NCN: [2023] UKFTT 00350 (GRC)
Case Reference: EA-2022-0240

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 22 and 23 March 2023
Decision given on: 3 April 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER ANNE CHAFER

Between

DEPARTMENT FOR WORK AND PENSIONS

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) JOHN SLATER

Respondents

Representation:

For the Appellant: Russell Fortt (Counsel)
For the First Respondent: Remi Reichbold (Counsel)
For the Second Respondent: In person

Decision: The appeal is allowed.

Substituted decision notice:

Organisation: Department for Work and Pensions

Complainant Mr. John Slater

The substitute decision - IC-83393-T8F2

1. For the reasons set out below section 43(2) of the Freedom of Information Act 2000 (FOIA) is engaged and the public interest favours maintaining the exemption. The public authority was entitled to withhold the information under section 43(2).
2. There is no appeal against the decision notice in relation to its findings on section 32(1)(a) FOIA.
3. The public authority is not required to take any steps.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-83393-T8F2 of 4 August 2022 which held that:
   1.1. some of the information held by the Department for Work and Pensions ('the Department') was exempt from disclosure on the basis of s 31(1)(a) and that the public interest favoured maintaining the exemption;
   1.2. section 43(2) was not engaged in relation to the majority of the disputed information;
   1.3. where section 43(2) was engaged the public interest favoured maintaining the exemption.

2. The Commissioner required the Department to disclose the information withheld under section 43(2) with the exception of the information relating to the third-party subcontractors.

3. Only section 43(2) remains in issue in this appeal.

Factual background

4. The matters set out in this factual background are findings of fact made by the Tribunal on the basis of the evidence before it, primarily from Mr. Clark, Senior Civil Servant at the Department.

5. Personal Independence Payments ('PIP') are benefits awarded to people on account of a disability or health condition that impacts on their ability to carry out certain daily tasks or on their mobility. When an individual makes a claim an independent health assessment {a PIP assessment) is carried out by health care professional.

6. The Department has outsourced the delivery of the PIP assessments to private sector providers. There are four separate contracts for four separate geographical areas, known as 'Lots'. Atos IT Services UK Limited t/a Independent Assessment Services ('Atos') and Capita are the providers relevant to this appeal.

7. The delivery of the PIP assessments is subject to performance regimes, including financial remedies if the providers do not meet agreed standards. Service credits fall due when the provider fails to reach contractually specified standards of performance. No pay amounts are similar, but the mechanism is that the Department retains some money which would otherwise be due to the contractor. Service credits are set at an amount that reflects the loss to the Department and must not be punitive. The Department considers mitigation put forward by the providers as part of the calculation. No pay amounts are intended to represent a proportionate price adjustment to reflect the reduced quality of chargeable outputs under the contract.

8. Monthly Lot Performance Group meetings take place between the Department and the providers. Performance against service levels is discussed and details of service credits and no pay amounts are made known. The minutes of those meetings contain extensive and detailed performance information including details of performance against service levels. updates on complaints, customer satisfaction and continuous improvement and progress against action points.

9. A redacted version of those minutes had been made public at the relevant time. The unredacted parts of the minutes include detailed sections on performance review. These specify the performance levels in percentage form, usually accompanied with a narrative explaining any failings and the mitigation put forward. The figures for individual service credits, total pre-mitigation service credits and post-mitigation service credits to be applied and the no pay amounts are redacted.

10. For example, one of the sets of minutes contains the following (open bundle p 1653):

> "SLA12 Claimants Sent Home Unseen: performance for March 2019 was 1.2% (Red) at month-end; resulting in a service credit of XXXXX. Difficulties with contacting claimants to cancel appointments or to report delays to claimants, as well as claimants not willing to wait more than 20 minutes have attributed to the poor performance. IAS are looking into extra steps to

validate correct contact details and to contact claimants early enough to cancel appointments or report delays.

SLA4a NR Clearances: performance for March 2019 was 78.9% (Red); resulting in a service credit of XXXXXX. There were 303 cases put forward for mitigation and all 303 were accepted; therefore post mitigation performance improved to 79.8% (Red) and the service credit reduced to XXXXXX.

SLA4b NR Cases over 55 days: there were 813 cases over 55 days at month-end (a reduction of 707 from February 2019); resulting in a service credit of XXXXXX

Head of Work: there was a reduction of 3,381 cases in the Head of Work which stood at 44,586 at March 2019 month-end.

