



Neutral citation number: [2023] UKFTT 687 (GRC)

Case Reference: EA/2022/0246.

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

**Between:**

**JESSICA LEARMOND-CRIQUI**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**and**

**THE SECRETARY OF STATE FOR SCIENCE, INNOVATION AND TECHNOLOGY**

**Oral hearing on: 29 June 2023 on CVP.**

**Decision given on: 21 August 2023.**

**Tribunal Judge: Brian Kennedy KC**

**Tribunal Member Rosalind Tatam**

**Tribunal Member Stephen Shaw**

**Representation:**

**For the Appellant:** Jessica Learmond-Criqui as a Litigant in Person

**For the First Respondent:** Richard Bailey, Solicitor within the Information Commissioners' Office.

**For the Second Respondent:** Horatio Waller of Counsel.

**Result:** The Tribunal dismiss the appeal.

## REASONS

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### **Introduction:**

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 5 August 2022 (reference IC-88892-G0P0), which is a matter of public record.

### **Factual Background to this Appeal:**

- [2] Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information on the report sought by the National Security Strategic Investment Fund (‘NSSIF’) relating to the Government’s investment in OneWeb. The Appellant also requested information on any reports on the health impacts of electromagnetic radiation or radiofrequency radiation from satellites considered with regard to the investment. The Commissioner’s decision was that the then Department for Business, Energy and Industrial Strategy (“BEIS”) appropriately applied the exemption at FOIA section 43(2) – Commercial information to the information held.
- [3] The Commissioner maintains the position set out in the DN; namely that the BEIS appropriately applied the exemption at FOIA section 43(2) – Commercial information to the information held. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

### **History and Chronology:**

- [4] OneWeb is a Low Earth Orbit (‘LEO’) broadband satellite communications company building a capability to deliver broadband satellite internet services worldwide. OneWeb was also stated in the DN to be the developer of a positioning

system rivalling GPS (however this was not accepted in the responses by the Appellant or the Second Respondent).

- [5] OneWeb filed for bankruptcy in the US in March 2020. The company was in urgent need of investment to continue its operations. The Government expressed an intention to invest in OneWeb. BEIS explained that due to the compressed timetable for investment, HM Treasury was unable to subject the proposed investment to a full Green Book compliant business case. Instead, the NSSIF, on the Government's behalf, sought professional financial advice on the company's prospects.
- [6] On 26 June 2020, the BEIS acting permanent secretary and accountancy officer felt unable to authorise the investment into One Web and wrote to the Business secretary requesting a ministerial direction concerning the government's proposed investment in One Web.
- [7] On 3 July 2020, it was announced that the Government (together with other investors) would invest in OneWeb.
- [8] On 17 September 2020, the Appellant wrote to BEIS and requested information in the following terms:-

*“Re the request for a direction below, the National Security Strategic Investment Fund (NSSIF) had on government's behalf sought professional financial advice on the company's prospects into the purchase of OneWeb by the government.*

*[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/902931/OneWebrequest\\_for\\_ministerial\\_direction.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902931/OneWebrequest_for_ministerial_direction.pdf)*

*The letter above states: ‘That work involved scrutinising the business plan from the firm's management, including its revenue projections, through a financial model. It drew on expertise provided by a space-sector consultant. The model was also adjusted to ensure that it reflects a more conservative projection of the likely returns’.*

*The request is for a copy of the report sought by NSSIF which relates to the statement above. (“the First Part of the request”)*

*In addition, a request is made for any reports considering the health impacts of using electromagnetic radiation / radiofrequency radiation from satellites on humans, animals, pollinators and trees in considering the implications of this investment”. (the Second Part of the Request”)*

- [9] On 29 September 2020, BEIS responded, refusing the request, relying upon the exemptions under section 41(1) and section 43(2) FOIA, a position upheld following an internal review.
- [10] The Appellant complained to the Commissioner about the reliance by BEIS concerning its reliance upon sections 41(1) and 43(2) FOIA to the report obtained by NSSIF on behalf of the Government (the withheld information and their claim that they did not hold any health report).

[11] **Legal Framework:**

S1 FOIA General right of access to information held by public authorities.

1. Any person making a request for information to a public authority is entitled —

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

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

However these rights are subject to certain exemptions set out in Part II of FOIA. For the purposes of this case, the relevant exemption in Part II is s. 43(2) FOIA which provides that:

“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)”.

