



Neutral citation number: [2024] UKFTT 962 (GRC)

Case Reference: FT/EA/2024/0204

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

Heard by Cloud Video Platform

Heard on: 11 October 2024

Decision given on: 30 October 2024

Before

**JUDGE PETER HINCHLIFFE
MEMBER DR PHEBE MANN
MEMBER EMMA YATES**

Between

PROSPECT

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Bob King

For the Respondent: Not represented. The Information Commissioner chose to rely on written submissions.

Decision: The appeal is **dismissed**

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. Prior notice of the hearing had been published on the gov.uk website, with information about how

representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Background to Appeal

2. An information request was made to the Ministry of Defence (“the MoD”) on 10 August 2023 by Mr King on behalf of Prospect, a trade union with 157,000 members. The relevant part of the request was as follows:

*“Under the Freedom of Information Act I would like to request the following information:
What percentage increase was mandated to AWE Plc for the remuneration of staff for the 2023 (June) pay round and when was this percentage offered.
I am happy to receive this information electronically.”*

3. The MoD responded on 23 August 2023 and confirmed that it held the requested information but refused the information request in reliance upon the exemptions set out in section s.43(2) (“commercial interests”) of the Freedom of Information Act 2000 (“FOIA”): Mr King requested an internal review of this decision by the MoD. On 9 January 2024 the MoD informed Mr King that the review had upheld the decision. On 12 April 2024, the MoD informed Mr King that in addition to relying on the exemption in FOIA s.43(2) it also considered the refusal of the information request on the basis of the exemption in FOIA s.36(2)(c) (“prejudice to the effective conduct of public affairs”).

4. Mr King on behalf of Prospect complained to the Information Commissioner about the decision of the MoD.

5. On 2 May 2024, the Information Commissioner issued Decision Notice IC-296311-C7X2 (the “Decision”) in which the Commissioner decided that:

“Section 43(2) does not provide a basis to withhold either piece of requested information.

• Both pieces of information are exempt from disclosure on the basis of section 36(2)(c).

• For the percentage increase which was mandated to AWE, the public interest in favour of withholding this information outweighs the public interest in disclosure.

• However, for the date this percentage was offered to AWE, the public interest in favour of disclosure of this information outweighs the public interest in withholding it.”

6. The Commissioner requires the MOD to take the following steps to ensure compliance with the legislation.

“Provide the complainant with the date the percentage increase was mandated to AWE.”

Appeal to the Tribunal

7. Prospect appealed against the Decision of the Information Commissioner to this Tribunal. In the appeal, Prospect set out the background to the decision and set out the grounds of appeal in the following terms:

“the MOD had changed their minds, after 9 months, and were now relying on section 36 of the act. We were not given the opportunity to put counter arguments advance of the decision by the ICO.

The ICO upheld “by a narrow margin” that the S 36 argument put forward by MOD was valid as, in their view, disclosing the information could have affected negotiations between AWE and Prospect on pay. The decision, without giving Prospect, the appellant, opportunity to respond, was arrived at on the assumption that negotiations took place. There were no negotiations on the number in question and the number was presented to the appellant as a set number on which they were unable to negotiate. It therefore follows that negotiations could not have been affected as there were no negotiations on the set number.

On the basis of how the law was applied, the MOD could have used each of the remaining 21 exemptions in the act, to argue that they should not release the information, and each time the ICO would have written to them asking for an explanation. In this case, it appears the MOD came up with an exemption that IOC could agree with, 'narrowly', on their second attempt. We believe the decision to not uphold our complaint was flawed and the information should be disclosed as, in the absence of negotiations, the position put forward by the MOD is erroneous.”

8. Prospect sought the reversal of the Decision and the disclosure of the Information they had requested.

The Legal Framework

9. The duty of a public authority to disclose requested information is set out in s.1(1) of FOIA. The exemptions to this duty are referred to in section 2(2) as follows:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

10. The category of exemption relied upon under FOIA in this case is s.36(2)(c) These are all so-called qualified exemptions, giving rise to the public interest balancing exercise required by s.2(2)(b). As noted above, the MoD’s initial reliance on s.43(2) FOIA had been abandoned by the time of the hearing.

11. The relevant parts of s.36 FOIA for the purposes of this Decision is as follows:

(2) Information to which this exemption applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act

(a) ...

(b) ...

(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

Powers of the Tribunal

12. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA as follows:

(1) If on an appeal under section 57 the Tribunal consider -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

13. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong rests with the Appellant.

The Hearing

14. At the hearing of the appeal held by video, Prospect were represented by Mr King. Both the Information Commissioner and the MoD chose not to be represented. No witness evidence was relied upon, but we considered an open bundle of documents comprising 91 pages. The Tribunal also had before it a closed bundle comprising the disputed information.

15. Mr King explained that he is the National Secretary for the defence sector for Prospect. Prospect is a trade union with 157,000 members. It represents a largely 'white collar' skilled work force at the Atomic Weapons Establishment ("AWE"). Mr King leads negotiations over pay and conditions with AWE on behalf of his members. He has first-hand knowledge of pay negotiations with AWE and he was involved in the negotiations in 2023 that prompted the information request on 10 August 2023.