SLA1 U Grade Audit Reports: the in-month performance for March 2019 was 3.1% (Red); however the rolling three month's performance was 2.5% (Green).

SLA6 Advice Clearances: performance for March 2019 was 93.6% (Red); resulting in a service credit of XXXXXX. There were two IAS system outages during the month as well as larger intakes of Advice referrals during the weekends, meaning resource challenges on a Monday to try to safeguard the two-day target. XXXXX asked if when DWP Ops are undertaking overtime and there is an expected increase of Advice referrals over the weekend, could IAS be informed so that they are aware of the possible increase in referrals on the Monday morning. XXXX took an action to consult with XXXX to see what communications can be put in place in order to effectively inform IAS on impacts of DWP Operational overtime (XXXXXXXXX).

SLA3 Rework Accuracy: pre-mitigation performance for March 2019 was 0.9% (Red); resulting in a service credit of XXXXXX. There were 14 cases put forward for mitigation and all 14 were accepted; therefore post mitigation performance improved to 0.8% (Red) and the service credit reduced to XXXXXX. XXXXX took an action to review what actions could be taken internally in IAS to improve performance, identify what the potential issues are with the volume of Rework referrals given the relationship between Rework and Audit results, and what level of performance may be achievable going forward. (XXXXXXXXX)."

11. This appeal relates to the redaction from those minutes of the values of the service credits and no pay amounts.

12. The current PIP Contracts were initially extended to expire on 1 August 2021. In July 2021 the contracts were extended for a further two years to July 2023. A further seven-month extension to 1 March 2024 has now been agreed. A procurement exercise was launched in November 2021 for the procurement of functional assessment services (FAS), not just for PIP health assessments, but also for health assessments for Employment and Support Allowance (ESA) and Universal Credit (UC) to be provided through a single supplier in each Lot.

Request

13. This appeal concerns the following request made by Mr Slater on 13 October 2020 for minutes of Lot Performance Group (LPG) meetings between Department and Capita, and the Department and Atos held in 2019 and up to 31 August 2020:

> "I refer the Department to my request for information ("RFI") of 08 July 2019 (see URL below)
>
> https://www.whatdotheyknow.com/request/pip_contract_meetings_minutes_ch
>
> Over a year later and after the involvement of the Information Commissioner the Department disclosed the meeting minutes I requested on 01 October 2020.
>
> Please interpret my new RFI (see RFI1 at the bottom of this document) using the following guidance (please do not interpret my critique of the Department's reliance on exemptions in my earlier RFI as a request for an IRR):
>
> *S.40 – Any personal information that is exempt under S.40 FOIA is to be considered out of scope for RFI1.
>
> *S.38 – I consider the Department's reliance on S.38 for its disclosure of 01 October 2020 to be excessive. I accept the redaction of the location of meetings was reasonable. Therefore, the location of any meetings is out of scope for RFI1. Without location information there is no need to redact meeting dates, dates of future meetings and Action Point (AP) reference numbers. Therefore, the Department cannot rely on S.38 to redact this information in disclosures related to RFI1.
>
> *S.43 – I consider the Department's reliance on S.43 for its disclosure of 01 October 2020 to be unjustified. Appendix 14 of the published PIP contract documents list the service credits in detail, including the financial value. Therefore, using the information that is already in the public domain it is possible to calculate an accurate estimate of the redacted information. I also believe it is firmly in the public interest for this type of information to be disclosed. If the Department relies on S.43 to redact the same information for RFI1 I will ask the Information Commissioner to make a decision under S.50 FOIA.

*ICO Guidance on interpretation – Please use the Information Commissioner's interpretation as described in the Department's response FOI2019/30040 (ICO) of 01 October 2020.

I assume that the type of meetings (see below) described in the published PIP contracts or the equivalent in the revised contracts, still take place.

'PART M – ONGOING CONTRACT AND PERFORMANCE MANAGEMENT

47.2 Engagement

47.2.1 Monthly meetings will be held between the representatives of the Authority and the Contractor. The Contractor will ensure that a suitably empowered representative attends these meetings. Such activity will be at no cost to the Authority.

47.2.2 The Contractor will attend strategic meetings to review the overall success of the Contract Lot at the frequency to be determined to discuss:

- operational strategies;

- efficiency opportunities.

47.2.3 The Contractor will attend a monthly contract management meeting to manage this contract and discussions will include but not be limited to:

- agreeing contractual change;

- reviewing contractual performance;

- resolving operational and contractual problems;

- transferring and exchanging information.'

