IN THE FIRST-TIER TRIBUNAL **Case No. Appeal No. EA/2015/0189**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50544668

Dated 12th August 2015

BETWEEN

Mr Michael John Abbott **Appellant**

And

The Information Commissioner **1st Respondent**

And

The Department for Business Innovation and Skills **2nd Respondent**

Determined on the papers at Fox Court on 27th April 2016 and thereafter

Date of Decision: 22nd September 2016

Date Promalgated: 23 September 2016

BEFORE Ms Fiona Henderson (Judge)

Dr Henry Fitzhugh

And

Mr Steve Shaw

Subject: s43(2) FOIA – commercial interests

Case Law: Department for Work and Pensions v IC [2014] UKUT 0334 (AAC)
APPGER v ICO and FCO [2015] UKUT 377 (AAC)

Decision: The Appeal is allowed in part

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50544668 dated 12th August 2015 which held that The Department for Business Innovation and Skills (DBIS) correctly applied s43(2)[1] FOIA to the request. The decision also found that s40(2) FOIA was incorrectly applied in relation to senior employees of DBIS and its contractors[2], and ordered additional disclosure from the withheld material insofar as it relates to the details of senior employees of DBIS and its contractors. S40(2) FOIA is not the subject of this appeal.

Background

2. The DBIS policy has been to stimulate business growth for small and medium enterprises. It has undertaken to do this through:

a) The "Growth Accelerator Scheme (GAS) which was launched in May 2012 and was intended to provide advice and support to businesses of any kind with the potential for high growth. Although it is said to be a new scheme, the Appellant maintains that a similar "growth" scheme was in place since at least 2010 upon which he was a Consultant.

b) The Manufacturing Advisory Service Programme (MAS) which was first launched in 2002 and was intended to provide advice and support for manufacturing businesses specifically. It provides companies with direct access to experts who work with them to identify and implement productivity and innovation improvements to their business.

3. Both schemes have now been combined to form the new Business Growth Service, however at the date of the information request it was envisaged that MAS would be retendered when it concluded.

4. Each scheme was delivered by a consortium of 4 UK businesses with the same prime Contractor, Grant Thornton UK LLP (GT) who is the signatory of a contract with the Government. Although GT is the lead partner and signatory, each of the 4 partners

1 Commercial interests
[2] The Commissioner upheld the use of s40 in relation to junior employees.

are responsible for delivering MAS in specific parts of the UK. In each scheme the consortiums created a pool of consultants to advise the businesses using the schemes.

5. Pursuant to a separate FOIA[3] request made by the Appellant it has been disclosed that DBIS paid GT a total of £63,125,047.43 (including VAT @20% on programme delivery) to the consortium led by GT for the 3 years between 1.1.12 until 31.12.14 of which £16,391,917.25 was grant funding. This related to a total of 81,060 intervention days delivered, 96.3% of which were delivered by external consultants paid directly by the client (subsidised under the scheme) and 3.7% of which were delivered by the consortium's employees or self employed consultants paid by the Consortium.

6. The Appellant registered as a consultant under both schemes but became concerned about the terms and conditions for the consultants and the efficiency of the schemes in general. He made a complaint in 2011 following which his rates were challenged and his work dried up. He believes that MAS is an expensive flawed scheme delivered without the required diligence or competence, at the public's expense and without adequate monitoring and governance by DBIS.

7. Following an initial FOIA request, he was provided with a copy of the GAS contract (with some personal data redacted) the specification and the implementation plan which he believed demonstrated serious flaws in the scheme's operation. The Appellant has raised concerns with the Parliamentary and Health Services Ombudsman (PHSO), he has complained about the GAS contract to the National Audit Office (NAO) the Financial Conduct Authority (FCA) and also made a claim in the Employment Tribunal as he believed that he had been penalised for whistleblowing. He had asked for the information that is the subject of this request from GT as part of his Employment Tribunal claim, this was refused by them on the grounds of commercial sensitivity although he was given some redacted disclosure and an unredacted copy was provided to the Judge in that case. This Tribunal understands the Appellant was unsuccessful in the Employment Tribunal due to its finding that he was a self employed contractor through a personal company and not an employee.

[3] P41 1 OB/1

Information Request

8. On 19th May 2014 the Appellant requested information from DBIS:

"I would like a copy of the contract between BIS and The consortium (which comprises of Grant Thornton, Pera and others) who are currently delivering the manufacturing advisory Service Programme".

9. DBIS wrote to the Appellant on 17th June 2014 providing some of the information requested and relying upon s43(2) and s40(2) FOIA to redact and withhold the information in the contract and 6 of the 11 schedules. The disputed information comprised:

- The index to the contract, (disclosed in full)
- The terms of the contract (disclosed subject to some s40 redactions)
- Schedule 1 MAS ITT Service Description Document[4] (disclosed);
- Schedule 1 MAS ITT Service Description Annexes B[5],C[6] and D[7] disclosed in full (save for a single s40 redaction).
- Schedule 2[8] Service levels (disclosed with redactions to section 4[9] and 5)
- Schedule 3[10] (GT's response to Tender) redacted in full
- Schedule 4 charges and Payment[11] (the majority was redacted)
- Schedule 5 Contract Management[12] (redacted)
- Schedule 6 Continuity of Service Plan[13] (redacted)
- Schedule 7[14] Change Control, disclosed in full
- Schedule 8[15] Exit Management Plan, disclosed with one redaction

[4] P 81 CB p101 PB/1 Open
[5] P95 CB p115 PB/1 Open
[6] P98 CB p118 PB/1 OPEN
[7] P103 CB p123 PB/1 OPEN
[8] P44 CB p64 PB/1 OPEN
[9] 105 CB p125 PB/1 OPEN
[10] P107 CB p69 PB/1 OPEN
[11] P50 CB p70 PB/1 OPEN
[12] P52 CB p 72 PB/1 OPEN
[13] P58 CB p78 PB/1 OPEN
[14] P65 CB p85 PB/1 OPEN
[15] P68 CB p88 PB/1 OPEN

- Schedule 9 TUPE[16] s40 redactions only
- Schedule 10 [17]Authority Assets disclosed in full
- Schedule 11[18] Implementation Plan – redacted in full.

