



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50880905**

Appeal Reference: EA/2020/0187V

Considered on the papers 18 January 2021 and 2 July 2021

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

AIMÉE GASSTON & NAOMI MATTHEWS

Between

PETER CHURCH

Appellant

and

INFORMATION COMMISSIONER

First Respondent

HERTFORDSHIRE COUNTY COUNCIL

Second Respondent

DECISION

The appeal is allowed in part. The Second Respondent shall disclose the further information specified in this decision within 35 days.

Judge C Hughes
10 July 2021

REASONS

1. In this case Mr Church has sought information from Hertfordshire County Council (HCC) on 11 July 2019 about the process by which Avanti was selected to be the provider of new schools in an area of east Hertfordshire. The request was as follows -

"Dear Sirs,

Freedom of Information - New school in Bishops Stortford North

I understand that you have recommended that the new school provision for Bishops Stortford North should be run by Avanti Schools Trust, who were selected through a thorough and robust competition process.

Hertfordshire has for many years had a reputation for providing excellent schools and I greatly benefitted from that schooling in my youth. Schools are an essential public service and there is a very significant public interest in understanding the process whereby Avanti Schools Trust was selected to run this school and to test the robustness of the selection process, particularly given Avanti have no other schools in the area.

... could you provide me with copies of the following documents: -

- *Avanti schools trust application to run this new school and the applications of any other entity who bid to run the school*
- *the assessment criteria template scoring grades and document setting out the assessment process*
- *the name and qualifications of the individuals on the selection panel*
- *the actual scores awarded to Avanti and any accompanying documents containing an assessment of the bid*
- *and the notes taken by the selection panel during the interview process with Avanti"*

2. HCC replied on 30 August 2019: -

- It refused part 1 relying on s43(2) of the Freedom of Information Act 2000 (FOIA)
- It provided the material requested by part 2
- It provided details of the senior positions held (or formerly held) by members of the selection panel, refused to supply the names in the absence of consent relying on s40(2) and explained that it did not hold information about the qualifications
- With respect to parts 4 and 5 it supplied the questions asked in the interview but declined to provide the scores awarded to Avanti, "accompanying documents containing an assessment of the bid" and the panel's notes relying on s43(2).

3. HCC explained that information was not in the public domain and was commercial in nature. The “Wave 14 programme to set up Free Schools” had been extended to 11 November 2019 and the Trusts involved in the Bishop Stortford application process might make further applications. Disclosure would place them at a commercial disadvantage by making details of their application public and could deter them from submitting applications to HCC reducing the field of applicants. HCC concluded that, despite the interest in transparency and openness, it was not in the public interest to disclose the requested information as its disclosure would prejudice the commercial interests of third parties and inhibit its future working relationship with Avanti.
4. Mr Church complained to the IC who investigated and in her decision, notice upheld the position of HC. She maintained the importance of the preservation of commercial confidence and advanced arguments against disclosure: -

29. The Commissioner’s guidance on section 43 outlines that “information about the procurement of goods and services by a public authority is usually considered to be commercially sensitive. This can include information provided during a tendering process”

30. The interests under consideration are therefore the commercial interests of AST and the council. The council however has only applied the exemption in respect of AST and the other bidding companies’ commercial interests.

.....

47. In the Commissioner’s opinion, there is a very strong and inherent public interest in ensuring fairness of competition and it would be firmly against the public interest if a company’s commercial interests were harmed simply because they have been awarded, or recommended to be awarded a public sector contract.

50. Having considered all of the above, the Commissioner’s decision is that there is a strong public interest in protecting the commercial interests of AST and ensuring that they can compete fairly in new competitions.

5. On 22 May Mr Church appealed against the IC’s decision, indicating that he considered that she had adopted the Council’s arguments “uncritically”. He was sceptical as to the commercial significance of the information and argued that the IC was wrong in concluding that any meaningful competitive advantage to competitors could flow from disclosure since the way Avanti ran its schools was in the public domain. He submitted: -

(v) at paragraph 49 the ICO accepts HCC's arguments that disclosing this information would "narrow down the information it received from companies in the future" and this would "potentially lead to a lack of innovation". This statement is unsupported,

heterodox and contrary to the operation of FoIA over the last 15 years. It is highly unlikely that AST, or any other person bidding for a school, would withhold information and thus disadvantage themselves in the tender,

(vi) the decision of who will run the new school in Bishops Stortford will profoundly affect the town and the many thousands who will attend that school in the coming years. The need to understand why this decision was taken and that it involved proper and robust consideration of all relevant factors is overriding. To the extent disclosure of this information causes AST or HCC any commercial prejudice (which is denied) that prejudice is very slight.

(vii) AST does not operate partly in the public sector and partly in the private sector. It, and its competitors, are providers of public services and will make tenders to public authorities. All tenders made to run schools by any entity will be subject to FoIA and, indeed, AST and its competitors are directly subject to FoIA. This provides a level playing field for competition in this marketplace. To the extent the ICO Decision states that disclosure would “interfere with the level playing field” (paragraph 48), that statement is incorrect and contrary to precedent,

(viii) to the extent that this information is commercially sensitive to AST (which is denied) the ICO makes no attempt to assess whether its disclosure would have a positive effect in improving the delivery in public services. In particular, the fact that competitors could better compete with AST could provide a significant overall benefit as, in general, competition is desirable. This is not a straightforward issue but is an important factor in the public interest assessment. The fact the ICO Decision makes no reference to this is a material omission; and

(ix) the ICO notes that HCC is intending to run further tenders and AST is intending to bid for them (paragraph 48), and state this means there is a public interest against disclosure. In contrast, the fact further competitions are expected and AST intends to bid means the public interest should be in favour of disclosure in order to understand the rationale for this award, given that HCC appears to intend to run the same process and apply the same assessment criteria.