RFI1 – Please disclose the meeting minutes for the meetings prescribed in 47.2.1, 47.2.2 and 47.2.3 (or their current equivalent) between DWP and Capita and DWP and Atos that took place in 2019 and between 01 January 2020 to 31 August 2020.

RFI2 – If it is possible within S.12 costs limits please tell me how many change requests were agreed in 2019 & 2020 for the 3 PIP contracts"

15. The Department confirmed that it held the requested information on 10 November 2020 and stated that they considered that sections 30, 38, 40 and 43 applied to the information. The Department provided a substantive response on 8 December 2020. It provided a redacted version of the LPG minutes and stated that it was withholding some of the requested information under sections 30(1), 38(1) and 43.

16. The MoD upheld its decision on internal review on 11 January 2021.

17. Mr Slater referred the matter to the Commissioner on 19 January 2021. During the course of the Commissioner's investigation the Department confirmed that they no longer relied on section 30. Instead it relied on sections 31(1)(a), 31(1)(b) and 31(1)(g). The Department relied in addition on section 36(2)(c) to redated internal contact details of its staff members. Mr. Slater indicated that he did not dispute the redactions made under sections 36, 38 and 40(2).

Decision Notice

18. In a decision notice dated 4 August 2022 the Commissioner decided that:
    18.1. some of the information held by the Department was exempt from disclosure on the basis of s 31(1)(a) and that the public interest favoured maintaining the exemption;
    18.2. section 43(2) was not engaged in relation to the majority of the disputed information;
    18.3. where section 43(2) was engaged the public interest favoured maintaining the exemption.

Section 31(1)(a)

19. The Commissioner was satisfied that that the harm envisaged related to the prevention and detection of crime. He was satisfied that the prejudice claimed was not trivial or insignificant and he accepted that it was plausible to argue that there was a causal link between disclosure of the disputed information and the prejudice occurring. The Commissioner accepted that disclosure of the withheld information would be likely to prejudice the prevention and detection of crime.

20. The Commissioner was satisfied that there was a strong public interest in withholding information that would be likely to aid those seeking to defraud the benefits system and that, in the specific circumstances of this case, this outweighed the public interest in disclosure of the information.

Section 43(2)

21. The Commissioner was not satisfied that disclosure of the disputed information would be likely to prejudice the Department's commercial interests. The claimed prejudice was to the Department's own commercial interests regarding contracts to administer benefits assessments. The Commissioner considered that this was not a commercial activity and was the administration of a social welfare scheme as set out in **Department for Work and Pensions v Information Commissioner and Zola** [2016] EWCA Civ 758 (**Zola**).

22. The Commissioner regarded the Department's arguments of prejudice to the commercial interests of 'future suppliers' as purely speculative.

The service credit redactions

23. The Commissioner was satisfied that the harm envisaged related to the commercial interests of the contractors. He was not persuaded that there was a causal link between disclosure and prejudice to the contractors' commercial interests. The Commissioner concluded that it was not apparent how prejudice would be likely to occur by revealing the financial penalty when the missed target itself has been disclosed.

24. The Commissioner was not persuaded that disclosure of the individual service credits would be likely to prejudice either contractors' commercial interests. The Department has confirmed that the financial model will be different under the re-tendered contacts. The Commissioner found it unlikely that the service credit amounts would not be made available to any interested parties until after the tendering exercise has been completed.

25. The Commissioner noted the Department's argument that effective contract management relies on open and candid discussions and understood why maintaining effective contract management was important, but he did not consider that this argument was relevant to section 43(2).

26. It was not apparent to the Commissioner how disclosure of the service credit amounts would reveal the contractors' unique business practices.

27. The Commissioner concluded that section 43(2) was not engaged in relation to the service credit redactions.

Third party contractor redactions

28. The Commissioner was satisfied that the harm envisaged related to the commercial interests of the third-party contractors. The Commissioner was satisfied that there is a causal link between disclosure and the prejudice to the third parties' commercial interests. He was also satisfied that the threshold of "would be likely to" had been reached. The Commissioner noted that the two third parties were referenced briefly in negative terms in a meeting in which there was no representative of either third party or the ability to refute the references.

29. The Department had provided the Commissioner with copies of its correspondence with the third parties and the Commissioner was satisfied that the Department's arguments were not speculative.

30. The Commissioner accepted that section 43(2) was engaged in relation to the information relating to the third-party contractors and concluded that the public interest favoured maintaining the exemption.

