



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

Case No. EA/2017/0057

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50640872
Dated: 21 February 2017**

Appellant: Hartlepool Borough Council

Respondent: The Information Commissioner

Date of hearing: 30 January at Field House

Date of decision: 14 March 2018

Before

**Anisa Dhanji
Judge**

and

**David Wilkinson
Dave Sivers
Panel Members**

Subject matter

FOIA section 43(2) - whether disclosure would or would be likely to prejudice the commercial interests of any party; section 2(2)(b) whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

DECISION

The appeal is dismissed.

The Commissioner's Decision Notice No: FS50640872 is upheld.

The disputed information must be disclosed to Mr John Latimer within 35 days of this decision being promulgated.

Signed

Anisa Dhanji

Judge

REASONS FOR DECISION

Introduction

1. This is an appeal by Hartlepool Borough Council (the “Council”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 21 February 2017.
2. It concerns a request made by Mr John Latimer under the Freedom of Information Act 2000 (“FOIA”), for information in relation to the transfer of ownership in 2003 of what was then Teesside International Airport (“TIA”).
3. TIA had been owned by 6 Tees Valley local authorities, including the Council. In 2003, Peel Group reached an agreement with them to acquire a 75% shareholding in TIA.
4. TIA became Durham Tees Valley Airport (“DTVA”). The 6 local authorities retained a combined 25% shareholding in DTVA, with Peel Investments Limited, a wholly owned subsidiary of the Peel Group, being the majority shareholder.
5. The aggregate shareholding of the 6 local authorities in DTVA is currently 11%.

The Request for Information

6. On 17 March 2016, Mr Latimer made a request in the following terms:

“In year 2003 Teesside Airport in 100% sharehold ownership of a group of Local Authorities was transferred to a new Company made up of a Group of Local Authorities with 25% shared ownership and Peel with 75% sharehold ownership.

Please provide details of that transfer of ownership and any consideration paid directly by Peel and any irrevocable commitments, e.g. in the form of deferred consideration, entered into by Peel.

Please also provide details of any third party commitments made by the Government Agency, One North East, that facilitated the transfer of ownership.”

7. In response, the Council confirmed that it held some of the requested information. It provided some of what it held to Mr Latimer, but it withheld the remainder on the basis of section 43(2) of FOIA.
8. At Mr Latimer’s request, the Council conducted an internal review, but upheld its original decision.

9. Mr Latimer then complained to the Commissioner who sought representations from both parties.
10. In the course of the Commissioner's investigation, the Council disclosed some further information coming within the scope of the request. As regards the remainder, in addition to section 43(2), the Council also sought to rely on section 36(2)(c) of FOIA.
11. For the reasons set out in her Decision Notice, the Commissioner considered that the Appellant had failed to demonstrate that either section 43(2) or section 36(2)(c) was engaged.
12. In addition, as the regulator of the Data Protection Act 1998, the Commissioner also considered whether section 40(2) of FOIA applied to some of the information in issue, but she found that the exemption did not apply.
13. The Commissioner ordered the Council to disclose the information.

Appeal to the Tribunal

14. The Council has appealed against the Commissioner's Decision Notice under section 50 of FOIA.
15. The appeal is only in relation to section 43(2). There is no appeal in relation to section 36(2)(c) or section 40(2), and no other exemptions have been relied upon.
16. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
17. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.
18. The parties have lodged an open bundle. We have also been provided, by way of closed material, the documents comprising the information in issue. We have considered all the material before us, and will refer to it as needed, but will not attempt to refer to all of it, nor to every turn of argument.
19. The Council has requested that this appeal be determined on the papers without an oral hearing. The Commissioner has agreed. Having regard to the nature of the issues raised, and the nature of the evidence, we were satisfied that the appeal could properly be determined without an oral hearing.

The Disputed Information

20. The Council identified 5 documents as containing information falling within the scope of the request. These are listed as (a) to (e) at paragraph 14 of the Decision Notice.
21. At the time of the Commissioner's decision, documents (d) and (e), had been disclosed in full. By the time of the appeal, document (a) had also been disclosed.
22. What now remains in issue are documents (b) and (c). The Council has said that it is prepared to disclose these two documents subject to certain redactions.
23. At the time the appeal was lodged, the Council's proposed redactions were quite extensive, leaving all but about 2 paragraphs in each of these documents un-redacted. After receipt of the Commissioner's submissions, the Council has proposed more limited redactions.
24. We will use the term "Peel" to describe the Peel Group, as well as any companies within the Peel Group.

