



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2014/0148

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS 50519211
Dated: 8 May 2014**

Appellant: UNIVERSITY OF SUSSEX

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: GABRIEL WEBBER

On the papers at: FOX COURT, LONDON

Date: 9 FEBRUARY 2015

Date of decision: 4 MARCH 2015

Date of promulgation: 12 MARCH 2015

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and ROSALIND TATAM
Tribunal Members

Written representations and submissions:

For the Appellant: Mr M Dautlich, Solicitor Pinsent Masons LLP

For the 1st Respondent: Mr Richard Bailey, Solicitor for Information
Commissioner

For the 2nd Respondent: Mr Gabriel Webber

IN THE FIRST-TIER TRIBUNAL

Case No. EA/2014/0148

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: FOIA

Absolute exemptions

- Confidential information s.41

Qualified exemptions

- Commercial interests/trade secrets s.43

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 8 May 2014.

SUBSTITUTED DECISION NOTICE

Dated: 4 MARCH 2015

Public authority: UNIVERSITY OF SUSSEX

**Address of Public authority: SUSSEX HOUSE
BRIGHTON
BN1 9RH**

Name of Complainant: MR GABRIEL WEBBER

The Substituted Decision

For the reasons set out in the Tribunal's open determination the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 8 May 2014.

Action Required Within 35 days of receipt of this Substituted Decision Notice the Appellant is to provide the withheld information in relation to "Service Provider Deliverables". .

Robin Callender Smith

Judge

4 March 2015

REASONS FOR DECISION

Introduction

1. Mr Gabriel Webber (the Second Respondent) asked the University of Sussex (the Appellant) for information about the final contract between it and a service provider responsible for catering services to the University over a ten-year term (Chartwells).
2. As a result of this the University provided, at various stages, much of the information to the Appellant in relation to this request.
3. By the time this appeal was considered by the Tribunal there were still a number of outstanding items to be considered which had not been disclosed, specifically **Service Provider Deliverables** and **Financial Return Information**.
4. The effect of those outstanding items – in terms of this information request – is considered below.

The request for information

5. On 8 September 2013 the Second Respondent sent an email to the University in the following terms:

Please send me an electronic copy of your contract with Chartwells in which they are contracted to provide outsourced catering services.

6. The Appellant responded on 4 October 2013 by relying on the exception under section 22 FOIA. It stated that once the procurement process had been completed it intended to formulate a publication plan for the major documents involved in the process. That decision was upheld following an internal review.

The complaint to the Information Commissioner

7. A redacted version of the contract was published on the Appellant's website on 27 February 2014. The University indicated that it wished

to withhold certain sections of the contract from publication under sections 41 and 43 FOIA.

8. The Information Commissioner reviewed the details of the Contract and recommended that further information be released. The University agreed to do this and forwarded the further information to Mr Webber.
9. It confirmed, however, that it still considered there was information exempt from disclosure under sections 41 and 43 FOIA in particular:
 - (a) Schedule 2 Part 5 – the “Service Provider Solution” which was Chartwells’ original tender submission to the University.
 - (b) Schedule 2 part 8 – the content of the column entitled “Strategy Deliverables”.
 - (c) Schedule 4 paragraphs 4.2 and 4.1 and Appendix 1.
10. Mr Webber confirmed to the Information Commissioner that he was not interested in seeing Chartwells’ original tender submission but only the final contract itself.
11. That confirmation means that the information in dispute in this appeal is the information in items (b) and (c) above which is described by the University in its Grounds of Appeal as the “Redacted Information”.
12. The Information Commissioner concluded in the Decision Notice that the exemptions claimed by the University under sections 41 and 43 did not apply to the redacted information.

The appeal to the Tribunal

13. The University’s Grounds of Appeal are, in effect, that the Information Commissioner erred in concluding that
 - the exemption under section 43 did not apply to the redacted information,

- he should have concluded that the public interest in the maintenance of the exemption under section 43 to the redacted information outweighed the public interest in disclosure and
 - he should have concluded that the exemption under section 41 was engaged in respect of the information in the column entitled “Service Provider Deliverables”.
14. In its further submissions to the Tribunal dated 18 December 2014 the Appellant made some further points.
- The University denied that it had, at any stage, acted in bad faith in respect of either dealings with Mr Webber or in its decision to award the catering contract to Chartwells (because it had disclosed almost the entirety of the contract save the disputed information).
 - The University took its obligations and responsibilities under FOIA seriously, employing trained professionals for the purpose and legal advice from outside Counsel where appropriate.
 - The University was no longer relying on section 22 FOIA in respect of the appeal.
 - Its position was that a considerable amount of information in respect of the information request had already been disclosed to the public and that disclosure of the disputed information would make a very limited additional contribution to the public debate but would substantially prejudice Chartwells’ commercial position. The contract was not related to the decision-making processes applied by the University in respect of the outsourcing but rather it was a commercial document resulting from the process and should be considered as such.
15. The Second Respondent – in an email dated 23 December 2014 – disagreed with those further submissions.

Evidence

16. The Tribunal was provided in advance of the hearing with an agreed bundle of material which included the information being withheld by the Appellant.

17. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure because, in this appeal, it is the Second Respondent who does not have access to the totality of the material available to the Tribunal or the Information Commissioner.
18. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
 - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
 - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
 - iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.
19. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:
 - i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
 - ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

20. The closed bundle in this appeal contained the disputed information. There was nothing additional in the closed bundle.

21. The Tribunal has considered carefully and rigorously the Appellant's points and concerns expressed in the Grounds of Appeal and in its other representations in relation to the closed material disclosed to it and the Information Commissioner but not to the Second Respondent.