Grounds of appeal

31. The Grounds of Appeal are that the Commissioner's decision was not in accordance with the law or alternatively constituted an irrational or alternatively flawed approach to the application of s.43(2) to the facts of this case. In particular:

> **Ground 1 -** The Commissioner wrongly equated the service credits with the costs of administration of a social welfare scheme.
>
> **Ground 2 -** It was not open to the Commissioner to conclude that there would be no prejudice to the re-tendering process by revealing the values of the service credits due to the fact that the financial models under the retendered contracts will be different to those under the current contracts. The Department had confirmed that the retender would contain 'substantially the same service requirement' and that service credits would continue to be applied in respect of performance indicators.
>
> **Ground 3 -** To the extent that the Commissioner considered that bidders would or would be likely to obtain information about the value of service credits during the procurement process (or thereafter), that conclusion was wrong.
>
> **Ground 4 -** The Commissioner wrongly concluded that there was no likely causal link between disclosure of the value of the service credits and prejudice to contractor's commercial interests in that:
> (i) The only proper conclusion is that the size of the service credits would reveal sensitive commercial information in respect of payments under a contract and thereby affect the commercial position of the contractors.
> (ii) The only proper conclusion is that the release of the value of service credits would disadvantage the incumbent contractors in the re-tendering process.
>
> **Ground 5 -** The Commissioner improperly concluded that the Department's arguments about the importance of protecting commercially sensitive information to promote the open discussions necessary to effective contract management and to avoid adverse impact on contractors' wider interests were not relevant to s.43(2).

The Commissioner's response

Ground 1

32. The Commissioner argues that it was correct to conclude that whilst disclosure might result in an increase in the amount spent on administering this particular disability benefit, this would affect the Department's financial rather than commercial interests in accordance with **Zola**.

Grounds 2 and 4

33. The Commissioner submits that these grounds amount to a restatement of the Department's case and a bare assertion that the Commissioner was wrong to find otherwise.

34. The Commissioner had understood that whilst the use of service credits was to be retained in any new contract, the specific amount of the credits would be a matter for negotiation. The Commissioner was not persuaded that the disclosure of service credit amounts would be likely to cause prejudice.

Ground 3

35. The Commissioner's findings were based on the Department's submissions which quoted a Commercial Manager at IAS as saying, "As there is a procurement in-flight (Functional Assessment Services 2023, PIN released on 20/09/21) information of this nature may be required or requested. Therefore, under our contractual obligations as the incumbent, we may release such information to other bidders at the appropriate time in the procurement process... "

Ground 5

36. The Commissioner maintains that maintaining effective contract management is not relevant to section 43(2). The Department has not articulated the basis on which its argument goes to support the engagement of section 43(2).

37. In relation to the adverse impact on contractors' wider interests, the Commissioner considers that this amounts to a bare assertion that the Commissioner was wrong to make the finding he did.

The response of Mr. Slater

Ground 1

38. Mr. Slater submits that the Commissioner was correct to equate service credits with the costs of administrating a social welfare system. Service credits are a form of damages for failure to perform against the agreed contracted service levels. Managing the performance of contractors against the agreed terms is manifestly part of administering a contract. As the contracts are part of the PIP social security welfare scheme, any costs incurred by the Department can reasonably be considered to fall within their administration.

Ground 2

39. Given the Department submissions, Mr. Slater submits that the Commissioner was right to draw the conclusion that disclosure would not be likely to prejudice the re-tendering process.

Ground 3

40. Mr. Slater raises the question of whether this ground is based on a misreading of the decision notice.

Ground 4

41. Mr Slater submits that there are no flaws in the Commissioner's reasoning and he was right to reach the conclusion he did.

Ground 5

42. Mr. Slater argues that the Department had the opportunity to provide the Commissioner with credible evidence to support its claims and failed to do so.

Evidence

43. We read an open and a closed bundle. The open bundle included witness statements from David Clark, Senior Civil Servant, Deputy Director, DWP, Lucy New, Client Partner at Atos for the Department and Neil Lockwood, Senior Commercial Manager, Capita.

44. The closed bundle consists of:
    44.1. the withheld information;
    44.2. correspondence between the Commissioner and the Department which reveals the content of the withheld information;
    44.3. the ministerial submission and the response in relation the qualified person's opinion under section 36.

45. It is necessary to withhold the above information from Mr Slater because it refers to the content of the withheld information, and to do otherwise would defeat the purpose of the proceedings.