#### Section 43:

Section 43 FOIA is a qualified exemption to disclosure and is therefore subject to the public interest test under section 2(2)(b) FOIA. This states that a public authority does not have to provide the information if; *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

#### Prejudice:

The First Tier Information Rights Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and 0030)* (“Hogan”) set out the following useful steps to take when considering whether disclosure would be likely to prejudice commercial interest, which we adopt in this case:

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

#### Likelihood of Prejudice:

The meaning of the words *“would or would be likely to”* prejudice has been considered by the Tribunal and Courts’ on a number of occasions.

The *“would be likely to prejudice”* test was analysed in the context of the s.29(1) exemption of the Data Protection Act 1998 in *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin). Munby J at [100] considered that:

*“likely” ... connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there “may very well” be prejudice to those interests, even if the risk falls short of being more probable than not”. (emphasis added)*

The Tribunal has endorsed Munby J’s observations when considering the equivalent language in Part II of FOIA: In the Tribunal in *Hogan v Information Commissioner [2011] 1 Info LR 588* summarised the two standards of chance, would and would be likely, as follows:

“there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not [“would”], and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not [“would be likely”].” ([33])

The First Tier Information Rights Tribunal in *John Connor Press Associates v Information Commissioner (EA/2005/0005)* also added clarity with regards to the minimum level of chance to satisfy the “would be likely to” test, considering at [15] that:

*“We interpret the expression “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility”.*

The approach in *Hogan* at [29] – [35] has since been approved by the Court of Appeal in *DWP v Information Commissioner [2016] EWCA Civ 758: per Lloyd Jones LJ at [27]*.

It is important to note that whilst the chance of prejudice needs be significant and weighty, the extent of the prejudice does not need to be, although it will be relevant to the public interest balance. It is sufficient that “*some commercial disadvantage*” is likely to be suffered (*Newham LBC v Information Commissioner EA/2011/0288* at [41]).

## **Public interest test:**

The material time to consider the public interest balance is the time of the response to the request. – see *Montague v Information Commissioner & Department of International Trade [2022] UKUT 104 (AAC)* ('Montague') – which in this case is 29 September 2020. The Tribunal considered the timing of the likelihood of prejudice also as at the end of September 2020 (consistent with Montague).

## **Commissioner's Decision Notice:**

**[12]** The Commissioner considered the scope of the complaint in relation to the request for information and concluded that:

- i) The harm alleged by BEIS relates to the commercial interests of OneWeb and therefore accepted that the alleged prejudice is relevant to the section 43 exemption;*
- ii) The causal relationship between releasing the withheld information and prejudice to the commercial interests of OneWeb is real and of substance [19];*
- iii) Disclosure 'would' prejudice the commercial interests of OneWeb and OneWeb's investors and that the anticipated prejudice is more likely than not [20];*
- iv) As a consequence of the above, the Commissioner was satisfied that the exemption under section 43(2) was engaged [21];*
- v) The public interest in maintaining the exemption under section 43(2) outweighed the public interest in disclosure on the facts of this particular case [26- 30];*
- vi) Given the Commissioner's conclusion on the application of section 43(2), the Commissioner did not consider it necessary to also reach a conclusion on the application of section 41 [31].*
- vii) In relation to second part of the request the Commissioner alleges that the Complainant has not complained to the Commissioner about BEIS' response to their additional request regarding material considering health impacts.*

- viii) *The Commissioner also stated that he was aware BEIS had engaged with the UK Space Agency to also confirm that no reports on satellite radiation health implications exist within the remit of the UK Space Agency.*
- ix) *The Commissioner at Paragraph 12 of the DN considered the scope of his investigation to be solely related to BEIS' application of FOIA section 41(1) and 43(2) exemptions to the report.*

### **Grounds of Appeal:**

**[13]** The Appellant's Grounds of Appeal are focused on the public interest balance, although she alternatively argues that s.43 is not engaged. The Appellant argues that the Commissioner erred in concluding that the public interest in maintaining the exemption under section 43(2) outweighs the public interest in disclosure. The Appellant argued that the public interest favours disclosure on the following grounds:

- (I) £500 million of taxpayer's money was spent on purchasing OneWeb for which the Government should be accountable;*
- (II) The purchase of OneWeb was against the advice of the UK Space Agency and against the advice of BEIS;*
- (III) The Government misled the public into thinking that OneWeb would replace Galileo and that therefore it was important for the public to have sight of the advice the Government received;*

**[14]** Further, the Appellant asked the Tribunal to consider the Second Part of the request which related to reports held by the UK Space Agency on health impacts of satellite radiation.