10. The Appellant asked for an internal review on 7th July 2014[19] stating that the information provided by DBIS was not "*the specification agreed as part of the contract with Grant Thornton but instead attached a copy of part of the tender document instead*". The details of the internal review were set out in a letter dated 14th July 2014 and upheld the exemptions relied upon and confirmed that the correct MAS Specification had been disclosed to him.

Complaint to the Commissioner

11. The Appellant complained to the Commissioner about DBIS's response to his request stating in his letter of 17th July 2014[20] that:

The MAS document is very clearly part of the Invitation to tender, the [GAS] is the detailed specification against which GTUKLLP are supposed to be delivering the contract, but aren't.

I am formally requesting the equivalent final agreed contract specification document that I have for the [GAS] scheme. The document supplied is clearly not it. I allege it is evidence being deliberately withheld to prejudice my claim and conceal likely wrongdoing."

12. In his email of 20th November 2014[21] the Appellant argued that non disclosure was contrary to the public interest and "*they have instead provided a largely irrelevant document which was part of the invitation to tender, and not the agreed contract*"

13. He gave examples of concerns he had with the contract and explained that he was not able to make a similar analysis as he had done in relation to the GAS contract as he

[16] P72 CB p92 PB/1 OPEN
[17] P78CB p98 PB/1 OPEN
[18] P359 CB p99 PB/1 OPEN
[19] P126 PB/1 Open p93 OB/1
[20] P98 OB/1 He had approached the Commissioner on 13th June as he had not received a response but BDIS provided its response on 17th June and so his complaint was not accepted until after the internal review.
[21] P112 OB/1

did not have the information. In his email of 24th November[22] he expanded his arguments detailing concerns he had about quality assurance, compliance with public funding criteria, and accountability for delivery of and returns from the service.

14. DBIS explained its position to the Commissioner (see its email of 26th November 2014[23]) namely that *"the ITT (Invitation to Tender) was used as the specification for the MAS contract as they were procuring a known service and there was no negotiation about how the service would operate unlike the [GAS] contract that was for a new service (originally called Business Coaching for Growth, but now renamed Growth Accelerator). The ITT [...] was included in this part of the MAS Contract as it provided details of the services required. This is the reason the two documents do not look alike, nor would they, as procurement procedures and contract negotiations for both were not the same or conducted by the same teams"*. DBIS provided the Commissioner with copies of the information.

15. They also provided details of their justification for applying the exemptions in their letter of 6th February 2015[24] and explained that the Commissioner had been provided with a complete copy of the withheld information because:

    - There was no Annex A to the specification *"due to the labelling of the Annexes starting at Annex B, there is no reference to Annex A in the ITT or the contract specification so it has not been withheld or removed from the contract specification"*.

    - Annexes E and F were not in scope as they referred to the old service and were not included in the contract for the new service.

Appeal

16. The Appellant appealed on 28th August 2015 on the grounds that

[22] P124OB/1
[23] P126 OB/1
[24] P146 OB/1

a) The information was not commercially sensitive (as he had had the equivalent disclosure from the GAS contract, much of the information was generic and known to those in the industry anyway),

b) The public interest favoured disclosure in light of the concerns raised out of the GAS information and the flaws evident from the operation of the MAS scheme.

17. The Commissioner opposed the appeal and relies upon the findings and reasoning in his decision notice. DBIS were joined by Case Management Note dated 6th November 2015, they oppose the appeal arguing that the GAS disclosure is consistent, the withheld information commercially sensitive and the public interest favours withholding the redacted information.

18. All parties have consented to the case being determined upon the papers and the Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) GRC Rules being in receipt of a bundle of documents containing: the Pleading and investigation file (OB/1), The witness statement from DBIS including open exhibit (PB/1 open) and closed exhibit (CB) and the Appellant's supporting documents (OB/3) including his response to the witness statement and addendum documents. In reaching this conclusion the Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules.

Scope

19. Although in his response the Appellant appeared to indicate that he had not asked for Grant Thornton's tender nor Schedule 6 and Schedule 11, he has declined to limit his grounds of Appeal to exclude those documents[25] and confirms that he seeks the contract and any appendices or other connected documents. We are satisfied that this is a reasonable position in keeping with the overriding objective and duty to co-operate with the Tribunal as set out in rule 2 GRC rules because clause 1.4 of the contract states:

The schedules form part of this agreement and shall have effect as if set out in full in the body of this agreement and any reference to this agreement includes the schedules.

[25] Letter of 24.12.15 p 59-60 OB/1

20. Consequently, whilst the Appellant may not have asked for these specific documents as additional items, if the information forming part of the contract is contained within these documents it is clearly within the objective terms of his request. Having not had the opportunity to see these documents and to know to what extent they supplement the terms of the contract it would not be reasonable for him to exclude them as irrelevant from this request.

21. Pursuant to correspondence between the parties during the Appeal process it appears that the Appellant had not received a complete copy of the redacted disclosed material. We are satisfied that this has now happened and the Tribunal will determine on those elements that remain redacted of the contract and appendices insofar as they relate to s43 FOIA.

22. Additionally, the Appellant stated in his response:

"If past contracts are integral to current contract, then they I believe form part of the current contract, which is what I have asked for, and should therefore be supplied, redacted if necessary."[26]

The Tribunal has had regard to the disputed information and is satisfied that past contracts do not fall within the scope of this information request. Whilst it is apparent from the ITT that the base provision of MAS was to remain the same (in terms of the levels of interventions/type of service to be offered) and that the past metrics of the existing scheme were to be provided to the tenderers so that improvements could be made, the past contract does not form part of the current contract: it is not attached as a schedule and the disputed information does not need to be read with the previous contract in order to make sense. In that regard the disputed information is "stand alone" and not dependent upon the terms of the earlier contract, as such we are satisfied that it is not within scope.