16. Mr King outlined the different approaches that he and his members might pursue in dealing with private sector and public-sector employers. He explained that in dealing with the public sector it was common for Prospect to be told how much had been made available to the employing entity for pay rises in any year by the ministry or body with budgetary control. Prospect and the employer would then negotiate to see how the budgeted sum could be most effectively spread around the workforce. This was true for some of his negotiations with the MoD. The AWE used to be regarded as a private sector employer, but the decision had been taken recently that it should be brought back within Government control and it was now an 'arm's length' body. As such Prospect believed that they should be made aware of how much had been approved by the MoD for AWE to spend on pay increases in 2023. Mr King explained how knowing this information could assist in a non-confrontational discussion about the areas and staff in which the funds would best be sent. He referred to AWE's reliance on special skills, some of which were in short supply in the UK and how AWE needed to be able to recruit and retain these skills. He also pointed to the workforce at AWE that he represented being a very intelligent, analytical and committed workforce. They are not militant. The strongest views

that emerged in the pay discussions in 2023 arose from AWE's refusal to disclose how much it had available to spend on staff, which created some distrust.

17. Mr King explained the basis of the appeal in the following terms:

- (i) The Information Commissioner should not have decided that the exemptions in s.36(2)(c) applied without permitting Prospect to comment and make submissions on the exemption and on why it would be in the public interest.
- (ii) Had they done so they would have been told that there were no negotiations in 2023 with AWE about the amount available for pay rises. AWE announced the percentage number available for increase in pay and would not negotiate.
- (iii) It would not prejudice the MoD's ability to offer an effective public service if it disclosed how much had been mandated for pay rises within AWE at the time that pay rises were being negotiated. Such openness was conducive to trust and productive discussions about how best to use the funds allocated. The industrial action that took place in 2023 arose as result of AWE's failure to disclose information and conduct negotiation in an open manner.
- (iv) As there were no effective negotiations in 2023, there was no chance of the release of the information requested prejudicing these negotiations.

18. The Tribunal outlined that the appeal would involve a consideration of whether the exemption at s.36(2)(c) applied and then a separate decision about whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Mr King focused his answers and submissions on these two separate matters. However, on the facts of this case, it was he said clear that there is a link between the two issues in so far as the effective and rational resolution of pay negotiations was, Mr King stated, good for the effective conduct of public affairs and made more likely by an open approach to such negotiations and a focus on a factual and analytical approach to agreeing pay awards.

19. The Commissioner relied upon its response to the appeal in which it stated that:

- (i) The MoD's late reliance on s.36(2)(c) FOIA was permissible as a public authority is entitled to review its handling of an information request and may change its position, as the MoD did in this case following an internal review. Public authorities may even raise new exemptions from disclosure for the first time in proceedings before the Tribunal: *Birkett v Defra* [2011] EWCA Civ 1606, [2012] AACR 32.
- (ii) The Commissioner accepted the MoD's argument that disclosing the negotiating approach, even after the completion of any negotiations that AWE adopted for 2023/24 would put AWE at a potential disadvantage in future (annual) pay negotiations. The Commissioner notes that Prospect is not the only trade union AWE conducts pay negotiations with.
- (iii) The grounds of appeal contained no public interest arguments.
- (iv) Prospect's dissatisfaction with the manner in which the MoD handled its request and the conduct of the Commissioner's investigation into its complaint are not within the Tribunal's jurisdiction per section 58 FOIA.

The Decision

20. The Tribunal considered the submissions of the parties carefully. The Tribunal members noted Mr King's careful and reasoned analysis of why it was conducive to the effective conduct of public affairs for pay negotiations to be conducted in a manner that facilitated open and rational discussions and built trust between employees and employers. Mr King made a strong case for his members at AWE being able and willing to engage in negotiation on the basis of an objective analysis of the facts. However, the Tribunal considered that pay negotiations must inevitably involve some conflict in the interests of the employer and employee and that a disclosure of one side's negotiating mandate was likely to put them at a disadvantage in most circumstances. If it were in the interest of one party to a negotiation to disclose the constraints upon their ability to agree a rate of increase then they would do so.

21. The Tribunal agreed with the Commissioner that the disclosure that was requested could affect negotiation with other parts of the work force who were not represented by Prospect and that it had the potential to affect the AWE's ability to negotiate effectively in future years. The Tribunal is aware that the effective conduct of public affairs is not necessarily enhanced by public sector employees being given pay rises that are as low as possible. Nevertheless, the effective conduct of public affairs is likely to be enhanced by public sector employers retaining control of information that affects their negotiating position with employees. The Tribunal concludes that it would prejudice the effective conduct of public affairs if AWE had to disclose any information about the pay rise that it was authorised to offer or any limitations on that, to representatives of its employees with whom it was negotiating and with whom it was likely to negotiate in the near future.

22. The Tribunal noted that the disclosure of the information requested in this case was in the private interest of Prospect and its members. This did not mean that it could not also be in the public interest. A body such as the AWE was undertaking work of considerable public interest. Understanding if AWE was able to recruit and retain staff with skill and experience that are vital to national security would be a matter of public interest. However, this interest was not particularly advanced by the disclosure of information that was relevant to the negotiating position of the parties to a pay negotiation, rather than to the remuneration actually agreed with staff or with key sectors within the overall staff when negotiations were complete. In all of the circumstances of this case, the Tribunal found on the balance of probabilities that the public interest in knowing the percentage increase that was mandated to AWE Plc for the remuneration of staff for the 2023 (June) pay round did not outweigh the public interest in permitting a public sector employer to decline to disclose information that might affect its ability to conclude pay negotiation with its staff on terms that were in the overall best interest of the public body and the public as a whole.

23. The Tribunal concludes that the appeal should be dismissed.

Signed

Date:

Judge Peter Hinchliffe