Findings and Reasons

Statutory Framework

25. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
26. The duty on a public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Section 43(2) is a qualified exemption. Pursuant to section 2(2)(b), information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This balancing exercise must take place as at the date of the refusal.

Issues

27. The only issues in this appeal are in relation to section 43(2) of FOIA.
28. Section 43(2) states that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
29. The first question is whether section 43(2) is engaged at all. This has to be considered in respect of each item of information. If it is not engaged, we need go no further.
30. If it is engaged, then we must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

The Parties' Positions

31. The Commissioner's position is that the exemption is not engaged, and that even if it is, the public interest favours disclosure. The Commissioner noted that she had specifically asked the Council to provide evidence demonstrating a clear link between disclosure of the information and any prejudice to commercial interests which may arise, but found that the Council had failed to provide sufficient evidence to support its position.
32. It is probably fair to say that before this appeal, the Council had framed its arguments in fairly broad terms. Some more specific arguments as to why the public interest favours withholding the information have only now been put forward, by way of submissions, from Peel Group, in support of the Council's appeal. However, the Council's position and Peel's are essentially aligned.
33. The Council has not put forward any submissions or witness statements for this appeal. Its position is set out in its correspondence with the Commissioner, as summarised in the Decision Notice, and in the Council's grounds of appeal. The Council has said that the information is about a commercial transaction concerning the appointment of a strategic partner. That transaction was conducted in a competitive environment in which a number of companies had initially expressed an interest. Negotiations for the future of DTVA are still ongoing, and disclosure would be detrimental to the development and implementation of those plans.
34. The Council identified several parties whose commercial interests it said would or would be likely to be prejudiced, apart from the Council itself. These are the local authorities referred to in paragraph 4 above. The Commissioner considered that the Council had not provided evidence as to any prejudice to any of these local authorities. The Commissioner therefore only considered the prejudice to the Council.
35. The Commissioner decided that the Council had not provided evidence that disclosure would be detrimental to the development and implementation of plans for DTVA. It had also not explained the nature of any ongoing negotiations. Although the Commissioner had, through her own research, established that negotiations for the future of the airport were ongoing, the Council had not put forward any arguments about how the release of the information would or would be likely to prejudice those negotiations.
36. The Commissioner further noted that the information was 13 years old. She considered that even though negotiations for the future of the DTVA were ongoing, they will have necessarily moved on. In addition, she noted that the Council now held approximately 1.8% in DTVA, and considered that the Council had not presented any arguments to demonstrate how such a small shareholding would impact negotiations sufficiently to warrant the prejudice claimed.
37. The Council has acknowledged, in its grounds of appeal, that it had failed to seek the views of third parties as to the alleged prejudice. The Council went on to say that it had now contacted Peel to seek its views. It also indicated that its views are aligned with Peel's.

38. Peel has made submissions in this appeal. It asserts that disclosure of the information would or would be likely to prejudice its commercial interests. It explains that DTVA is one of 4 airports across the North of England in which the Peel has invested, the others being Liverpool John Lennon Airport, Robin Hood Doncaster Sheffield Airport, and City Airport Manchester.
39. It goes on to explain the economic reasons for the proposed redevelopment of DTVA. It refers to the publication in April 2014 of the “Durham Tees Valley Airport Master Plan to 2020 and Beyond” (the “Master Plan”), which it says sets out proposals for the future redevelopment of DTVA, including of the surrounding land to the north and south of the runway.
40. It also says that planning permission has been granted to extend and refurbish the terminal building, the construction of the northside business park, the construction of 350 residential homes on northside, a new link road from northside to southside, and the construction of logistics, distribution and industrial buildings as the first phase of development of southside. Realisation of these development plans will depend on a number of factors, including attracting inward private sector investment, and agreeing terms with businesses and individuals seeking to relocate to the industrial, office and residential space on offer.
41. As to what prejudice it would suffer to its commercial interests were the information to be disclosed, Peel has made its submissions in generic terms rather than in relation to each specific item of information. Essentially, it makes two points. First, it says that disclosure could weaken Peel’s position in negotiations with partners or potential partners in respect of investments in DTVA and the balance of risk to be shared between Peel and any new investors. It adds that Peel is currently active in progressing commercial and residential developments in pursuance of the Master Plan, but that similar considerations apply in relation to Peel’s other ventures, particularly those relating to aviation or involving partnerships with local authorities.
42. Second, it says that the information could be used by competitors who have an interest in preventing DTVA being moved to a long-term viable business model, or by those who oppose private ownership of the airport. It says that the information will enable such persons to compare the economic activity at the airport against the proposals and strategic goals in the bid, notwithstanding that the context has evolved significantly since 2003 in response to changing economic circumstances. This could unfairly create pressure on local authorities to reject commercial proposals from Peel, refuse to grant applications for planning consents required to fully implement the Master Plan, and to restrict or refuse public funding for such developments which may otherwise have been made available.
43. In response, the Commissioner accepts that most of the information is of a “commercial nature”. However, she says that Peel’s submissions do not provide any persuasive evidence that disclosure of the information would or would be likely to cause prejudice to its interests. She would have anticipated a more granular explanation of how the prejudice arises in relation to the information, i.e. on a line by line basis. This is particularly so, given the