23. The Appellant disputes whether the entirety of the disputed information is before the Tribunal, he does not accept that he has been provided with the final specification as it is too imprecise in his experience and he disagrees with the reasons given for there

[26] P41 OB/1

being no Schedule A to the Specification. The Tribunal accepts that these are factual issues for it to determine as part of this appeal.

Evidence

24. The Tribunal has had regard to all the documentary evidence before it, even where not mentioned directly in this decision. The Appellant's evidence is taken from his representations to DBIS, the Commissioner and the Tribunal. DBIS provided a witness statement from Paul Bond Head of Electronics and Manufacturing Support at DBIS since 9th September 2012 who leads the Team responsible for managing the delivery of the "MAS" contract. The Appellant points out that Mr Bond was not in post until 9 months after the contract was negotiated and signed, and argues that his evidence should be treated with caution. The Tribunal is satisfied from his role and seniority that he has sufficient operational and practical experience to understand the process of tender and contract negotiation and to assess the relative commercial sensitivity of the information in the disputed information insofar as it relates to GT, its partners and DBIS and as such is a suitable witness for the purposes of this appeal.

25. Mr Bond's evidence was that MAS was originally run on a regional basis by Regional Development Agencies but in 2011 an open tendering process was run by BIS to run a new national service. The Appellant queries the use of the term "open tendering" process which he understands to mean competitive bidding against the same standard specification and he argues it is inconsistent with what appears to be the "negotiated" contract relied upon by DBIS. Similarly, whilst GT rely upon the commercial sensitivity of negotiated elements of the contract, DBIS told the Commissioner that:[27] *"the ITT (Invitation to Tender) was used as the specification for the MAS contract as they were procuring a known service and there was no negotiation about how the service would operate unlike the [GAS] contract that was for a new service".*

26. The Tribunal is satisfied that this evidence is not inconsistent. It is apparent from the papers that there was no restriction on those able to enter into the process, and that the product offered was to be the same, however, from the terms of the specification (as

[27] P126 OB/1

disclosed to the Appellant), it is apparent that there was considerable fluidity in the way that the service could be delivered and DBIS were actively seeking different approaches to the new contract. This would necessarily mean that the eventual contract terms would depend upon what was agreed by the successful tenderer hence the negotiated elements of the contract.

Whether further information is held

i. A separate Specification

27. DBIS's case is that unlike the specification for GAS which was 4 times the size of MAS and offered a different product and service to that of its predecessor

"the ITT (Invitation to Tender) was used as the specification for the MAS contract as they were procuring a known service".

28. The Appellant disputes this and maintains that due to the lack of specificity in the ITT, DBIS must be withholding the actual specification. It is not disputed that GAS replaced the High Growth Coaching run by GT and its partners for many years. He argues that to all intents and purposes it is identical to the previous programme[28]. Additionally, he argues that MAS and GAS overlap – they have the same purpose, the same clients, the same prime contractor, the only material difference being their targets (MAS targets manufacturers, whereas GAS applies to general business). All this he argues points to an inconsistency in specification which is incredible.

29. Mr Bond's evidence[29] is that

"the constituent parts of each specification for the MAS and GAS contracts the core elements are the same. Both sets out the rationale for the scheme, specify the core deliverables and outputs of the scheme, the governance arrangements for delivering and managing the service and details how to handle any legacy arrangements.

The specifications only differ in the level of detail each is set out in, primarily as the new Growth Accelerator programme was radically different in aim and scope to its

[28] P23 OB/1

[29] Para 83-4 witness statement

predecessor, MAS on the other hand was simply a replacement of the previous regionally administered scheme with a nationally administered scheme."

30. The Tribunal accepts this evidence and is satisfied that there was no additional separate specification. We have had regard to the whole of the disputed information including the response to tender from which there is no reference to an additional specification document. It is not for this Tribunal to judge whether the GAS scheme was radically different in aim, scope and practice from its predecessor (which may come down to a question of philosophical perception versus practical experience). We take into consideration the similarities in the specifications between the 2 schemes in concluding that the ITT in this case did serve as the specification. We are supported in this conclusion by the fact that they were negotiated by different teams and that the thrust of the ITT in MAS was to provoke alternative thinking around delivery of the same product. It is apparent from the entirety of the disputed information how the details came to be agreed and the extent to which previous procedures and standards were lifted directly from the existing MAS scheme.

ii. Annex A

31. Schedule 1 has embedded pdf documents which are named:

- MAS ITT Service Description Final 1.
- MAS ITT Service Description Annex B

32. Annex B is referred to within Final 1 as are annexes C-F. The Appellant queries the absence of an Appendix A and argues that this is indicative of a further withheld document. In his pleadings he notes that in the letter of 14th July 2014 from DBIS which set out the findings of the internal review the following enclosures were listed:

- Annex A – the FOI Code of Practice
- Annex B – The MAS specification as specified in Schedule 1 of the MAS Contract
- Annex C – Message Undeliverable response from [email address given]

He argues that contrary to DBIS's stated position that there was no Annex A *"due to the labelling of the Annexes starting at Annex B"* there was an Annex A which was

the FOI code of practice. He argues that this demonstrates that DBIS evidence is not credible.

33. We are not satisfied that the Annex A referred to in the letter of 14th July resolves this issue. The letter of 14th July clearly indicates that Annex A is being used in this context to denote the first attachment to that letter rather than referring to Schedule 1 or the contract. It is not apparent where the FOIA code of practice is material to the ITT specification whereas its relevance to the internal review is evident in the letter of 14th July 2014. Annex B in the letter refers to the second attachment to the letter (namely the full and final specification for the MAS contract). Whilst coincidentally this can be expected to include Annex B to Schedule 1, it is not being used in that context here which is to denote the entirety of the specification for the MAS contract not one of the annexes. We are supported in this conclusion by the identity of Annex C in this letter which is clearly stated to be the third attachment and is proof that an attempt was made to send an electronic copy of the disclosed material which was unsuccessful. In Schedule 1, Annex C is the National Service Description. We note that other schedules within the contract use Annexes and that e.g. Schedule 6 has an Annex A. We are satisfied therefore that Annexes as used by DBIS relate directly to the document to which they are attached and we would expect there to be explicit reference in the body of the document to describe what was in the Annex.