46. We heard open oral evidence from Mr. Clark, Ms New and Mr. Lockwood.

47. We held a closed session in which we heard evidence from Mr. Clark and Ms New. There were no closed submissions. The following is a gist of the closed session, agreed by the Department and the Commissioner and approved by the tribunal. A copy was provided to Mr Slater during the hearing.

> "Mr Clark briefly addressed paragraph 36 of Mr Slater's skeleton argument. Mr Clark also addressed the point about potential differences between the service credits for the two current providers. Mr Clark caveated this by explaining that he is not able to carry out financial analysis and that his

evidence as to what information could be derived from credit service values is based on what he has been told by others at DWP.

Ms New addressed paragraph 36 of Mr Slater's skeleton argument and said that: (i) she does not personally have knowledge of the contractual issues referred to by Mr Slater; and (ii) PIP is very different from the contracts referred to by Slater in paragraph 36. Ms New also addressed the issue about reverse engineering to calculate the cost of delivery of the service. Ms New said that she is not a financial expert and the calculation was carried out by someone else. She added that those who carried out the calculation had been able to calculate the figures to within pennies and that as a result competitors would be able to calculate unit pricing (i.e. the agreed price for each assessment) which would impact on Atos because competitors may reduce their own price as a result of that knowledge and could reveal Atos' methods. Ms New said that in her opinion this would be of assistance to Atos' competitors. While this would not reveal Atos' exact operating model, it could give an insight into how well the operating model is working."

The law

48. The relevant parts of s 1 and 2 of the FOIA provide:

> "General right of access to information held by public authorities.
> 1(1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
>
> Effect of the exemptions in Part II.
> .....
> 2(2) 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."

49. Section 43(2) provides:

> "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)"

50. 'Commercial interests' should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity.

51. Paragraph 21 of the Court of Appeal's judgment in **DWP v ICO and Zola** [2016] EWCA CIV 758 ('**Zola**') states as follows:

> "…Mr. Sharland makes a subsidiary submission which relates to the appellant's own commercial interests. He accepts that additional public spending on benefits is not a commercial interest but a financial interest. However, he submits that where additional costs are incurred by contractors and sub-contractors as a result of withdrawals by placement hosts and these additional costs are passed on to the appellant, these fall squarely within "commercial interests" within section 43(2). He then points to the conclusion of the First-tier Tribunal (at [189]) that any prejudice that might be said to have been suffered by the appellant is of a financial rather than of a commercial nature and submits that this is an error of law because it fails to take account of such additional costs. To my mind, such additional costs incurred by the appellant would not be commercial in nature because they are incurred in the administration of a social welfare scheme. In any event, the only evidence before the First-tier Tribunal to support this head of claimed commercial prejudice was in the letters produced from the contractors. The First-tier Tribunal considered that these were speculative on this point and declined to give them any weight. I consider that it was entitled to take this view."

52. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

53. Section 43 is a qualified exemption, so that the public interest test has to be applied.

54. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.

55. In **APPGER v ICO** [2013] UKUT 0560 (AAC) the Upper Tribunal gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out (paragraph 75):

> "… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of,

proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

The role of the Tribunal

56. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Oral submissions and skeleton arguments

Does the claimed prejudice to the Department fall within section 43(2)

57. Mr Fortt submitted that the Department's interest in a commercially competitive tendering exercise and a contract management process does not cease to be commercial simply because there may be an associated element of financial prejudice associated with the administration of welfare benefits.

58. Mr. Fortt submitted that the Department is solely concerned with the administration of welfare benefits, such that any contract that it enters into on unfavourable terms will impact indirectly on the Department's financial interests related to the administration of welfare benefits. What was said by the Court of Appeal in **Zola** cannot have been meant to deprive the Department from having any commercial interests under section 43. **Zola** was not considering the impact of release of financial information on a tendering process. Where disclosure may give rise to prejudice to financial interests relevant to a welfare scheme, nothing in the authorities precludes the same material causing prejudice to commercial interests at the same time.

59. It was argued on behalf of the Commissioner that **Zola** is limited to the administration of a social welfare scheme. That may be a significant proportion of what the Department does, but it is not everything that the Department does. For example, in **DWP v ICO** (EA/2009/0073, 20 September 2010), the First-tier Tribunal accepted that the Department's commercial interests would be likely to be prejudiced in the context of procuring Government IT services. In this appeal Mr. Clark accepted that PIP is a social welfare scheme and that service credit values are calculated on the basis of loss to the Department which he defined as the expense incurred in a failure to deliver in relation to health assessments which are a key component of PIP. The Department have advanced no evidence to distinguish PIP from the social welfare schemes considered in **Zola**. As far as the Commissioner has been able to ascertain they also involved a competitive tender process.