### **The Commissioner's Response:**

**[15]** The Commissioner maintained his position and relied on the DN for the findings therein and the reasons therein for those findings. However, the Commissioner set out the Second Respondents observations in respect of the Appellant's Grounds of Appeal:



- I. Disclosure of the information would prejudice the commercial interests of OneWeb, impairing the success of the company in terms of its ability to compete and secure contracts, which would adversely impact on the returns on the investment of public money;
- II. There had, at the material time (i.e. prior to the response to the request), been public scrutiny of the Government's decision to invest by the BEIS Strategy Committee on 17 September 2020 (on the same day as the request). The Committee held an evidence session to have a technical overview of UK satellite strategy and of satellite-based broadband against the backdrop of the OneWeb deal (there has been further scrutiny by other select committees though after the material time);
- III. Non-disclosure agreements ("NDA") had been created with regard to the financial model analysis and technical assessment.

**[16]** Further, the Commissioner stated if it is accepted by the Tribunal that disclosure of the withheld information would prejudice the commercial interest of BEIS this will accordingly add weight to the public interest in maintaining the exemption.

**[17]** In respect of the Second Part of the Appellants request the Commissioner argued (in the Tribunal's view erroneously) that this was not part of the Appellant's section 50 complaint. BEIS nevertheless informed the Commissioner that they did not hold this information.

**Response of Second Respondent:**

**[18]** The Second Respondent states that the Report is confidential in three respects. They are as follows:

*"Firstly, the Report is based upon, and presents, information provided by OneWeb to the Government that attracts confidentiality by virtue of the NDA. The disclosure of the Report in 2020 would make the SoS liable to an action for breach of confidence from OneWeb pursuant to the NDA.*

*Secondly, the Report contains information the disclosure of which would likely make the SoS liable to OneWeb in an equitable action for breach of confidence. The Report clearly meets the Coco v AN Clark (Engineers) Ltd criteria.*

*Thirdly, the Report itself states that it is confidential to the Consultancy, and it should not be disclosed except in accordance with the terms of the engagement letter. The disclosure of the Report in 2020 would have made the SoS liable to an action for breach of confidence from the Consultancy.”*

- [19] The Second Respondent also argues that the report contains trade secrets for the purposes of section 43(1) of FOIA.
- [20] The Second Respondent contends that the relevant commercial interests that are engaged are the commercial interests of the Second Respondent, its investors and of the Government from the evidence that commercial competitors are referenced in the report.
- [21] The Second Respondent recognised a limited public interest in the disclosure of the Report in that it would provide transparency into the financial appraisal which informed the Government’s decision to invest in OneWeb. However, the public interests in withholding disclosure of the Report, individually and cumulatively, they argue, outweigh the public interest in its disclosure. The Second Respondent argued the section 41 exemption applies, and the section 43 exemption applies.
- [22] The Tribunal notes that the Second Respondent in this Response does not refer to the second part of the request.

**Appellant’s Reply;**

- [23] In addressing the BEIS report, the Appellant stated that section 43(2) is not engaged. In arguing the same, the Appellant provided various screenshots of news articles related to the Second Respondent. Regarding section 41, the Appellant contended that it is in the public interest to disclose the material which will be a

defence to “any action by OneWeb for breach of confidence”. Further, the Appellant believed that the NDA would state the same.

- [24] In response to the Commissioner, the Appellant averred that the commercial interest of OneWeb is not affected so section 43(2) does not apply. Further, if the Tribunal disagrees with the Appellant’s conclusion, her position remains that the public interest of disclosure outweighs that of non-disclosure.
- [25] The Appellant argued that the information is not confidential as information has been filed in US Courts which is open to public scrutiny and the bankruptcy has been reported throughout the media in the United States. The Appellant provided various screenshots of news articles related to the Second Respondent in support of her claim.
- [26] The Appellant set out extensively (Paras 45 -54) her view that it is inconceivable that there are no reports on “*the Health impact of using electromagnetic radiation/radiofrequency radiation from satellites on humans, animals, pollinators and trees* – “: as set out in the Second part of the request.