34. We go on to consider DBIS's explanation. The Tribunal observes that documents often go through many drafts and it is not unheard of for clerical errors or anomalies to creep into revised documents. The Tribunal must deal with what it is satisfied on a balance of probabilities was held at the relevant date. Whilst the Appellant questions the format of the specification, we accept the evidence that no document is missing. There is no reference to Annex A in the body of schedule 1 and in our judgment it is more probable therefore that the numbering has gone awry than that a document is missing or edited out to avoid disclosure.

Commercial Prejudice

35. s43 FOIA provides:

(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).

It is subject to the s2(2)(b) FOIA public interest test, namely that:

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

Whether the exemption is engaged

36. The applicable test for determining whether the information is in scope is as follows:

i. The actual harm alleged must relate to the applicable interest i.e. it must relate to the commercial interests of either DBIS or GT

ii. DBIS must be able to demonstrate that some causal relationship exists between the potential disclosure of the disputed information and the prejudice which the exemption is designed to protect and that this crosses the threshold of "would" or "would be likely" to cause the prejudice claimed.

iii. The risk of prejudice must be a very significant and weighty chance of prejudice, being more than a hypothetical possibility, a real and significant risk, it can be less than 50% i.e. it need not meet the civil standard of "more probable than not". –. In this case DBIS relied upon "would" which is a higher evidential burden on the public authority to discharge.

iv. Additionally, the prejudice itself must be real, actual or of substance[30].

37. DBIS' arguments here have been advanced with the input of GT who whilst not a party were consulted. We note that an Employment Tribunal Judge did not order disclosure of the unredacted disputed information on the grounds of commercial sensitivity, that decision was not made within the parameters of s43 FOIA. This Tribunal is not bound by that finding and makes its own assessment of the commercial sensitivity in this case insofar as it applies to s43 FOIA.

38. We are satisfied that the prejudice envisaged is commercial, it relates to a business contract between DBIS and GT, and is material to DBIS and GT's ability to contract

[30] Department for Work and Pensions v IC [2014] UKUT 0334 (AAC) at [26 -7]

on better, more lucrative, more favourable terms or those providing better value for money. We accept therefore that the harm alleged is commercial in nature and therefore in scope.

39. We are satisfied that there is a causal link between disclosure and prejudice to commercial interests of GT in:

- bidding on the retendering of the MAS contract in the future[31]
- bidding on other contracts with DBIS knowing what they have been prepared to agree to in the past,
- bidding on other contracts not for DBIS but against GT.

40. From the evidence of DBIS we accept that any future contract for MAS would be preceded by a competitive tendering process.[32] We also accept that bidders for contracts such as MAS are operating in a highly competitive marketplace. Having had regard to the withheld information we accept that it sets out the contractor's proposals for the operation of the MAS service. It details how the contractor plans to run, manage and organise MAS, how GT organises itself, strategic information about its business and operation of MAS, its resources and tolerance levels in terms of risk and financial planning.

41. The Appellant argues that there is transparency to much of this information from companies using the service, and those contractors supplying it. Thus the service offered, the structure, pricing, subsidy and (we extrapolate) the marketing, training, publicity and service materials would be visible and thus known to competitors.

42. The Appellant further argues that the case for Proprietorial methods is overstated - all competitors have their own way of doing things, and therefore another company's approach is of limited use. The Consortium's proprietary methods are unlikely to be unique or special as PERA and GT had been delivering the same contract for many years.

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[31] We must confine our consideration of the exemption to the "relevant date" which following the reasoning in APPGER v ICO and FCO [2015] UKUT 377 (AAC) is the date of the public authority's refusal. At that time it was still envisaged that MAS would be retendered. We cannot therefore take into consideration that it is now apparent that MAS was not retendered.

[32] At the relevant date the existing MAS contract was coming to an end and it was anticipated that the contract would be retendered

43. DBIS argue that even if some information is known about the operation to those involved in the scheme, this should be distinguished from disclosure of contractual information which is definitive to the world at large about how GT secured the contract and manages the scheme – including the manner in which the bid was presented. The Tribunal agrees that despite elements being known, the sum of the information is greater than its parts, it is informative and commercially beneficial to competitors providing the whole picture. Other organisations could tailor their own tenders using the disputed information as a template or targeting the GT bid with a view to undercutting it based on the work and analysis that GT has done.

44. The Appellant points to the use of the "Orbit tool" which was used for GAS, information about which he argues is in the public domain because it was supplied to all its contractors[33]. He believes that part of the information being protected relates to the "MX start diagnostic tool" adopted by MAS West Midlands under the previous contract but in the public domain due to a press release 2011 and a University of Warwick Thesis[34]. The Tribunal makes no comment about any licencing or confidentiality arrangements attached to the use of proprietorial systems in assessing this point and proceeds on the basis that widely distributed proprietorial systems will lose some of their commercial sensitivity in that their use and some elements of their operation are likely to become known to competitors in the same field.

45. In considering this point, the Tribunal makes no comment on the contents of the withheld information however observes, by way of generality, that the fact that a system or tool or product is to be used in the delivery of a contract is not the same as knowing the detail of its operation, the analysis behind its use, the costings including any savings, alternatives considered or being used in tandem and any improvements or enhancements made or envisaged.

46. The Appellant's case is that there will be significant disclosure of detail in any future tender process. He argues KPIs would have to be supplied to all those tendering so that they are not commercially confidential. The current MAS metrics were disclosed

[33] P21 OB/1
[34] Appellants addendum documents

as part of ITT Annex F. Additionally, there has been selective disclosure of performance figures e.g. in the annual report showing targets and actual figures.[35]

47. Whilst this reduces the commercial sensitivity of some of the disputed information, it does not remove it and hence the real prejudice associated with disclosure. The Tribunal observes that disclosure as part of the tender process is to a more limited audience than disclosure to the world at large and competitors on other projects who may not wish to bid on a MAS retender would have the advantage of the detailed figures and GT's appetite for risk, point of compromise etc. Similarly, disclosure of figures by GT is selective and not comprehensive and in particular not broken down into detail.