60. The Commissioner submits that the prejudice to the Department which would arise from bidders being deterred and/or increasing their prices is financial not commercial in nature. If any additional costs arose, they would be costs associated with the administering of a social welfare scheme.

61. Mr. Slater submits that the Court of Appeal in Zola set out its reasoning at paragraphs 18 and 21 as to why it concluded that costs incurred in the administration of a welfare system are not commercial in nature. There is nothing in that reasoning that excludes PIP from being considered to be part of a social welfare system. From the perspective of the Department any potential harm ultimately comes down to cost.

Would disclosure be likely to prejudice the commercial interests of any person?

62. Mr. Fortt accepts that as a matter of logic information that would be so stale as to be of no benefit to potential bidders or to cause any current embarrassment would be unlikely to be protected, but this information is sufficiently close in time to be highly relevant still when the re-tendering was anticipated to take place at the relevant time.

63. Mr. Fortt submitted that there was a distinction to be drawn between performance information itself and the financial consequences of performance, the latter of which is commercially sensitive. Here performance information has been made public, and it is only the financial consequences that are withheld.

64. Mr. Fortt submits that release of the figures would impact on the anticipated competitive bidding process because not only would it allow competitors to reverse engineer to a degree where can have a very precise understanding of the unit pricing, competitors would also be able to identify some aspects of how the contract was performed. If this information is available to competitors it acts to the detriment of the incumbent contractors. This is plainly also a prejudice to the Department because it needs to be able to hold a competitive bidding process to gain the value for money that taxpayers expect.

65. In addition Mr. Fortt relies on the reputational damage to the contractors. The evidence of Mr. Lockwood and Ms New was that they would have significant concerns about the release of the additional financial information. The rationale is that whilst levels of performance are revealed in part by the disclosures already made, what is not shown is the level of importance which is attributed to the lack of compliance with that performance indicator, which is only revealed by the service credits that are attributed to them.

66. Mr. Reichbold submitted on behalf of the Commissioner that this information would not impact on any future bidding process. There is no causal link. The service credits do not reveal anything about the model adopted by the contractor. Service credits will continue to be applied, but the number will be different.

67. Mr. Reichbold submitted that some of Mr. Clark's evidence should be treated with caution, because he advances prejudice on behalf of the contractors that they do not assert, such as the impact on shareholders and the market. Some of the evidence from Ms New should be treated with caution, such as the speculation that the system as a whole might collapse. Mr. Lockwood went further in his oral evidence than in his witness statement. There is an inherent contradiction in Mr. Lockwood's evidence: he said that service credit values are highly commercially sensitive but said that concerns about competitive advantage were at the bottom of his list of concerns. Notably when Capita had the opportunity to make submissions at the time of the complaint, they did not mention service credits.

68. Mr. Reichbold submitted that there was no evidence before the tribunal to support the reverse engineering. Ms New and Mr. Clark accepted that they were not financially qualified and could not replicate it. Further, this argument is undermined by the fact the Department does not award contracts on price alone and that the financial model will be different under the new contracts.

69. The Commissioner considers that the Department has not made out its case in relation to how disclosure of the specific numbers gives anything away about the contractor's operating model or their intellectual property rights.

70. Mr. Reichbold submitted that the addition of the figures would not add to any reputational damage that may be suffered from the performance data and mitigation already included in the disclosed minutes. Ms New accepted this in evidence.

71. Mr Slater submitted that the arguments based on an upcoming tendering process came close to making section 43 an absolute exemption because there was always going to be a future tendering process likely to happen at some point. The public interest has to be assessed at the time of the response, not in relation to something that might happen in the future.

72. Mr. Slater submitted that the new FAS contracts are significantly different from the old PIP contracts, and therefore the values of the service credits from the PIP contracts will not prejudice the procurement exercise for the new FAS contracts, particularly given the age of the information.

73. Mr. Slater submitted that the evidence of Mr. Lockwood showed that the 'ethical wall' that was meant to ensure that the bid team did not know the level of service credits under the existing contract was not operating effectively.

74. Mr. Slater submitted that the alleged damage to reputation was in essence an argument that the information might be misunderstood by the public. These are large organisations and are able to provide explanations.