### **Second Respondents further submissions on background:**

- [27] Amongst other matters the Second Respondents Background set out the forum for the appeal hearing in their Skeleton argument dated 22 June 2023 – thus - ;

*At Para.2.” On 17 September 2020 Ms Learmond-Criqui (“JLC”) sent an email requesting disclosure of documents pertaining to that decision from what was then the Department for Business, Energy and Industrial Strategy (“BEIS”) (“Request 1”) [OB/127-128]. On the same day, JLC submitted a separate request directed to the UK Space Agency (“the UKSA”) (“Request 2”). BEIS has since been split, and the newly formed Department for Science, Innovation and Technology (“DSIT”) now has responsibility for this area of policy [OB/183/11]”.*

**At Para.3.** *“Request 1 sought disclosure of the following from BEIS:*

***Part A:** a report commissioned by the National Security Strategic*

*Investment Fund (“NSSIF”) providing financial services into OneWeb’s prospects.*

**Part B:** *“any reports considering the health impacts of using electromagnetic radiation/radio frequency radiation from satellites on humans, animals, pollinators and trees in considering the implications of this investment.”*

**At Para. 4.** *“In relation to Part A of Request 1, DSIT has since disclosed openly that it holds this report, prepared by the consultants, Lazard. It is within the closed bundle [CB/14]. DSIT maintains its decision to refuse disclosure, under ss41 and 43 of the Freedom of Information Act 2000 (“FOIA”). In relation to Part B of Request 1, DSIT’s position throughout the proceedings has been that it holds no reports fitting this description.”*

**At Para 5.** *“The decision by BEIS to refuse Request 1 was upheld by the Information Commissioner (“the IC”) in the decision letter 5 August 2022 [OB/1-9] on the basis of s43 of the FOIA and having found that the public interest in maintaining that exemption outweighs the public interest in disclosure. Because of this conclusion, the Commissioner did not need to consider the reliance on s41 of the FOIA.”*

**At Para 6.** *“Part B of Request 1 was repeated in identical terms by JLC within Request 2 to the UKSA. Request 2 additionally sought disclosure of a “technical report” created by the Aerospace Corporation. This is a separate document from the Lazard Report.”*

**At Para 7.** *“The decision by the UKSA to refuse Request 2 was upheld by the IC in a separate decision letter dated 3 May 2023 (Reference IC-218830-V4B8 - not in the bundle). Notwithstanding the overlap, this appeal concerns Request 1 only. JLC has sought permission to join this appeal with her appeal for Request 2, which at the date of writing has not been granted by the Tribunal.”*

**[28]** At no stage in the hearing did the Appellant take issue with these submissions. We find no material grounds for rebutting these submissions.

### **Witness Statement of William Hardy:**

- [29] William Hardy was formerly the space policy advisor responsible for the Department's policy interest in OneWeb. He provided written witness evidence to the Tribunal on the 24<sup>th</sup> of March 2023. His witness statement identified the documents within the Department's possession that fall within the scope of the Appellant's information request and explained how those documents came to be in the Department's possession. Further, he provided an overview of the nature of those documents. William Hardy addressed the public interest in the disclosure of those documents and explained the commercial interests that would be harmed if the documents were disclosed further in his evidence in open and closed sessions at the hearing.
- [30] Mr Hardy stated in relation to Part B of the request that he was not aware of any report which the Department for the UK Space Agency held on the health impacts of satellites sought for the purpose of considering the implications of HMG's investment in OneWeb. Mr Hardy stated that the Appellants concern about potential health impacts is not a concern which the Department or the UK Space Agency shares. He stated that he had confirmed that position with the UK Space Agency who explained that the radiation for One Web satellites, which are over 1,000 Kilometres from earth, is very weak when it reaches earth and many orders of magnitude below the guideline limits for public exposure.

### **Late Application from Jessica Learmond-Criqui:**

- [31] The Appellant in her late application for disclosure and admission of a supplementary bundle and witness statement filed by her respectively on 15 June and 21 June, argued in support of her appeal against the decision to withhold the requested information. She invited the tribunal to: "*receive evidence which was not before the Commissioner; make different findings of fact from the Commissioner; and make a different final decision to that of the Commissioner*". Mr Bailey on behalf of the Commissioner consented to the application to admit these documents. Mr Waller objected to these documents being admitted at all. However, at the outset of the hearing we allowed that they be admitted on the basis

that the Tribunal would assess its value at the hearing rather than create any disadvantage to the Appellant by being denied the opportunity to have the evidence considered.

