



ON APPEAL FROM

THE INFORMATION COMMISSIONER'S DECISION
NOTICE No:FS50593297

Dated: 22nd. March, 2016

Appeal No. EA/2016/0082

Appellant: Stephen Jackley ("SJ")
First Respondent: The Information Commissioner
("the ICO")
Second Respondent Department for Work and
Pensions ("the DWP")

Before

David Farrer Q.C.

Judge

and

John Randall

and

Gareth Jones

Tribunal Members

Date of Decision: 4th. August, 2016

Date Promulgated: 16th August 2016

The Appellant appeared in person.

Tim Buley appeared for the DWP.

The ICO did not appear at the hearing but submitted a written response to the grounds of appeal.

Subject matter : FOIA S. 43(2)

Whether disclosure of the discounts offered to the DWP by a tendering contractor would prejudice the commercial interests of the contractor and/or the DWP.

If it would, whether the public interest in withholding such information would outweigh the public interest in its disclosure.

The Tribunal's decision

Disclosure would prejudice such interests and the public interest in protecting the confidentiality of such information outweighs the public interest in disclosure.

The appeal is dismissed.

David Farrer Q.C.

4th August. 2016

The relevant statutory provision

FOIA s.43(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”.*

This exemption is subject to s.2(2)(b) so that, if engaged, the question of balancing public interests arises (see the decision).

Abbreviations In addition to those relating to the parties and those indicated in the text the following are used in this Decision –

FOIA The Freedom of Information Act, 2000

The DN The Decision Notice.

The FTT The First Tier Tribunal

Our Decision

The Background

1. In June, 2011 the government launched “The Welfare to Work Programme”, (“the WP”) a major nationwide project designed to support people receiving benefits in finding and remaining in employment. A significant feature of the WP was the redirection of public expenditure from the payment of

benefit to the funding of schemes which would prepare recipients of benefit for work, find jobs for them and help them to remain in those jobs.

2. The WP involved the DWP entering into contracts with private sector organisations (“the providers”) for the provision of employment – related services. The providers would accept referrals of unemployed individuals from job centres (“customers”), advise them, guide them into suitable work and help them sustain their employment. The customers fell into eight different groups, presenting varying difficulties in obtaining and retaining employment. For WP purposes, the country was divided into eighteen “contract package areas”, for each of which providers were appointed, following competitive tenders.
3. The DWP identified suitable potential providers and issued a very detailed Invitation to Tender (“the ITT”). It was not a prescriptive document. Its approach was to pay by results and to leave it to the provider to decide how those results could be achieved. The contract period was seven years. Tenders were evaluated by an equally weighted assessment of quality and cost.
4. The ITT provided for four types of payment to the successful bidder:
 - 1 An Attachment Fee was payable on first contact between customer and provider following referral. This fee was reduced over the first three years and disappeared thereafter.
 - 2 A Job Outcome Payment payable when the customer had been in work for either thirteen or twenty – six weeks, depending on the customer group. This is the payment which gives rise to this appeal and it is further considered at §5.
 - 3 A Sustainment Outcome Payment payable where the provider kept the customer in work for a specified period after payment of (2).

4 An Incentive Payment awarded in respect of successful placements of certain customer groups involving mandatory referral.

The level of payment for each customer group reflected the varying difficulties in placing the customer in work and then helping him to remain in work.

5. As to (2), Job Outcome Payments, the ITT included a maximum payment in respect of each customer group and of jobs started at different stages in years 1 – 5 and asked the tendering contractor to propose a percentage reduction from those figures in its tender. The volume of referrals was, of course, unknown when tenders were submitted. This was a highly competitive element in the ITT and required tendering contractors to make complex calculations based on their assessment of

(i) the volume of business likely to be generated by different customer groups,

(ii) when, within a five – year period, that business would be generated and

(iii) what the various costs of provision would be, given that some groups would require more servicing than others.

6. Prospects Services Limited (“Prospects”) was one of two companies which tendered successfully for a contract in CPA 11 (South – West England).

The Request

7. On 14th. July, 2015, SJ made five requests, all said to be pursuant to FOIA, though requests 4 and 5 were specifically made under another statute and related to information that would be held by Prospects, rather than the DWP. They play no part in this appeal. Requests 1 – 3 read as follows –

“Please can you outline

- (1) How much government money (“funding”) Prospects receives per individual on its work programme (South West) as of present ?*
- (2) How much funding Prospects receives for the duration of, and on completion of, the aforementioned Work Programme as of present ?*
- (3) How many complaints Prospects have received in the period 2014 – 15 in relation to the aforementioned Work Programme ?”*

8. On 5th. August, 2015, the DWP responded, as to (1), by invoking FOIA s.43(2), stating that disclosure would prejudice its commercial interests and those of Prospects. It supplied, as to (2), an estimate of the total funding to be provided to Prospects over the currency of its contract and, as to (3) the number of complaints.
9. Following a requested internal review the DWP maintained its position as to the Job Outcome Payments but acknowledged that the other three payments (see § 4) were fixed payments and were in the public domain. So the DN and this appeal are confined to that one element of request (1). SJ complained to the ICO.