48. The Appellant points to the passage of time which he argues means that this information is no longer commercially sensitive, additionally, it is no longer intended to retender for MAS. We are satisfied that none of these points reduce the commercial sensitivity and prejudice of disclosure because we are required to confine our consideration of the exemption to the "relevant date" which pursuant to the reasoning in APPGER v ICO and FCO [2015] UKUT 377 (AAC) is the date of the public authority's refusal. At that time the contract was current, operational and retender was envisaged imminently.

49. The equivalent information the Appellant seeks, he considers to have been disclosed in the GAS contract, therefore he argues there cannot be commercial prejudice from disclosure or else it would not have been released. We accept the arguments of DBIS who do not agree that the same information was disclosed e.g. the GAS tender was withheld, whilst KPIs and management information criteria are disclosed what is redacted appears to be when they are measured and their consequence, charges and payments and the implementation plan are redacted.

50. Whilst we look at consistency to assess the value of the evidence from DBIS and the industry standard and actual commercial sensitivity – disclosure is not determinative as disclosure also depends upon the assessment of the public interest even where the exemption is engaged and the information is commercially sensitive.

[35] E.g. p64 OB/3

51. Taking all the above into consideration we are satisfied that competitors would have an unfair advantage in future bids for this and other similar contracts in that disclosure would provide them with information not otherwise publicly available and for which in relation to their competitors there is no reciprocity which would enable them to:

i. Copy the model,
ii. Accurately undercut the costs when competing for bids in general,
iii. Target their efforts at undermining the GT model,
iv. Benefit from the experience, analysis, knowhow, strategy and approach of GT in designing their own model.

GT would thus be unfairly disadvantaged in competing. We are satisfied that the prejudice is real and of substance and the exemption is therefore engaged in relation to GT.

52. DBIS also argued that it would prejudice them commercially as it would mean they were less likely to achieve best value for money for the taxpayer as it would enable a *"future supplier to know the nature of the service (including its price and how it was run, operated and monitored) for which the government was prepared to award contracts in the past and to have tailored future tenders accordingly by offering a service of no greater value for money"*[36] and

"the world would know the price that the government was prepared to pay for this or similar services, weakening the government's ability to pay the same or lower price for the same or similar services offered by future tenderers"[37]"

We are mindful of the contract cost information disclosed pursuant to the Appellant's subsequent FOIA request in weighing the commercial sensitivity of this information. We agree with the Commissioner who concluded that DBIS is in a strong enough position that it could withstand the impact of disclosure without it having a significant effect upon its commercial interests in obtaining best value for tax payers' money.

53. DBIS argued that they risked reducing the pool of those willing to bid. We do not agree, the size of the contract and the fact that contracts such as these are likely to be

[36] Para 24 WS
[37] Para 59 WS

available only from public authorities means that it is likely that these will continue to remain an inviting prospect for commercial bidders. DBIS is a public authority under FOIA with the responsibilities of accountability and transparency that that entails. All commercial partners should be expected to be aware of this and to understand that any commercial information provided is subject to FOIA indeed the s45 Code of Practice puts the onus on the public authority to ensure that the parties with whom it contracts understand the role of FOIA.

54. It is also argued that bidders would be reticent about providing detailed commercially sensitive information for fear of release, which would hamper DBIS's ability to tender for future contracts of this nature. We have had regard to the length and value of the contract. There are limited similar opportunities for contracts of this size and all public sector contracts are subject to FOIA with the same risks. We are satisfied that DBIS is in a strong enough position having regard to the length and value of this contract to specify the level of disclosure that they would require in order to assess and validate a bid.

55. It was argued that DBIS would be less able to negotiate improvements on its contracts as disclosure would demonstrate their tolerance level and future tenders would be more likely to replicate the existing service rather than to innovate. We take into consideration that as with the current service there is likely to be some disclosure of metrics, processes and pricing in any future tender. We are satisfied that this can be managed through careful drafting of ITT or contract specification. As with this contract the ITT can specify that improvements are wanted in particular areas. We are therefore not satisfied that the exemption is engaged in relation to commercial prejudice to DBIS.

Public interest.

56. The Appellant's public interest arguments can be placed into 3 categories:

i. Concerns relating to general government procurement and contract management.

ii. Concerns he has with MAS through comparison with the GAS documents

iii. Concerns he has with MAS through his own experience as a contractor within the scheme.

57. Taking these themes in turn. We accept the Appellant's arguments that there is a very strong public interest to have transparency over Government contracting. We have taken into account the concerns raised in relation to overbilling in certain government contracts, the historic inadequacy of government monitoring and governance processes and the flaws in existing government procurement and contract management as set out in the National Audit Office Transforming Government Contract Management Report dated September 2014 (NAO)[38] and The Public Accounts Committee - Transforming Contract Management Report dated 10.12.14 (PAC).[39] In particular we take into account that the NAO report identified that there is a need to improve transparency over government contracting[40]:

- *Monitoring and control – ...clear standards and objectives for its contractors*
- *Transparency – ability to see through the contractor's organisation, performance and costs and the knowledge that others can raise issues on your behalf.*
- *Assurance - Reason to be confident of the suppliers controls and know that services provided meet the required standards.*

58. The "model of an integrated system of control and assurance"[41] provides for increased transparency both to the government department but also to the public:

- e.g. under FOIA including reduced use of commercial confidentiality clauses,
- published information on performance: including Key Performance Indicators
- Published information on delivery environment including information on staff numbers employee engagement and codes of conduct.