- [32]** The Appellant outlined the documents relevant to her appeal and recommended reading for the Tribunal in advance of her appeal. In her late witness statement, she provided a background to her request, an application for disclosure of redacted letters between the Second Respondent and the Commissioner; a health request, a request for financial information and the Appellant outlined that in her opinion the Commissioner erred in law; and the Appellant raised other public interest submissions.
- [33]** The Appellant concluded that the Second Respondent provided no evidence from OneWeb to support its argument of prejudice to commercial interests. Further, that there is no evidence of publicly available information from the the data room which would have been set up post US court Chapter 11 bankruptcy.
- [34]** The Appellant contends that there is no evidence of non-disclosure agreements. Finally, the Appellant argues that the Government have misled the public in relation to its intentions of buying OneWeb.
- [35]** The Second Respondent's reply to the late application dated 26 June 2023 was comprehensive and compelling. The application was effectively a late attempt by the Appellant to bolster and expand the arguments.
- [36]** This Tribunal accept and adopt the rebuttal by the Second Respondents in their reply of 26 June 2023. We accept and adopt the seven reasons as set out clearly and persuasively reasoned from paragraphs 19 to 29 therein. We do not accept that the additional evidence in the new Witness statement from the Appellant adds material information or evidence to assist her arguments herein.

## Analysis:

[37] While we admitted the late documentation and submissions, we found nothing of material value to assist us in determining the issues before us. With respect to the first part of the request;

[38] The Tribunal have read and considered all the submissions from the parties and evidence including witness statements provided by the Appellant and on behalf of the Second Respondent. We heard evidence from William Hardy, who at the outset of this appeal was the space policy advisor responsible for DSIT's interest in OneWeb. He was asked a limited number of questions in Open Session by the Appellant and the Panel but because of the nature of his evidence, the pertinent and material evidence was heard in Closed Session. The Closed Session Gist of that evidence is as follows;

- 1.) Counsel directed the Tribunal to the Lazard Report and the non-disclosure agreement which are contained within the closed bundle. The Tribunal were taken to each part of the report, and Members scrutinised the accuracy of the summary of its content within the letter of Ms Beckett to the Secretary of State, when she described the assessment as having *"involved scrutinising the business plan from the firm's management, including its revenue projections, through a financial model"*.
- 2.) The Panel asked questions to Mr Hardy on whether the report reached a "rational commercial case for investing" in OneWeb, as Ms Beckett stated.
- 3.) The Tribunal also scrutinised the extent to which the information within the report is already within the public domain, for example as a result of the US bankruptcy proceedings. Mr Hardy confirmed that he did not have knowledge of the extent of information in the public domain.
- 4.) Counsel's general submission was that the information is not in the public domain. The Tribunal were directed by counsel to the documents generated by the US Bankruptcy Court proceedings, within OB/545 onwards. The submission was made that the information made publicly available through those proceedings was limited in subject matter to the assets, liabilities and financial affairs of OneWeb, and it did not purport to reveal information about the business plan, or projections for revenue, funding and expenditure. Further, the

submission was made that limited detail was disclosed within the schedules concerning those subject matters.

- 5.) The Panel scrutinised Mr Hardy's closed witness statement. The Panel explored the extent to which the report addresses the issues of interest to the Appellant and the public, and in particular the extent to which the investment was motivated by an objective to use OneWeb's satellites for PNT capabilities. In that regard, the Tribunal scrutinised the accuracy of Mr Hardy's witness statement paragraph 23, final sentence. The Panel were given a technical overview by Mr Hardy of the concept of adding resiliency to PNT services and shown that these concepts were explained to the Select Committee at OB/430 and OB/447.
- 6.) Finally, the Tribunal were taken to the non-disclosure agreement in order to scrutinise its breadth.

**Is Section 43 engaged:**

- [39] The Tribunal have been persuaded that releasing the withheld information would have put information about One Web's business, structure and finance options in the public domain that would usually be private for a commercial venture. We accept that the information could have been, and still could be used, by identified competitors to draw assumptions on OneWeb's commercial strengths, weaknesses, and future planning, giving them an advantage over OneWeb and that disclosure would also weaken OneWeb's ability to compete for contracts and to do business with suppliers and customers.
- [40] We accept that release of the withheld information at the time would have increased the commercial risk to current and potential investors and it could have prevented OneWeb from attracting enough investment to become fully funded for its first-generation constellation. And that as HMG are a shareholder, releasing the information would therefore detriment the UK taxpayers' interests as well.
- [41] We have also been persuaded that disclosure would damage the trust that any other current or future commercial partner might have in HMG's ability to protect information they share in confidence and consequently prejudice and reduce the bargaining power of HMG in future negotiations.



