



Appeal Number: EA/2023/0064

Neutral Citation Number: [2023] UKFTT 01003 (GRC)

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

Between:

EDWARD WILLIAMS

Appellant:

and

The INFORMATION COMMISSIONER

First Respondent:

and

THE HOME OFFICE

Second Respondent:

Date and type of Hearing: On 16 November 2023 a hearing on the papers.

Panel: Brian Kennedy QC, Jo Murphy, and Kerry Pepperell.

Representation:

For the Appellant: Edward Williams, as litigant in person in his grounds of appeal dated 6 June 2023.

For the First Respondent: Nicolas Martin, Solicitor by way of written submissions in the Response dated 22 March 2023.

For the Second Respondent: Andrew Deakin of Counsel by way of written submissions in the Response dated 14 June 2023.

Result: The appeal is dismissed.

REASONS

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 6 February 2023 (reference IC-185677—X8N2), which is a matter of public record.
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. In essence the appeal concerns a request for the invoice details relating to a flight chartered to fly migrants to Rwanda on 14 June 2022. The Home Office (“HO”) responded on 13 July 2022. It refused to provide the requested information citing section 43(2) of FOIA (the exemption for commercial interests) but provided some detail about the immigration plan which aims to more easily remove those with no right to be in the United Kingdom, together with details about return flights including weblinks. On 13 July 2022, the Appellant requested an internal review. The HO provided its internal review outcome on 9 August 2022. It maintained that section 43(2) of FOIA applied and that the balance of the public interest favoured maintaining this exemption.
3. The Appellant now appeals against the DN. The Commissioner and the HO (as Second Respondent) oppose the appeal and invite the Tribunal to uphold the DN. The Appellant seeks a paper hearing. The Respondents agree with this mode of hearing. The Tribunal refer to papers in the hearing Open Bundle herein as “OB”.

Legal Framework:

4. Section 43(2) FOIA provides as follows:
Commercial interests.
(1) Information is exempt information if it constitutes a trade secret.

(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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

The Grounds of Appeal:

5. Paraphrasing the Appellants submissions, he indicated he would like a decision without a hearing and the decision quashed. The Commissioner he argues, was wrong to find that the public interest favoured non-disclosure. This he claims was a misuse of the Commissioners discretion to the extent that the notice involved an exercise of discretion by the Commissioner, in that he ought to have exercised his discretion differently. He asks the Tribunal to allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal should dismiss the appeal. The *'flight'* he argues, - *"(it never took off due to a legal challenge) was a complete waste of public money. There is a higher public interest in knowing how much public money was wasted. The request is for the final invoice, this presumably was at a reduced price due to the cancellation. It is very unlikely there will be another 'flight' like this"*.

6. The Appellant further argues that: *"The price of flights is dependent on the cost of aviation fuel, which changes in line with the oil price. Releasing the information would not cause serious prejudice to the commercial interests of any person. The price will fluctuate"*.

7. Later in an email to the Tribunal dated 15 June 2023 at OB p21 the Appellant added the following submissions:

"I have only asked for what I imagine to be the invoice for a cancellation which should be a fraction of the price of the invoice had the flight taken off. At the time of the response to the request, it was inconceivable that there would be another cancellation invoice because the govt. would have smoothed legal path to prevent another 'pyjama injunction' by any court, including the Strasbourg court. The HO knew, or should have known, that the flight would be injunctioned from taking off. The HO should have applied

to the High Court for a declaration of legality under CPR 8 before even booking the flight. The HO was negligent and profligate. This goes to the public interest.

8. The Appellant further argues: *“On 14 June 2022 three Claimants made applications to the European Court of Human Rights for interim measures. On the application of NSK, one of the Claimants in CO/2032/2022, the European Court of Human Rights granted an interim measure preventing him from being removed to Rwanda “until 3 weeks after delivery of the final domestic decision in [the] ongoing judicial review proceedings”. In the two other applications (RM, the Claimant in CO/2077/2022; and HTN, the Claimant in CO/2104/2022), the Court granted an interim measure preventing removal until 20 June 2022. The practical consequence of the grant of interim measures has been that no removals to Rwanda have taken place either on 14 June 2022 or since. The HO has a sad history of dealing with migrants wishing to claim asylum including the failed 'push back at sea' debacle. This ended, entirely predictably, in meek but unapologetic surrender by the HO. One week before the JR was due to be heard, the HO folded. In the end, reality, in the form of the law, always arrives: “-*

The Commissioner’s Response:

9. In his Response to the grounds of appeal the Commissioner submits that the appeal should be dismissed for the reasons given in his DN and he supports the submissions of the HO provided to the Commissioner during his investigation. The Commissioner argues that the Appellant has failed to set out in the grounds of appeal how or why the DN is not in accordance with the law or that the Commissioner ought to have exercised her discretion differently.