[38] OB/3 p 224
[39] OB/3 p283
[40] NAO Transforming Government contract management OB/3 @ p271
[41] OB/3 p 272

59. The PAC report concluded that:

- The way the government contracts gives too much advantage to the contractors,
- Contracts should [avoid] the taxpayer being locked into unreasonable and out-dated costs and a victim of excessive profits.
- Contractors also need to accept that spending public money brings with it a greater degree of public scrutiny and transparency, they must be far more open through, for example, the publication of contracts and performance indicators being standard practice.[42]

60. The Cabinet Office Standard operating procedures should require departments to set and regularly review KPI regimes, to ensure that they are incentivising the right behaviours, with clearly specified indicators that are capable of highlighting poor performance at any early stage. They stressed:
"the public's right to more visibility of the taxpayer's pound, wherever it is spent. A citizen whether from the perspective of funding or receiving contracted out public services should have easy access to meaningful performance information, and be able to draw matters to government's attention where local knowledge and experience casts doubt on what is being reported".[43]

61. Additionally, the report stated that *"the CBI was clear that more transparency was required and that every contract should stipulate the right levels of transparency. It also said that both government and contractors have hidden too much behind claims of commercial confidentiality when revealing information publicly"*[44]

62. A further recommendation was that the "*Cabinet Office should require all service contracts to be published including a clear expression of the performance the service user can expect and then how contractors are performing*"[45].

[42] OB/3 p 287
[43] OB/3 p300 emphasis added
[44] OB/3 P302-3
[45] OB 3 p303

63. Whilst the Contract document has been published, it does not include a clear expression of the service levels, the monitoring information or the performance; that is in the redacted schedules and the tender document. As such it circumvents the accountability and transparency envisioned and deemed necessary in the aforementioned reports. Although there are annual reports with targets and actual figures, these are self selecting, not complete and do not indicate how these values have been measured or verified.

64. The Appellant has detailed concerns he has with MAS through comparison with the GAS documentation. The GAS information specified: how the Scheme is delivered, costs, how it was managed, how much coaches are paid, the intended length of interventions, job and personnel specifications and delivery structure. Following his analysis of the GAS contract he believed that:

- Subcontractors were paid less than half the market rate as identified by DBIS,
- subsidies were halved with larger SME's paying a premium,
- the service was not impartial,
- there was no training, qualification or experience requirement.

65. The Appellant argues that transparency is necessary because in his judgment it is likely that similar flaws would be indentified in relation to MAS. Additionally, there is no or insufficient visibility in relation to any of the expected measures below for the MAS contract:

i. State funded interventions are required to comply with Treasury and public procurement criteria.

ii. Contracts should provide "Additionality" in that the tax payer should see return for their investment –ie controls should be in place to ensure that interventions are not deadweight (would not have otherwise taken place).

iii. The contract should be delivering viable and sustainable gains.

iv. There should be no displacement (growth "created" diverted from existing jobs/output elsewhere).

v. Approval for projects should be robust, fair and not under the control of a single individual, decisions should be subject to spot checks and audited.

vi. There should be criteria and controls for quality and effectiveness.

vii. There must be a requirement for roles of those delivering to be specified detailing skills, qualifications and experience.

viii. Profit sharing should encourage efficient and effective delivery and should not negatively impact on quality or outcome.

66. It is not within this Tribunal's jurisdiction to uphold or reject specific complaints relating to the procurement, operation, management or delivery of the MAS or GAS contracts. However, we agree that further information is required to enable the public to hold DBIS to account and to provide clarity in how it spends money, ensuring effective use of public funds. The contract is for a large sum of public money which increases the need for, clarity over the agreed contract and method of operation.

67. Disclosure of additional information could potentially result in better value for money in future bids as the public would be in a position to make representations if they felt that the procurement was flawed, and save public money, as well as furthering understanding of and participation in the debate of issues of public concern such as:

i. The plight of manufacturing (the Appellant believes that the Government's Industrial Strategy has not been efficiently delivered by DBIS and it is in the public interest to provide information that might reveal the reasons for continual failure).

ii. Whether the DBIS strategy was the best approach.

68. We accept that the contract will be subject to scrutiny such as internal audit and scrutiny within DBIS (who will receive performance information). Many issues can be raised by the public with outside agencies such as the NAO, PHSO etc. based on individual experience or information already in the public domain (such as perceived

flaws in the vetting process, conflicts of interest, billing rates, allocation etc.) We accept the Appellant's point that these arguments have more force if supported by data rather than anecdotal evidence, it also saves concerned members of the public from raising ill founded concerns. Transparency includes the reassurance of knowing that there are adequate controls and safeguards to the spending of public money.

69. The Appellant has a number of specific concerns with MAS through comparison with the GAS documents and as a result of his own experience such as the vetting of contractors. He successfully registered his pet Cat on the advisor database (a publicly available database) to demonstrate the flaws in the verification process both in relation to identity and expertise. He argues that this raises:

- a safety risk to service users (such as lone workers or employees under 18)
- a danger to public safety if safety critical products e.g. automotive spares, or electrical goods are not designed and manufactured to safe and correct standards.
- A financial risk to SME's who would be disclosing their financial details to an un-vetted individual.

Whilst we consider the safety risks to be overstated, we do consider that transparency relating to the vetting of those providing the service to be in the public interest both by way of reassurance for clients, to demonstrate expertise, competence and good use of public funds and as part of the marketing and reputational management of the DBIS strategy and MAS service.

70. The Appellant points to an individual having control over 11 stated consecutive processes.[46] He argues that this is poor practice and reflects that there is no system to allocate work fairly – and avoid the conflict of interest of the prime contractor favouring employees over subcontractors. He also maintains that particular coaches were allocated too many clients making it impossible for them to deliver effectively and suggesting "cronyism". It is not clear from the information disclosed thus far how GT ensured Consultants met standards of the contract and what they were or how rates were determined.