- [42] Having considered all the evidence before us we are satisfied that the relevant commercial interests that are engaged are the commercial interests of OneWeb, of its investors and of the Government. So far as OneWeb is concerned, we are persuaded that it would be placed at a competitive disadvantage compared with its competitors if they were provided with insight into its business plan, which normally remains private and confidential to a business enterprise and that the commercial interests of investors are engaged in that the disclosure of the business plan could lead to the value of their investment decreasing. We also accept that the commercial interests of the Government are engaged firstly because of the likelihood that the value of its investment could fall if the Report is published, and secondly because disclosure would likely undermine trust between the Government and OneWeb and any future potential commercial partner.
- [43] We are persuaded that it is more probable than not that prejudice would be caused to the above commercial interests through disclosure. Alternatively, there is a real and significant risk of prejudice. That test is satisfied as at the date of the information request, in September 2020, the relevant time for considering whether s43 is engaged (*Visser v Information Commissioner* (EA/2011/0188) at [19]).
- [44] We further accept that even if the position is considered as at the present date, there would still be prejudice as 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”).
- [45] We are satisfied on all the evidence before us, and through the non-disclosure agreement, that there would, or would be likely to be real, actual prejudice of substance by disclosure of the withheld information and there is a causal link between the disclosure and the prejudice claimed. We find s43(2) is engaged.

**The Public Interest:**

- [46] Section 43 FOIA is a qualified exemption to disclosure and is therefore subject to the public interest test under section 2(2)(b) FOIA. This states that a public authority does not have to provide the information if; “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*”.

**[47]** The Tribunal accept the Appellants' argument that there is a significant public interest in ensuring transparency where the expenditure or lending of large sums of public funds are involved (*Brighton and Hove City Council v the Information Commissioner and John Keenan* (EA/2016/0119) at [43]). We agree that as far as the Lazard Report is concerned there is a public interest in disclosure in that it would provide further transparency into the financial appraisal which informed the Government's decision to invest in OneWeb.

**[48]** We acknowledge and accept the submissions made on behalf of the Second Respondent that:

*"1. The letter Sam Beckett wrote on 26 June 2022 summarises the scope and purpose of the Lazard Report and the key conclusions that were reached [OB/19-21]. It is not necessary for the public to see the full report to understand these matters.*

*a) The scope and purpose of the Lazard Report is described in Ms. Beckett's letter as involving "scrutinising the business plan from the firm's management, including its revenue projections, through a financial model".*

*b) Ms. Beckett summarised the outcome of the Report as setting out a "rational commercial case for investing".*

*c) Her letter goes on to refer to potential returns and commercial risks that Ms Beckett derived from the Lazard Report.*

*2. Transparency had already been significantly achieved into the investment through the information about OneWeb and the Government's decision to invest within it that was made publicly available before JLC submitted her request for information."*

**[49]** We acknowledge the fact the information considered in the Report was provided to HMT under strict confidentiality, and that Lazard provided the Report under confidentiality, demonstrates the real commercial sensitivity of the information, and presents significant weight in the public interest in favour of non-disclosure.

- [50] We also acknowledge and agree that there is a strong public interest in fostering confidence in the business community that commercial confidential information provided to the Government will not be disclosed (see by analogy *Brighton and Hove City Council v the Information Commissioner and John Keenan* (EA/2016/0119) at [50], and *R (Veolia ES Nottinghamshire Ltd) v Nottinghamshire CC* [2012] PTSR 185 at [126] per Rix LJ).
- [51] We find that in the public sector there is often a difficult balancing exercise to be performed between the speed of decision making and full internal consultation. Unusual decisions must be taken in unusual circumstances and the material facts are not always determinative. Transparency v Public Interest is not always easy and will on occasions raise suspicions and rumours. There was a ministerial direction here because of the unusual circumstances. We have no evidence to suggest anything has been wrongly withheld. In all the circumstances and after considering all the material evidence and all factual and legal issues before us we find the overwhelming public interest in withholding disclosure of the Report, individually and cumulatively, outweigh the limited public interests in its disclosure.
- [52] With respect to the second part of the request the Tribunal concluded, based on all the evidence before us, that on the balance of probabilities that BEIS held no relevant or material reports on the health impacts of using electromagnetic radiation/ radiofrequency radiation from satellites in considering the implications of this investment.

**Conclusion:**

- [53] Accordingly, we must dismiss both parts of this appeal.

Brian Kennedy KC

17 August 2023.