6. In resisting the appeal, the IC affirmed her view of the commercial significance of the information and noted that: -

In particular, while observation of the structure and operation of schools may provide AST’s competitors with a certain amount of information about the nature of its bids, it will not provide competitors, for example, with clear information on what elements were scored highly by public authorities such as the Council. It is clear that disclosure of the remaining information sought by the Appellant would be likely to undermine the competitive position of AST.

7. In resisting the claim that the names of the assessors who carried out the exercise should be revealed, the IC argued that the role titles were sufficient. The individuals had a reasonable expectation that their data would not be

disclosed and there was a risk that disclosure would cause damage or distress. She accepted HCC's explanation that the individuals were not at a level that public facing accountability for performance would be expected.

8. HCC in supporting the IC drew attention to the normal rules of confidentiality in tendering for public contracts, that the individuals on its assessment panel were not of a senior level, did not have a budget obligation or were part of the public facing role and not at a level where public accountability for performance would be expected.
9. In arguing that the names of the assessors should be disclosed, Mr Church considered that the roles were senior and noted that one of the individuals had had a significant public role for HCC in relation to the pandemic. The identified roles were: -

Head of School Standards and Accountability, Hertfordshire County Council;
Headteacher, Simon Balle School;
Head of Organisation and Sustainability, Hertfordshire County Council;
Director of Education Services, Herts for Learning Ltd;
Executive Head, The Spiral Partnership Trust Family; and
Education Consultant – former secondary school head.

10. HCC concluded; -

“25. Finally it is important to note that although the Council held the competition it did so on behalf of the Department For Education (DfE) and AST were only recommended by the Council to the DfE who are the actual decision makers in the process. “

Consideration

11. FOIA provides for the protection from disclosure of information for a range of reasons, including: -

43 Commercial interests.

.....

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

12. This exemption is subject to a public interest test. In arguing that the information of this specific would prejudice commercial interests reliance is placed on consideration of the arrangements for the tendering for services by public authorities and an assumption that the same considerations apply in this case. It seems to the tribunal that this is a misplaced focus. Such tenders are usually focussed on the price to the public authority of a specific service for

a number of years (often three) and would frequently involve the pricing of different elements of the service. That is not the case here. There is barely a single figure in the documents, the information identified as needing protection on commercial sensitive grounds is neither numerical nor managerially or financially sophisticated. The competition is not, in that sense, a financially driven competition nor is there evidence of innovative managerial thinking. Although the exemption is engaged, it is only weakly so.

13. The competition in this case was between a number of trusts with their competing proposals to run schools in Bishops Stortford indefinitely – it may be noted that some Voluntary Aided Schools came into existence in the 19th Century, started receiving public money under the terms of the 1870 Education Act (colloquially “Forster’s Education Act”) and continued to do so into the 21st Century. Free Schools and Academies are the latest iteration of the process by which independent organisations can receive public funds to provide education. This competition was envisaged to place responsibility for the provision of education in Bishop’s Stortford in the hands of a group of charity trustees for a very long period of time. The selection of the winning trust is therefore a matter of considerable significance. The tribunal is satisfied that the balance of public interest is decisively weighted in favour of disclosure of the commercial interest material in the applications sought by part 1 of the request.
14. Although the award is *“only recommended”*, the role of HCC in determining the future provision of education in Bishops Stortford for an indefinite period is to make that recommendation to the Secretary of State. That recommendation has (presumably) some weight in the Secretary of State’s decision-making. How the recommendation was arrived at is a matter of significant weight and the *“actual scores awarded to Avanti and any accompanying documents containing an assessment of the bid and the notes taken by the selection panel during the interview process with Avanti”* should be disclosed.
15. From an inspection of the closed material relating to part 1 of the request, there is personal data relating to three categories of individual which is marked to be withheld relying on s40(2) of FOIA. The applications contain CVs for proposed staff at the school. The tribunal does not consider that this material should be disclosed. Nor do details of individuals appearing as contact points or addressees or otherwise appear in the material. However, the tribunal is satisfied that the personal information about trustees (with the exclusion of personal contact details) is properly disclosable. Trustees are responsible for the governance of the trust, are accountable to the Charity Commission and are the public-facing officers of the trust. They should have a reasonable expectation that the material they have included in the application form about themselves in seeking this recommendation should be available to the public.
16. The third part of the request was for the names and qualifications of the assessors. The argument against disclosure is that they are not sufficiently

senior and had no expectation from HCC that their names would be revealed. The tribunal considers that this is an instance where the IC has uncritically accepted the assertions of HCC. They are individuals of sufficient expertise and seniority to make the recommendation on behalf of HCC to the Secretary of State. Two of them as a headteacher and former headteacher in that role were public-facing and had budget responsibilities. The Head of Standards and Accountability had a substantial public role in relation to the pandemic. From their titles and known or likely experience, as well as from their selection to make this decision, their names are properly disclosable.

Signed Hughes

Judge of the First-tier Tribunal

Date:10 July 2021

Promulgation Date: 15 July 2021