Conclusion and remedy

22. The Tribunal will deal with the exemptions claimed in respect of the information request firstly by considering the effect of section 41 FOIA and then the effect of section 43 FOIA.

23. It will seek to do so in a way that leaves this decision as open as is lawful without prejudicing the position of the Appellant and without resorting to further reasoning which would not be disclosed in a Confidential Annex. To that end this decision will be sent first to the Appellant and the Information Commissioner (who has already seen all the withheld information) for the sole purpose of checking that it does not specifically mention the detail of the information that has been withheld.

Section 41 FOIA

24. The University seeks to rely on the exemption in section 41 for information withheld under the heading “Service Provider Deliverables” or the “Methodology” (which is also claimed to be exempt under section 43).
25. The Tribunal agrees with the Information Commissioner’s observation that the exemption cannot apply to information the public authority has generated itself. A concluded contract between a public authority and another person is not usually information being provided by one party and obtained by another party. Information in a concluded contract – particularly in this case – cannot benefit from the section 41 exemption because it has not been obtained by the public authority from another party.
26. The Appellant submits that the methodology was as a matter of fact provided by Chartwells to the University and the column entitled “Service Provider Deliverables” was not subject to negotiation prior to signature.
27. On the facts of this case this information could fall within the category of confidential information obtained from another party but it is still necessary to demonstrate that disclosure of the information to the public – and to the second Respondent – would constitute a breach of confidence actionable by that or any other person.
28. That can only occur if the information has the necessary quality of confidence, is imparted in circumstances importing an obligation of confidence and there was unauthorised use of the information to the detriment of the confider. That is a well-known and well-established maxim of case law in this area derived from *Coco v Clarke* [1969] RPC 41.
29. While the first two elements – the information having the necessary quality of confidence and it being imparted in circumstances

importing an obligation of confidence – may exist here, the third element is more problematical in the context of this case.

30. The Tribunal does not accept that it is likely that disclosure would result in detriment to Chartwells.
31. All this information demonstrates is that Chartwells correctly tailored its proposed strategy deliverables to *this* particular contract. Other catering contracts that may come up in the public sector in the future will be specific to the needs of the relevant public authority and it is hard to see that the information here would be likely to cause detriment to Chartwells.
32. On the facts of this case disclosure of this information would not constitute an actionable breach of confidence. The exemption under section 41 (1) is not engaged and should be disclosed to the Second Respondent.

Section 43 FOIA

33. To determine whether the exemption under section 43 (2) is engaged it is necessary for two questions to be considered. Firstly, is the requested information “commercial”? Secondly (and if the answer to the first question is “yes”), would the disclosure of the requested information be likely to prejudice the commercial interests of any person?

34. Is the requested information “commercial”?

(1) The Tribunal accepts that the redacted information is commercial in nature.

35. Would its disclosure be likely to prejudice commercial interests?

(1) The Tribunal needs to be satisfied as a matter of law that there is a real and significant risk of prejudice to the commercial

interests of the University and/or Chartwells rather than a hypothetical possibility of this happening.

- (2) The Appellant argues that the **Financial Return Information** can be “reverse engineered”. This is on the basis that the financial information withheld combined with the financial information already disclosed (such as the Funding Responsibilities column in the methodology) would enable third parties to work out the commercially sensitive information by deduction, enabling third parties to “reverse engineer” the commercially sensitive information in relation to the information withheld from the **Financial Return Information**.
- (3) In all the circumstances of the case that proposition from the Appellant – accepted by the Information Commissioner in his later submissions – appears to the Tribunal to be correct in relation to this category of withheld information.
- (4) The Appellant is entitled to seek protection of that exemption under section 43 (2) FOIA, it is engaged and the public interest in maintaining the exemption with respect to this **Financial Return Information** outweighs the public interest in disclosure.
- (5) The Tribunal is not persuaded that the same protection from that exemption exists in relation to the content of the column entitled “**Strategy Deliverables**”. Disclosure of this information would not be likely to prejudice Chartwells on the specific facts of this case. Public sector contracts are a lucrative source of business to many private companies. Transparency and accountability where contracts have already been signed and agreed would be unlikely to deter such companies from engaging in them in the future.
- (6) It is difficult to see actually looking at the relevant information – which the Tribunal has done in terms of the unredacted closed information it has available to it – how disclosure of such

information would be likely to prejudice the commercial interests of either Chartwells or the Appellant. Some of the information appears to be duplicate to that elsewhere in the contract and has already been disclosed.

- (7) For instance it is known – from information already disclosed – that this information will be reviewed annually. The redacted information appears similar to the generic key performance indicators (KPIs) that are commonly used within contracts such as this against which service providers are monitored.
- (8) The information appears to be contract-specific, in other words specific to the 10-year contract between the Appellant and Chartwells. It is difficult to see that other contracts in the public sector will necessarily incorporate these specific provisions for those contracts for what may be completely different services.
- (9) As the Information Commissioner notes, the contract has a break clause after five years. It is unlikely that this information would be useful to service providers in this field in five years' time.
- (10) In short, the risk that disclosure of this information would be likely to prejudice the University's commercial interests falls on the hypothetical rather than the "real and substantial" side of the divide.
- (11) In terms of the position of Chartwells, the disclosure methodology information on its own – without Financial Return Information – would be unlikely to prejudice the commercial contractor. It, too, is only a hypothetical risk rather than one which is "real and substantial".
- (12) For completeness, the Tribunal finds that it is unlikely that the disclosure of the information under the heading **Service**

Provider Deliverables would prejudice the commercial interests of either the University or Chartwells.

36. Our decision is unanimous.

37. There is no order as to costs.

Robin Callender Smith

Judge

4 March 2015