The DN

10. The ICO upheld the DWP’s reliance on s.43(2) in relation to the requested disclosure of the amount of Job Outcome Payment made to individual customers (Request 1). He found that disclosure would prejudice the commercial interests both of the DWP and Prospects. As to the DWP’s interests, it would undermine future tendering exercises by deterring contractors from revealing to the DWP sensitive pricing information which could be accessible to competitors. As to Prospects’ interests, prior

knowledge of its approach to pricing would place its competitors at an unfair advantage in future tendering, since Prospects would have no corresponding information as to their calculations.

11. Whilst acknowledging a general and significant public interest in knowing how large amounts of public money are spent, the ICO concluded that, in this case, the public interest in maintaining confidentiality as to pricing outweighed it.

12. SJ appealed to the Tribunal.

The Appeal

The case for SJ

13. In his Grounds of Appeal SJ did not expressly concede that the s.43(2) exemption was engaged but his criticism of the DN focused on the ICO's finding as to the public interest. As to the engagement of the exemption, he asserted that the type of tendering process involved here occurs at intervals of five years or more by which time the pricing information is out of date, hence no longer sensitive.

14. As to the public interest, he argued that the ICO wrongly attached more importance to a reduction in the number of future tenders than to disclosing how much a contractor received from public funds. He submitted that the decision was at odds with the ICO's previous guidance and FTT decisions¹. The decision demonstrated "a worrying bias in favour of protecting the

¹ Cranfield University v ICO and Dr. Helen Peck, [2011] EA/2011/0146 and Department of Health v ICO [2008]

companies' commercial interests rather than the public interest of disclosing the information".

15. In oral submissions at the hearing SJ conceded that s.43(2) was engaged so far as Prospect's commercial interests were concerned but not as to those of the DWP. He contended that the public interest nevertheless favoured disclosure. Knowledge of how much was paid per individual gave a better general perspective on the funding of these activities. Government departments outsourced many services at great public expense. It was essential that the utmost transparency was observed in such contracts. He put his case with great clarity in stating that the public must be told "how much public money is given to private providers to provide a public service".

The case for the ICO

16. In his Response the ICO substantially confirmed his position as set out in the DN. He rejected allegations of bias or of deviation from previous guidance. He pointed out that the DWP provided a great deal of information as to these contracts on its website but distinguished the undisclosed requested information because it was commercially sensitive and very detailed. He disputed the claim that his decision was inconsistent with the cited FTT decisions. Each appeal is to be determined on its particular facts.

The case for the DWP

17. The DWP called two witnesses as to the issues of prejudice to commercial interests and the public interest.

18. Mr. John Michalski is Head of Employment Category in the Commercial Directorate of the DWP. He described the structure of the WP and the

tendering process. He emphasized the great scale of the WP project and the number of people referred to the providers. The discounts quoted by providers had resulted in the saving of many tens of millions of pounds. Disclosure of the successful percentage discounts would destroy the competitive price element from future procurement competitions with serious effects on the value for money which the taxpayer obtained. Regardless of the passage of time, those minded to tender in future competitions were likely to be unwilling to do so, knowing that such sensitive information would probably be revealed to the public. The National Audit Office (“the NAO”) had reported twice on the progress of WP, having had unrestricted access to the tenders submitted.

19. Nicola Squibb, a Regional Director of Prospects gave evidence as to the effect of disclosure on Prospects’ commercial interests. She described the market for government contracts of this kind as highly competitive and gave a compelling account of the complexities of preparing a competitive tender relating to Job Outcome Payments, which was the “value for money component” of each bid. Prospects had gained a great deal of insight into the evaluation of such bids. Prospect’s operating delivery model was checked and rechecked to create the most aggressive tender permitted by its unavoidable cost base, which she regarded as a trade secret. Even the disclosure of Prospects’ cost and quality scores could enable a rival to calculate the likely discounts which it had successfully applied. This information had a transferable value in relation to other competitions of a broadly similar kind. Prospects relied on public sector contracts for nearly 90% of its revenue and the WP represented 12% of that revenue.

20. She cited the DPP’s forthcoming ITT for a “Work and Health” Programme, structured in a similar fashion to the WP and worth around £500 million in total over all the contract package areas. Prospects is preparing a tender

using the experience and the skills derived from the WP exercise. Its interests would be gravely prejudiced if those assets were devalued by disclosure of the requested information.

21. She indicated that the information as to the discounts proposed was submitted in the expectation of confidentiality and cited Regulation 43 of the Public Contracts Regulations 2006 which imposes a duty on the public authority not to publish information which the tendering contractor has reasonably designated as confidential.

22. In his closing submissions, Mr. Buley summarized the arguments emerging from this review of the evidence. He confirmed that, notwithstanding references to “trade secrets” in the evidence, the DWP confined its reliance on s.43 to s.43(2). He emphasized how much financial information as to WP was in the public domain and submitted that the pricing of individual Job Outcome payments added little or nothing to the public’s ability to form a judgment on the value of WP. The public interest in ensuring confidentiality clearly outweighed the interest in disclosure of this very specific and highly sensitive information.

