teams” who had to deal with the work after a contract was one often operated with different aims. In addition there would be other contractors who would never have read that kind of detail in the contract at all.
41. Mr Knight asked Mr Hood whether he felt that meant those contractors should be given more protection. Mr Hood stated that, perhaps, it should be given greater emphasis and contractors should be warned about the consequences.

Conclusion and remedy

42. The Tribunal found the arguments advanced by Counsel for both the Appellant and the First Respondent (which were effectively adopted by the original requestor/Second Respondent Mr Palmer) were well-articulated and finally balanced.
43. However the oral evidence given by Mr Hood, where he sought to assist the Tribunal, did so only to a very limited degree.
44. It seemed at one stage that Mr Hood was arguing that, despite the fact that specific clauses in the contract drew attention to the general application of the Freedom of Information Act, an additional balancing exercise to compensate for those contracting parties who did not read or understand the effect of that notification needed to be built into the way in which the MoJ had responded to the information request.

45. The Information Commissioner accepted that the pricing information in respect of Wallington Cars and Couriers was exempt under section 21 (1) FOIA because Mr Palmer (the Second Respondent) as Managing Director of that company has access to that information.

46. Mr Milford, on behalf of the Appellant, urged the Tribunal to look at other decisions in the Information Rights Tribunal favouring the MoJ's approach to section 43 (2) FOIA. Specifically:
 - (1) That section 43 (2) was a prejudice-based exemption which did not require that the prejudice was more likely than not to occur.

 - (2) The word "commercial" depended on the context in which it was used and should not be tied solely to competitive participation in the buying and selling of goods and services. "Commercial interests" included the interest of public authorities.

 - (3) In *Department of Work and Pensions v Information Commissioner* (EA/2009/0073) another Tribunal had accepted as prejudicial to the commercial interests of the DWP and its supplier the disclosure of the detail of certain commercially sensitive terms of a contract with ATOS to host and support the "Government Gateway" website. That was on the basis that disclosure of that information would be likely to prejudice the commercial interests of the DWP in any future procurement of the Gateway service or similar services.

 - (4) The imminence (or otherwise) of the re-tendering of the contract could be important to the likelihood of prejudice.

 - (5) The extent of competition within the market could also be important when considering the likelihood of prejudice to the commercial interest of public authorities and suppliers.

- (6) Where section 43 (2) had been triggered by the application of the “prejudice” test there was an overlap between that test and the application of the public interest test that followed. In effect, the greater the likelihood of prejudice, the more likely that the balance of the public interest would favour maintaining whatever qualified exemption was in question.
- (7) The public interest balancing exercise was time-sensitive and had to be judged at the time the request was made or at least answered.
47. Mr Milford maintained that section 43 was clearly engaged in relation to the Disputed Information. It related to individual transaction rates for particular journeys and the total price for each particular journey recorded on invoices. Disclosure of that information would disclose the detailed pricing structure adopted by Cheam Cars.
48. Further, the pricing information in relation to individual journeys undertaken by Cheam Cars was unquestionably commercially sensitive information in circumstances where information about the prices charged by Cheam to the MoJ were not freely or publicly available. This was on the basis that it constituted a unique pricing structure that was separate from the publicly-stated charges.
49. Because there would shortly be a new tendering exercise for the taxi/car hire services in respect of HMP Highdown and Downview then disclosing the unique pricing structure used by Cheam would enable all prospective bidders in the future competition to know the pricing structure that was successful in the last one.
50. Disclosure of that pricing structure would give an unfair advantage to competitors in future bidding exercises – quite apart from disclosing Cheam’s confidential information to its direct competitor Wallington Cars and Couriers – and might reduce the number of competitive bids received potentially taking

Cheam out of that future competition because of fear of its prices being made public.

51. On the basis that section 43 (2) was engaged the public interest balance was strongly in favour of maintaining the exemption. The MoJ needed to be able to run an effective and fair procurement exercise to secure best value for money for the taxpayer. Because the existing contractual term expired on 1 January 2016, at the time the MoJ was considering the information request the re-tendering process was close to restarting.
52. Suppliers in the public sector needed to know that they could operate in a competitive environment on a fair playing field. Cheam's commercial position would be weakened and its competitors would benefit unfairly from the disclosure.
53. Although there was a general public interest in transparency and accountability in relation to the use of public funds that public interest had been met by the disclosure of the invoice totals for a two-year period. There was no compelling public interest requiring the disclosure of Cheam Cars' unique pricing strategy.
54. Mr Palmer had suggested that his request had been made to ensure that the procurement process was lawful. The Disputed Information disclosed no unlawfulness at all.
55. Tribunal Member Nigel Watson agreed with these reasons. As a consequence he would not have allowed the disputed information to be released.
56. Despite those arguments the majority of the Tribunal (Judge Robin Callender Smith and Tribunal Member Dave Sivers) were satisfied that the Information Commissioner's consistent position – that section 43 (2) was not engaged – was the correct conclusion.