relatively small amount of information in issue. The Commissioner further says that Peel has provided little detailed analysis about the information. It is not clear, for instance, to what extent the information may already be in the public domain, and what exact prejudice would or would be likely to be caused to Peel's commercial interests by disclosure.

44. In its response to the Commissioner's submissions, Peel reiterates that the information relates to a complex commercial transaction of a type routinely tendered for or entered into by Peel. It says that the disclosure of the information would be likely to weaken Peel's negotiating position in relation to such transactions by revealing the approach it took and the compromises it was willing to make in relation to the transaction in question. It does not consider the Commissioner's request for a more "granular explanation" is reasonable, given the breadth of the commercial interests in question, and the multiple ways in which prejudice to them could manifest.

Our Findings

45. It may be helpful if at this point we describe documents (b) and (c), although we will do so only in general terms so as not to undermine the purpose of this appeal.
46. Document (b) is headed "Partner for Development of Teeside International Airport". It has been described as a summary of the agreement for the 6 local authorities to transfer 75% of TIA to Peel Group. The document is undated. It comprises just over one page of A4 (single spaced). There are 4 passages that are proposed to be redacted comprising about 21 lines. These concern:
- the intended investment to be made by Peel and the extent to which the payment will be an investment as opposed to a loan, as well as what the specific payments will be for, and to some extent the terms;
 - the continuing ownership by the public authorities and the way in which their percentage of ownership will be determined by Peel. It also sets out other rights of the parties in connection with the sale by Peel and shareholders' rights of the public authorities;
 - conditions under which Peel could close the airport; and
 - Peel's intentions regarding Southside and the consequences as regards ownership of the land if it does not follow through on those intentions.
47. Peel says that it is not known who produced this document or how it came into the Council's possession.
48. Document (c) comprises about 7 pages and is in two parts. The first part comprising one and a half pages is headed "Cabinet Report" and is dated 24 February 2003. Its purpose is stated to be to advise Cabinet of the decisions made in respect of the future development of TIA. No redactions are proposed to this part of the document.

49. The second part of document (c) is headed "Report of Chief Financial Officer. Its purpose is stated to be to advise Cabinet members of the selection of Peel as the "preferred bidder" to be the strategic partner.
50. The proposed redactions are all in relation to paragraph 5 headed "The Best and Final Offer of Peel" which it is proposed be redacted in its entirety, except for paragraph 5.3. These summarise the financial terms, the shareholding to be retained by the local authorities, why Peel considers that it would be a strong partner, and Peel's proposal for redevelopment of the airport and adjoining lands.
51. Section 43(2) is engaged if disclosure of the information would or would be likely to prejudice the commercial interests of *any* person. Therefore, it clearly need not be prejudice to the commercial interests of a public authority. In this case, the assertion is that the prejudice will be suffered primarily by a non-party, namely, Peel. There is no evidence as to any prejudice to any of the other local authorities referred to in paragraph 4 above.
52. It is not clear to what extent the Council is still relying on prejudice to its own interests, but we entirely agree with the Commissioner's assessment as set out at paragraphs 35 and 36, above. We do not find that the Council has established that disclosure of the information would or would be likely to prejudice its commercial interests.
53. We turn now to Peel's position. Peel has not sought to draw a distinction between disclosure that would prejudice its commercial interests versus disclosure that would be likely to prejudice its commercial interests. Indeed, it has taken a largely generic stance, arguing that because its business interests are wide ranging, disclosure of the information in relation to this particular airport development and its agreement with these particular public authorities, will prejudice its future negotiations with these and other public authorities and disclose valuable information to its competitors.
54. What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable. While we accept that negotiations for redevelopment of the airport are ongoing, Peel has not shown how information dating back to 2003 in relation to a specific project in a specific economic climate, would cause prejudice to such negotiations 15 years later.
55. The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to

prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual.