The reasons for our Decision

23. On the evidence of Mr. Michalski and applying commercial commonsense, we accept that disclosure would prejudice the commercial interests of both the DWP and Prospects. As to the DWP, the essence of a competitive tender as to price is the submission of “sealed bids”, just as in the auction of a house. If price is disclosed, there is no such competition. Moreover, contractors are clearly likely to be discouraged from tendering in future competitions if they believe that confidential information will be revealed.

Disclosure in such a case as this would be very likely to have that effect with future DWP or other government outsourcing contracts.

24. As to Prospects, SJ conceded at the hearing that prejudice to its commercial interests would result from disclosure. That is plainly right. The problem in cases such as this is that the Tribunal is asked to order the disclosure of confidential information belonging to one particular contractor. That is clearly unfair because its competitors are not required to reveal corresponding information. We have no doubt that disclosure would damage Prospects in other comparable competitions in the future. The Work and Health ITT is one example.
25. We turn to the balancing of public interests; to be more precise, the question whether the public interest in maintaining the s.43(2) exemption outweighs the public interest in disclosure.
26. Nobody could sensibly doubt the strong public interest in knowing whether public funds are efficiently spent by central government, especially where the amounts at stake are as large as in the WP programme. As noted above, the DWP provided the estimated value of Prospects' contract over the course of the seven years for which it will run, namely £54m. or thereabouts. It also disclosed the model used to ensure a competitive element to the tenders for Job Outcome Payments, namely the provision for discounts offered from a stipulated payment. The number of attachments is or will be in the public domain.
27. It was significant that, when asked by the Tribunal what value to the public interest disclosure of the disputed information would have, which provision of the aggregate figures for WP payments to Prospects lacked, Mr. Jackley was unable to supply an answer. It is not apparent to the Tribunal that this

very specific and undoubtedly sensitive information has a clear added value for public scrutiny. Absent any suggestion of impropriety in the preparation and submission of tenders – and, of course, no such issue arises here - the public concerns are

- (i) that the taxpayer is getting value for money in terms of what is achieved in relation to the overall costs of achieving it and
- (ii) that the ITT provides a fair and efficient basis for tendering.

28 Here, (i) involves an assessment of how many customers find employment, how soon, for how long and at what cost to the DWP. (As regards Prospects, £54m.). Those figures must then be compared to the likely levels of job entry, the ensuing length of employment of such customers and the probable outlay on benefits without WP involvement (“the non – intervention performance”). This may be a crude description of the more sophisticated measurement which an informed examiner would employ but it is very difficult to see how any such exercise would be significantly strengthened by the provision of the undisclosed data.

29 As to (ii), we acknowledge a public interest in the disclosure of the tendering model requiring contractors to specify the discounts that they would apply to maximum payment figures because transparency in large government contracts of this character must be observed to the greatest extent consistent with the public interest in the government getting the best possible deal and information as to that model demonstrates the fostering of competition. That information was fully disclosed.

30 As indicated above, we do not consider, however, that there is a strong public interest in seeing the specific discount figures submitted by a tenderer.

- 31 As to the public interest in withholding the specific figures, the Tribunal accepts the evidence submitted by the DWP as to the degree of damage that disclosure would inflict on future tendering processes and on Prospects' competitive position in future tenders. It accepts that the probable result would be a significant blow to the public interest in maintaining a competitive market for large government contracts.
- 32 A public authority cannot ensure a competitive tender, where each tenderer knows his figures and those of his competitors may be published before the contract is awarded. Contractors would simply not tender, where they knew that the product of complex expert calculations of the kind described by Ms. Squibb, would be available to competitors. The probable result would be higher costs in the performance of such contracts as those provided for in WP or possibly even the abandonment of such programmes because the target of fair competition could not be met.
- 33 The damage to Prospects' commercial interests is of wider concern than that of its owners. Putting a successful and responsible tenderer at an unfair commercial disadvantage weakens the vital competitive element in the procurement process, which may have serious consequences for the price that the DWP or another government department will pay.
- 34 A further distinct factor in assessing the public interests involved is the reasonable expectation of commercial confidentiality which, the Tribunal accepts, Prospects and other tenderers had when submitting bids. Of course, that cannot be a decisive element in the balancing exercise but there must be a clear need to override that expectation by disclosure if the integrity of this procurement process is to be preserved. No such need is demonstrated here.

35 To summarise, the Tribunal considers it more probable than not that disclosure would substantially impair the government's ability to obtain best value for money from large procurement projects of the kind involved in this appeal.

36 We note that the NAO had full access to the disputed information when preparing its two reports on WP. That would not, of itself, indicate that there was no public interest in a member of the public seeing the figures but it is a factor relevant to the balancing process. A body charged with checking that the public is getting value for money has scrutinized them and evidently seen nothing to cause concern.

37 We conclude that the public interest strongly favours withholding the specific figures submitted by Prospects in relation to the discount on maximum fees for Job Outcome Payments, which is the information sought in request (1).

38 This appeal is therefore dismissed.

39 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

4th. August, 2016