Where does the balance of public interest lie?

75. Mr. Fortt submitted, in essence, that the prejudice that would be likely to be caused outweighed the public interest in transparency.

76. Mr. Reichbold submitted that there was a strong public interest in knowing what the Department is doing to enforce targets and contracts which involve health assessments for a social welfare scheme. Mr Lockwood in spoke about the fact that the minutes as they stand do not provide a complete picture. The missing numbers will, to some extent, add to that picture and add to the context. In the evidence advanced by Mr Slater there is a news article on page 1612 at the open bundle which refers to there having been 2.5 million claims for PIP between August 2017 in July 2022. That is relevant to the public interest because it underscores the fact that there are very large numbers of individuals who make applications for PIP.

77. Mr Slater submitted that there was an overwhelming public interest in transparency because PIP is a benefit for some of the most vulnerable people in society and there are significant issues with the process, illustrated by the high rate of successful appeals at tribunal.

Discussion and conclusions

78. The issues we have to determine under section 43 are:
    78.1. Does the claimed prejudice to the Department fall within section 43(2)?
    78.2. Would disclosure be likely to prejudice the commercial interests of any person?
    78.3. Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

ISSUE 1: Does the claimed prejudice to the Department fall within section 43(2)?

79. In summary, the claimed prejudice to the Department's interests is that releasing the requested information would be likely to:
    79.1. distort any future competitive tendering exercise, such that there was a real risk that the Department would not get best value for money;
    79.2. undermine the trust and confidence in the Department of current contractors and future potential contractors, such that there was a real risk that contractors would be less likely to bid, the bidding process would be undermined and contract management would be adversely affected.

80. The question for the tribunal is whether this claimed prejudice is to the Department's commercial interests, in the light of the Court of Appeal decision in Zola.

81. The information requested in Zola was the identities of some of the organisations, primarily charities and businesses, who were at the time of the requests hosting placements under certain schemes aimed at promoting the employment prospects of jobseekers. Under the schemes placement hosts received a benefit in the form of free labour. Placements were arranged by contractors and sub-contractors who received payment from the Department. There was no direct contractual relationship between the placement hosts and the Department. It is not clear from the judgments whether the contractors and/or sub-contractors were chosen through a competitive tendering process.

82. The claimed likely prejudice to the Department's own commercial interests in Zola was threefold:

    82.1. There was a real risk that the additional costs to contractors and sub-contractors having to find new placements would have been passed on to the Department;
    82.2. There was a real risk that the Department would have to expend more on benefits. This was said to be commercial in nature because it would have less money to spend on commercial activities such as contracts with contractors to assist jobseekers going back to work;
    82.3. There was a real risk that disclosure would have led to the collapse of the programme as a whole.

83. In the First-tier Tribunal decision the Commissioner's argument is recorded as follows, at paragraph 76:

> "The Commissioner began his initial written response by stressing that the distinction between "financial" and "commercial" for the purpose of section 43(2) is simple and easy to understand. An activity, he claims, is commercial if it involves selecting, negotiating with and entering into contracts with possible private-sector firms: paying unemployment benefit is a "very different". The latter is merely a function of public administration."

84. The First-tier Tribunal's conclusions on this are at paragraph 189:

> "In the case of the DWP, the Tribunal is equally satisfied that any prejudice that might be said to have suffered is of a financial rather than of a commercial nature. This issue has been addressed above. The Tribunal accepts the Commissioner's contentions on this point. Put shortly, the defraying of welfare payments is not a commercial activity."

85. The Upper Tribunal did not address the issue, but it appears at paragraph 21 of the Court of Appeal decision:

> "Finally in this regard, Mr. Sharland makes a subsidiary submission which relates to the appellant's own commercial interests. He accepts that

> additional public spending on benefits is not a commercial interest but a financial interest. However, he submits that where additional costs are incurred by contractors and sub-contractors as a result of withdrawals by placement hosts and these additional costs are passed on to the appellant, these fall squarely within "commercial interests" within section 43(2). He then points to the conclusion of the First-tier Tribunal (at [189]) that any prejudice that might be said to have been suffered by the appellant is of a financial rather than of a commercial nature and submits that this is an error of law because it fails to take account of such additional costs. To my mind, such additional costs incurred by the appellant would not be commercial in nature because they are incurred in the administration of a social welfare scheme. In any event, the only evidence before the First-tier Tribunal to support this head of claimed commercial prejudice was in the letters produced from the contractors. The First-tier Tribunal considered that these were speculative on this point and declined to give them any weight. I consider that it was entitled to take this view."