56. For Peel to say that it is not reasonable to have to provide a more granular explanation of the prejudice, given the breadth of the commercial interests in question, and the multiple ways in which prejudice to them could manifest, also misses the point. It does not need to show every possible way in which prejudice would or would be likely to arise. It is not even necessary to show that the extent of the prejudice would be significant. It is sufficient that “some commercial disadvantage” is likely to be suffered: Newham LBC v Information Commissioner EA/2011/0288. However, it must show that disclosing the information would have “a very significant and weighty chance” of causing prejudice that is “real, actual or of substance”: Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and EA/2005/0030); Department for Work and Pensions v the Information Commissioner and FZ [2014] UKUT 0334 (AAC); and R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin).
57. Peel has fallen well short of this. It has failed to show the causal link between the disputed information and the claimed prejudice. We can, of course, only decide the appeal on the basis of the evidence before us, and on that basis, for the reasons set out above, we find that section 43(2) is not engaged.
58. Having reached this view, it is not necessary to go on to consider the public interest balance, but for completeness, we will do so, at least briefly.

The Public Interest Balance

59. The issue to be addressed is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
60. Under FOIA, there is of course no presumption in favor of disclosure. The burden lies on the parties asserting it, to establish that the harm that would or would be likely to be caused by disclosure of the information is such that it outweighs the considerations in favor of disclosure.
61. There has been very little in the way of detail in relation to the public interest balancing exercise, from either the Council or from Peel. In her Decision Notice, having found that section 43(2) was not engaged, the Commissioner did not go on to consider the public interest balance. In its grounds of appeal, the Council says that there is a strong public interest in robust competition for ownership of assets like the airport and that disclosure of the information would undermine, not promote such competition. In Peel’s submissions, it says that

while there is legitimate public interest in matters concerning the ownership of the airport and the terms on which there should be public and/or private participation in plans for its development, it is for the local authorities to make decisions that are able to protect the public interests, whilst at the same time being respectful of the duties of confidence owed to a private investor and commercial partner. It goes on to say that the negotiations with regards to the future of the airport are sensitive and ongoing. It asserts that the information is not purely historic and remains relevant to the current situation, and that Peel is entitled to have its investment in the airport protected. In its response, the Commissioner says no more than that the analysis of the public interest in Peel's submissions is brief, and that even if section 43(2) is engaged in relation to any part of the information, the Commissioner does not consider that the public interest test favors maintaining the exemption.

62. The correct approach to the application of the public interest balancing exercise under section 2(2)(b) of FOIA, is set out in the Upper Tribunal's decisions in APPGER v ICO and FCO [2013] UKUT 0560, Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC) and Home Office v IC and Bingham Centre for the Rule of Law [2015] UKUT 0308 (AAC). The public interest balance must be undertaken by reference to specific public interest factors relating to the content of the information. This does not mean that generic factors are not relevant. However, the generic factors do need to be borne out by the particular information in issue.
63. We find, again, that the Council and Peel have put forward very little in the way of detail to support their assertions. There is no reference at all to the specifics of the information. Peel's submissions as to the public interest in maintaining the exemption amount to little more than a generic assertion. It has not shown how the information "remains relevant to the current situation", nor how its ability to obtain a return on investment in the future would be compromised by its disclosure.
64. As Peel acknowledges, there is a clear public interest, in terms of greater public understanding and accountability, in information concerning ownership of the airport and its redevelopment, and in the financial decisions taken by the Council and other local authorities. We do not agree that it is solely for the local authorities to safeguard that public interest. It is self-evident that there is a public interest in decisions taken by the Council being transparent. That, in our view, is beyond dispute.
65. For all these reasons, we dismiss this appeal. Our decision is unanimous.

Signed
Anisa Dhanji
Judge

Date: 14 March 2018