[46] GAS contract p 448 OB/3

71. The Tribunal accepts that it is important to balance the commercial sensitivity of GT's analysis, expertise, strategy, thinking and know how in the minutiae of the contract and the need for individuals to understand decisions made by public authorities about their lives and challenge these decisions. There has already been some disclosure of the broad picture in terms of the use of external consultants relating to the Appellant's additional FOIA request, however, the measures used to assess performance are still not visible and we are satisfied that there is a strong public interest in greater transparency in this area. We are supported in this conclusion by the BIS Research paper 155 dated November 2013 (authored by Policy Research Group Durham Business School/St Chad's College) (the Durham Report) which reported that MAS clients could not connect improvements to MAS interventions[47]. How the KPIs were to be monitored to ensure that this performance information was correct, properly and independently collected and verified is not apparent from the currently disclosed information.

72. In assessing the public interest in disclosure of a more precise breakdown of GT's figures, the Tribunal takes into account that their Sub contractors are required to publicly reveal their day rates, skills, number of contracts awarded publicly and have ratings from clients available. We are satisfied therefore that this is indicative of industry norms that some specific figures are routinely made publicly available notwithstanding commercial competition.

Against disclosure

73. As set out above[48] the Tribunal is not satisfied that there would be real prejudice to DBIS' commercial position resulting from disclosure and as such we do not attach much weight to this in weighing the balance of public interest.

74. DBIS points to the information already in the public domain such as the global costs figures, the information already disclosed which it argues is sufficient to meet the

[47] OB/3 p165
[48] Paragraphs 53-56 above

need for transparency and accountability. They argue that the Appellant can mount his arguments on the basis of current knowledge

75. They point to the other avenues for scrutiny which they maintain would be more proportionate than disclosure of the sensitive commercial information to the world at large; e.g. NAO and PHSO who could obtain the un-redacted papers for the purposes of investigating any complaint. Additionally, the NAO report[49] envisaged external review of performance as a way of ensuring transparency and accountability rather than full public disclosure.

76. The Appellant took his individual complaint encompassing issues with allocation of work etc. to the Employment Tribunal which DBIS argue is a private interest and not a public interest. We are satisfied that it is in the public interest that the public are not hindered in pursuing a claim or enforcing a right due to lack of pertinent information. However, on the facts of this case we are satisfied that the disclosure provisions and ability for the Tribunal Judge to scrutinise the un-redacted information as part of that case is sufficient to meet that public interest without disclosure under FOIA.

77. We accept that it is in the public interest to preserve a situation where private sector suppliers can contract with public authorities without prejudice to their commercial interests. Whilst the Appellant argues that it was GT's choice to tender in the knowledge of FOIA, we note that the redacted information was supplied as commercial in confidence to DBIS. However, this was with the caveat that there was a duty to provide information under FOIA as required and all the information was therefore supplied on the clear understanding that there was no absolute guarantee of confidentiality. We are satisfied that the Tribunal must have regard to the relative sensitivity of the information withheld in assessing the public interest. There is less public interest in protecting information which has some visibility and will become apparent even if only in outline to suppliers, clients and the public. Similarly, often the fact of a system, product or procedure is less sensitive than the detail of its use.

[49] OB/3 p 237

78. Having applied the principles as set out above we are satisfied that the public interest is weighted in favour of some additional disclosure as detailed in the closed annex attached to this open decision. The Tribunal has provided some general reasoning relating to the withheld elements of the disputed information.

Management information including KPIs and other data (schedule 2.4)

79. We accept this information is not in the public domain and is the product of negotiation between the DBIS and GT and that these are variable measures specific to each contract rather than industry generic or standard terms. We accept that this provides specific information on how the contract was managed and monitored and on the potential legal liabilities and consequences for GT. The information is commercially sensitive as those who contract with GT in future will know what GT were prepared to agree to, rivals can pitch their own bids towards the same KPIs but undercutting the rate. However, the fact that this performance data was being collected was generally known and it is likely that this information would be disclosed to future tenders in future bids (as it was in this case). It is reasonable for the public to know the basis upon which the contract is being assessed and the data DBIS have asked to be measured.

80. We repeat the factors set out in paragraphs 57-63 above and are satisfied that the public interest favours transparency not only of the definitions and their calculations but the status of each measure both so that GT and DBIS can be held to account in terms of scrutinising the performance of the contract and its ongoing management. The calculations do not show actual figures, but without them it is not possible to assess the value of the measures in terms of whether the data is adequate and represents a rigorous standard.

81. Although KPIs were redacted from the GAS contract, the test here is not consistency in the application of DBIS policy but the balance of public interest.

Schedule 2.5 Regional Activity Breakdown

82. This remains redacted. We accept that this shows the minimum service levels acceptable to DBIS and is a negotiated figure. Disclosure would reveal pricing

structures, financial models and resources each supplier was prepared to commit. It shows the point of compromise. It is commercially sensitive, these are projections and therefore represent negotiated compromise rather than what was achieved.

GTs tender on behalf of the Consortium (Schedule 3)

83. GT object to disclosure on grounds of commercial sensitivity, they state[50] that the ITT was prepared solely for DBIS with a presumption that it wouldn't be released publically. It contains commercial assumptions made by GT and "*the methodology they have used to provide the Business Coaching for Growth Service.*[51]"

Disclosure would prejudice the accumulated competitive advantage that has resulted from their provision of similar services over a period of several years. ... it would enable them to use and copy GT's proprietary methodology which includes (but is not limited to):

- *Pricing model and costs*
- *Operational delivery plans*
- *Mobilization and exit plans*
- *Tools and techniques and analytics*

84. DBIS support these arguments because it would have a negative impact on GT's competitive advantage revealing strategic information about their business and the operation of MAS which would benefit their competitors in a retendering of MAS and when tendering for other contracts in the future. It would also place information on the structure and finances of GT that would not otherwise be available in the public domain. Reciprocal information on competitors would not be available.

85. We accept this evidence and consider that there is a strong public interest in those who bid for government work not being prejudiced commercially in relation to their competitors. However, whilst the general approach to this work is set out in the MAS

[50] P183 OB/1
[51] Original name of MAS

specification, the precise details of how GT would undertake this contract are not[52]. The ITT was extremely vague and the provisions of the tender bid have been incorporated into the contract and are thus enforceable as such. We recognise that it is not usual to disclose a tender bid and that this was not done in the GAS case, however, the GAS specification was more detailed and therefore public interest in disclosure for the purposes of transparency was not as high.