The Home Office Response:

10. The HO submits that the requested information is properly exempt under section 43(2) FOIA and argues that the Appellant has failed to properly articulate any error in the DN. The HO invites the Tribunal to uphold the DN for the reasons set out in the DN.
11. The HO further maintains that release of the requested information would cause harm. The Tribunal is referred to the witness statement of Ms Carla Johnson dated 14.06.2023 in which the details of the anticipated harm are set out. In sum the HO maintains that:

a. Disclosure of the disputed information would reveal sensitive commercial information (in particular the price of an individual charter and cancellation terms). This would damage the integrity of the procurement process and drive-up prices. (The HO notes that this information is protected by confidentiality agreements.)

b. Further, as a consequence of this information being revealed, companies would take the view that such disclosure would be likely to take place in future. This would discourage such companies from bidding for future HO contracts. Limiting the number of bidders for HO contracts (especially in the context of the small market in issue) would tend to drive up prices and so damage the commercial interests of the HO and His Majesty's Government more generally.

c. Disclosure of the disputed information would also damage the commercial interests of the commercial carrier in question. The relevant carrier has been identified in national and international press. The price of the charter and cancellation fees will therefore be attributed to that particular airline. This is plainly sensitive information, and its disclosure would undermine the ability of the carrier to tender competitively when bidding for future contracts.

d. Finally, were the Tribunal to rule that disclosure of sensitive pricing information in this context should generally be disclosed to the world at large, this would damage the commercial interests of those other carriers that remained willing to tender for HO removal flights.

12. The HO further argues; the term "*commercial interests*" falls to be read broadly (see e.g. *University of Central Lancashire v ICO and Colquhoun* EA/2009/0034 at para. 3.1 and *The Department for Work and Pensions v ICO and Zola* [2016] EWCA Civ 758). The Home Office submits that the threatened harm plainly relates to the commercial interests of the HO and industry partners.

13. The HO accordingly submits that section 43(2) FOIA is engaged on the facts.

14. The HO accepts that there is general public interest in transparency and that this will extend to disclosure of information going to the spending of public money so as to ensure that public authorities are providing value for money.

15. However, the HO submits, that the Courts have made clear that there is a strong public interest in the protection of commercially sensitive information (see *Veolia ES*

Nottinghamshire Ltd v Nottinghamshire County Council and others [2012] P.T.S.R. 185 at para.111) and maintaining a fair market. Courts have also recognised the importance of the procurement process in protecting these interests (Edenred (UK Group) Limited v HM Treasury and others [2014] EWHC 3555 (QB) at para. 17).

16. Accordingly, the HO maintains that disclosure of the requested information would undermine the integrity of the procurement process, reveal commercially sensitive information and undermine the fair market in this area. This would impact both the Home Office and commercial partners. Further, revealing this information would limit the pool of carriers willing to tender for HO removal flights. This would limit the HO's ability to effectively remove people without leave to remain in the United Kingdom (including the deportation of foreign national offenders). As such the HO submits that the public interest weighs heavily against disclosure in this case.
17. In support of their above submissions the HO relied upon the witness statement of Carla Johnson with explicit but confidential assertions (within the Closed Bundle) on how disclosure would:
 - a) Undermine the competitive procurement process of the aircraft operator market;
 - b) Affect confidentiality and;
 - c) present security risks.
18. To further substantiate their position on these points the HO has enclosed letters (within the closed bundle) directly from a selection of third-party suppliers that have operated these charters so far this year. Based on these letters and the above, the HO argue they fundamentally believe that the proposed disclosure to the world at large of the withheld information will have a significant negative impact on the aviation industry and on their customers.

The Tribunals Deliberations:

19. The Tribunal considered the appeal afresh and find as follows:
 - a) The request related to a specific invoice for the plane to fly migrants to Rwanda on the 14 June 2022.
 - b) The cost of this cancelled flight related directly to a specific Air Partner. That Air Partner tendered for the service in a competitive tender alongside other Air Partners.

20. The Appellant does not appear to dispute that Section 43(2) (commercial interests) is engaged. However, he states that *"The IC was wrong to find that the public interest favoured non-disclosure."*
21. The Tribunal do not need to consider S31, as we find that S43(2) is engaged and the public interest test factors favour withholding the information.