57. The MoJ relied, in its resistance to the Information Request, on its own commercial interests in securing – through the procurement processes – the best prices for taxi journeys as well as the commercial interests of Cheam Cars.
58. The Tribunal accepts that these do constitute “commercial interests”.
59. However there is no causal link between the disclosure of the disputed information and the prejudice to those interests.
60. The MoJ has failed to demonstrate the very significant and weighty chance or risk of real, actual or substantial prejudice to those interests. The prejudice must arise as a result of the disclosure of the particular information in dispute – the prices which Cheam Cars charged the MoJ for taxi journeys to and from HMP Highdown and Downview - over the period between 1 January and 31 March 2013.
61. Cheam Cars were put on explicit notice of the legal limits of commercial confidentiality when entering into the contract with the MoJ. Clause 19 of the contract required Cheam Cars to acknowledge that the MoJ is subject to FOIA and may have to disclose the information. There was the same FOIA warning in Clause 20 of the contract.
62. The majority view of the Tribunal was that disclosure of this information would not mean that the MoJ would secure less attractive prices in the forthcoming contract than it would otherwise have been able to get. Disclosure equally might drive down the prices being put forward by bidders who would have an indication of the price they had to beat in terms of the last contract.... although time and circumstances may well, practically, result in that being a different figure in any new bid.
63. Competitive tendering was more likely to lead to cheaper price offerings than more expensive ones. Cheam Cars won the bid by only £12 and a fresh re-tendering exercise may well generate a cheaper bid which would enhance the value for money in terms of the public purse.

64. It is notable that the particular pricing structure adopted by Cheam Cars – which allowed them to bid at the level they eventually reached – was not the one that was used in its opening bid. The mechanics of the bidding auction demonstrated (and the same process would be used in the re-bid) that bidders repeatedly lowered their offers showing that the pricing structure is not immutably fixed.
65. In terms of the commercial interests of Cheam Cars it was clear that disclosure of the disputed information to competitors would mean that they learned something about the prices that had been agreed with the MoJ. But that did not mean that would materially prejudice Cheam Cars' position in any future re-tendering exercise.
66. There were a whole series of variables (outlined at Paragraph 28 of Counsel's skeleton argument) that could come into play within the re-tendering exercise.
67. Mr Palmer's request under FOIA related to pricing information for both his company and Cheam Cars. Both of the two competing firms' prices would have been put into the public domain side-by-side without one being given a competitive advantage over the other.
68. To the extent that the information retains any value in the re-bidding process the two previous leading bidders will effectively be on an equal footing. Mr Palmer already knows, historically, that Cheam Cars overall bid was £12 lower than his in the last contest. The key concern in a competition is the price to beat.
69. For all these reasons the majority of the Tribunal finds that the qualified exemption in section 42 (2) is not engaged.
70. Even if it had found that the exemption was engaged, the majority of the Tribunal takes the view that the public interest would favour disclosure of the pricing information.

71. The Tribunal is fortified in that view by the opinion of Gavin Miller QC in his contribution to Philip Coppel QC's practitioner's textbook *Information Rights* (fourth edition 2014 at page 846) that

Given the quintessentially private nature of the interest being protected by the exemption (the commercial interests of the person), it is difficult to see what particular public interest there is in maintaining the exemption without important interests that already stand to be protected by other provisions in Part II of the Act. It is suggested that it would be impermissible to use the public interest weighing exercise for the purposes of section 43 (2) effectively to reshape and enlarge the discrete exemptions provided elsewhere in the Act: most notably, the exemptions for confidential information and trade secrets.

72. There is a strong public interest in being able to see whether or not a public authority is securing the best possible prices for services and, had it been relevant in this appeal, it would have been final factor used by the Tribunal to find that the information requested should indeed be disclosed.

73. Our decision is a majority one.

74. There is no order as to costs.

Robin Callender Smith
Judge
1 July 2015

Promulgated 14 July 2015