86. From disclosure in this case and the NAO and PAC reports it is clearly expected that the contract will be public and it would be unfortunate if public authorities could "contract out" of transparency by adopting an approach whereby the service levels, and accountability provisions were not visible because they only appear in the tender document. We accept the Appellant's arguments that it is likely that some of this information will be released in an ITT for future tenders in terms of explaining the current levels of funding and metrics and that some of the structure would also be apparent to anyone using the scheme. Whilst we accept that this is a more limited category than the world at large, the prejudice being guarded against (namely knowledge of rivals) cannot be expected to be protected with this level of public knowledge.

87. The Tribunal has therefore had regard to what information is likely to be visible or generic and what is less commercially sensitive in assessing the public interest. We acknowledge that the tender bid format itself is sensitive in that it shows the approach and strategy of GT; for this reason, the public interest is not in favour of disclosing the whole document. We remind ourselves that FOIA provides the right to information rather than a document and for this reason such disclosures as we find are in the public interest are elements of information rather than whole sections of the tender document. If when disclosing information from the Tender DBIS wish to put it into a neutral format so that the structure of the bid is not apparent, that would be permitted within the terms of this determination. Similarly, if information appears elsewhere in the public domain we will not order its disclosure from the tender document as the public interest in transparency in this context is not sufficient.

88. The specifics are set out in the closed annex but by way of general explanation:

[52] p183 OB/1 Email DBIS ICO 8.5.15

- Figures, presumptions and projections showing capacity, cash flow, resource allocation, costings etc. remain redacted as their commercial sensitivity outweighs the public need for transparency in particular as there are other methods available for scrutinising this such as audit.

- What is being recorded and what status the measure has is important for transparency and accountability as noted in the NAO and PAC Reports and should be disclosed,

- the rationale for data, alternatives considered, analysis of data that has led to a conclusion and the justification of levels etc. represents work done, expertise, proprietary approach, strategy and operational capacity and has a high commercial sensitivity and is less necessary for transparency and accountability as such it remains redacted.

- Measures that are important for public confidence that the Tribunal would have expected to find in a wider specification are also disclosed.

Schedule 4

89. Details of the precise legal and financial consequences of particular KPIs are redacted as they have more commercial sensitivity than the KPI values set out in schedule 2. The details set the level of risk and represents a commercial threshold that GT may want to negotiate differently in future contracts. It also provides the detail for competitors to target and undercut when there is no reciprocity.

90. The fact that there is scrutiny and consequence to over and underperformance is important for transparency and has been disclosed. Since the KPIs have been disclosed the public ability to hold GT and DBIS to account in terms of delivery is met without the detail.

91. Mr Bond's evidence was that the table on p51 should be withheld because:

"it would prejudice DBIS commercial interests because the world would know the price that the government was prepared to pay for this or similar series, weakening

the government's ability to pay the same or lower price for the same or similar services offered by future tenderers".[53]

92. The same argument could be made for knowing how much GT agreed to provide the service for. We are mindful of the contract cost information disclosed pursuant to the Appellant's subsequent FOIA request and do not take this argument into consideration in weighing the commercial sensitivity of this information. However, the fact that the total cost of the contract is in the public domain in our judgment reduces the public interest in disclosure of this table which shows the projected breakdown over time in addition to enabling the total cost to be calculated.

Contract Management Structure (Schedule 5)

93. DBIS witness evidence was that disclosure would give rival firms a clear idea how GT organise themselves to bid for Government Contracts which is not standard and is specific to these suppliers. We disagree and have had regard to the requirements of the ITT[54] and are not satisfied that the structure is sufficiently unique that its commercial sensitivity should be protected at the expense of transparency. Whilst firms have their own way of doing things we are satisfied that the broad structure is likely to become apparent to future tenderers and there will be some visibility from users. The NAO and PAC reports both stressed the importance of accountability[55]. Disclosure is consistent with the disclosure the Tribunal has determined should be made from the tender document.

94. Additionally, the titles of the roles of GT and DBIS have already been disclosed[56]. The job descriptions associated are not surprising and reflect the rigour with which this contract is being managed. Governance and accountability will be more effective if the senior leadership team has clearly defined responsibilities for championing contract management,[57] a clearly defined system of problem escalation at a level that mirrors the contractor.

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[53] P10 WS
[54] at p 113 PB/1 open
[55] Eg Governance and Visibility best practice as defined by the NAO P248 OB/3
[56] p 72-3 CB p92-3 PB/1 open
[57] P248 NAO report OB/3

Continuity of Service plans and risk assessment (Schedule 6)

95. There would be visibility for those involved, reducing commercial sensitivity, in particular in terms of the organisation of the roles and the organizations involved. Disclosure of job titles helps make sense of the material disclosed thus far which is unnecessarily confusing with the redactions in the text especially where the roles are disclosed[58].

96. The table consists of risks identified, how serious, what steps taken to mitigate these and whether they have yet been implemented. Although it is important to understand that the contract is properly managed and the rigour with which these have been assessed and planned for, it would provide a template of the vulnerabilities including the likely success of steps taken to manage this. Competitors would benefit from the assessment (they could lift the piece of work done and match it) there are also implications for the security of the data and success of the project. Although the GAS contract schedule was partially disclosed to identify risks (but not mitigation or response) this document is more detailed. There is sufficient information in the body of schedule 6 to meet transparency requirements.

Scheme implementation plans (Schedule 11)

97. This is detailed project management, showing what is left to do at what stage and how it is broken down. It shows the level of risk and the structure of the transition. It is likely that it is company specific and represents work done which could be used by competitors to undermine the bid or improve their own processes. The commercial sensitivity outweighs the need for transparency and scrutiny.

Conclusion

98. For the reasons set out above we allow the appeal in part and direct that the information specified in the closed annex be disclosed within 35 days.

99. This decision is unanimous.

[58] P60 CB P80 PB/1 open

Dated this 22nd day of September 2016

Fiona Henderson

Tribunal Judge