S43(2) - Commercial interests

22. In her witness statement Carla Johnson, Deputy Director, Returns Logistics Operations, Immigration Enforcement, Home Office, states that: *"disclosure of the information would prejudice the commercial interests of the Home Office, as well as those of our stakeholders, limiting the willingness of airline suppliers to bid for Home Office work in future."*
23. Attached to Ms Johnson's statement is a closed exhibit, which contains four letters from airline suppliers which raise concerns that disclosure would undermine the procurement process and the organisation's competitiveness.
24. The Tribunal reviewed the closed correspondence from the Airline Partners, and all affirmed that their pricing was highly sensitive and subject to fluctuations by market forces. They indicated broadly that commercial pricing would be undermined by the release of this specific invoice. They additionally indicated a reluctance to provide future services if their commercial interests and faith in the public procurement process remaining confidential were to be undermined.
25. The procurement of public contracts is regulated, this regulation provides certain assurances to protect the commercial interests of an economic operator;
The Public Contracts Regulations 2015 reg. 21;
(1) A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.
(2) Paragraph (1) is without prejudice to—

(a) any other provision of this Part, including the obligations relating to the advertising of awarded contracts and the provision of information to candidates and tenderers set out in regulations 50 and 55 respectively;

(b) the Freedom of Information Act 2000;

(c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.

(3) Contracting authorities may impose on economic operators' requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

26. *The Public Contracts Regulations 2015 reg. 50 (6);*

(6) Certain information on the award of the contract or the conclusion of the framework agreement may be withheld from publication where its release—

(a) would impede law enforcement or would otherwise be contrary to the public interest,

(b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or

(c) might prejudice fair competition between economic operators.

27. The Tribunal are satisfied as follows:

a) The withheld information contains the pricing and cancellation terms for an individual charter and would therefore reveal to their competitor's sensitive commercial information.

b) The increased security risks as a result of disclosure of operational information, would increase costs and could lead to operators exiting the market.

c) It is stated that, following the pandemic the availability of operators has reduced and further loss of operators would negatively impact on the Home Office's ability to procure flights.

d) They all object to disclosure and all state that the information is confidential, and disclosure would breach their agreements.

28. The Appellant argues that fuel prices fluctuate over time and that disclosure would not cause serious prejudice to the commercial interests. However, given that this is a mall

specialised market, the competitors will be familiar with fuel price fluctuations, and would be able to take this into account should the invoice be disclosed.

29. The Tribunal recognises that there is significant public interest in transparency and disclosing information on the spending of public funds in this matter. This Policy is controversial and has generated much public debate and legal challenges. However, we noted that the issue of transparency is met, to some extent, by the availability of annual Government spend on cancelled deportation flights (See OB p23), which does not identify any individual operator's commercial information.
30. The Appellant argues that they are not aware of the airline involved in this case being made public. However, disclosure under FOIA is disclosure to the world at large and whilst the Appellant may not personally be aware of the details, because of the wide reporting of this matter, a significant amount of information is already in the public domain.

The Public Interest Test:

31. The Tribunal give significant weight to the witness statement provided and the letters from the airlines and concluded that the public interest does fall in favour of withholding the requested information. The commercial interests of the HO and the carriers would be prejudiced by disclosure to the world at large.
32. Turning to the balance of the public Interest in favour of disclosing the requested information;
 - a) The Rwanda policy is a matter which is still currently subject to press attention and legal challenges, it remains a matter which is of importance and interest to the public.
 - b) The public have a right to understand the costs associated with the Rwanda Policy.
33. Turning to the balance of the public interest in favour of maintaining the exemption;

- a) The government have published general costs associated with the Rwanda policy.
- b) There is a public interest in the Home Office being able to secure charter aircraft contracts that represent value for money, releasing this invoice places the commercial operator at a disadvantage and places their competitors at an advantage which in turn results in the HO receiving future prices which may not be competitive.
- c) Maintaining co-operation with commercial Airline Partners to provide services and competitive pricing in the future.
- d) Prejudice to competitive tendering
- e) Obtaining value for money where commercial operators consider their technical and trade secrets may be released.
- f) Disadvantaging the commercial operator of this flight by subjecting them to reputational damage and prejudice to their commercial position for future contract terms and pricing.

Conclusions:

- 34. In all the circumstances and for the above reasons the Tribunal are satisfied the balance of public interests significantly outweighs the non-disclosure of the requested information.
- 35. Consequently, the Tribunal also find that the Appellant has failed to properly articulate any error either of law, or in the exercise of his discretion by the Commissioner, in the DN and we must dismiss this appeal.

Brian Kennedy KC.

27 November 2023

Promulgation Date : 29 November 2023