86. First, in our view, the view expressed by Lord Justice Lloyd Jones as to whether or not such additional costs would be commercial in nature did not form part of his reasons in determining this issue and is therefore strictly obiter. The Court of Appeal's decision, in paragraph 21, was that the only evidence before the First-tier Tribunal to support the claim that additional costs incurred by contractors and sub-contractors would be passed on to the Department was considered by the First-tier Tribunal to be speculative and it had declined to give it any weight. The Court of Appeal's finding was that the First-tier Tribunal was entitled to take this view.

87. Second, we note that it was accepted, rather than argued, before the Court of Appeal that additional public spending on benefits is not a commercial interest but a financial interest. It was the finding of the First-tier Tribunal, unchallenged in the Court of Appeal, that there was a distinction between commercial and financial interests. This distinction has its roots in the Commissioner's submissions accepted by the First-tier Tribunal: An activity is commercial if it involves selecting, negotiating with and entering into contracts with possible private-sector firms, whereas paying unemployment benefit is merely a function of public administration.

88. Even assuming that Lord Justice Lloyd's comment are binding on us, in our view he was simply expressing the opinion that, on the facts of that case, the particular additional costs that would be incurred by the Department ('such additional costs') would not be commercial because they formed part of the costs incurred in the administration of a social welfare scheme. We do not accept that he intended to lay down a rule, as a matter of general principle, that any prejudice to the Department which ultimately results in additional costs incurred in administering a social welfare scheme could only prejudice its financial interests and not also its commercial interests.

89. This is particularly so given that the genesis of the distinction between commercial and financial interests in that appeal specifically identified that an activity would be commercial if it involved selecting, negotiating with and entering into contracts with possible private-sector firms. Prejudice to the Department's activities of selecting, negotiating with and entering into contracts with possible private-sector terms is highly likely to have the knock-on effect of a higher cost of administering a social welfare scheme. That does not make it purely a prejudice to the Department's financial interests.

90. For those reasons, we accept Mr. Fortt's submissions that the fact that the claimed prejudice is likely ultimately to lead to an increase in the cost of paying or administering welfare benefits, does not prevent that from being prejudice to the Department's commercial interests.

91. The facts and the claimed prejudice in this case are very different to Zola. The placement providers were not in any contractual relationship with the department, unlike the contractors in this appeal. There was not, in Zola, claimed to be any impact on the operation of a competitive tendering process.

92. In our view prejudice to a competitive tendering process would clearly fall within prejudice to the commercial interests of the Department, and so would prejudice to the Department's ability to carry out effective 'contract management' of a contract with a private-sector company. The Department has a commercial interest in being able to conduct an effective competitive tendering process and in being able to effectively manage its contracts with contractors.

93. For those reasons we find that the claimed prejudice is to the Department's commercial interests.

Prejudice to commercial interests

94. The claimed prejudice to the Department's commercial interests is set out above. The claimed prejudice to the existing contractors' commercial interests is that release of the information would be likely to lead to:

95. Unwarranted reputational damage to the contractors

    95.1. A distorted future re-tendering process, including an unfair competitive advantage to other bidders.
    95.2. Loss of trust and confidence in the Department.

96. In relation to the distorted tendering process, this is claimed to be likely to arise in three ways:

    96.1. The requested information would allow competitors, by way of reverse engineering, to calculate the current contractor's unit price.

96.2. The requested information would give competitors insight into the current contractor's operating models.

96.3. The requested information would give competitors insight into the levels of service credits under the current agreements, allowing them to tailor any future bids.

97. We accept that all the above claimed prejudice relates to the interests protected by the exemption and is real, actual and of substance.

98. We heard evidence from Ms New in open and closed on the possibility of reverse engineering. Ms New candidly accepted that she had not and could not carry out the calculation herself, but that it had been carried out by ATOS' financial modellers. She stated that she had been informed that it was relatively straightforward to use the withheld information to reverse engineer and calculate the cost of delivery of the service.

99. Ms New gave an example in open of how this could be done in relation to the 'no pay amount'. She stated that the no pay model is based on total price, so knowing what the no pay amount is and the percentage that ATOS has achieved allows the calculation of total cost, which can be divided by volumes delivered which gives the unit price.

100. On the basis of Ms New's evidence we find as a fact that it would be possible for competitors in any future tendering exercise to calculate the unit price agreed between the contractors and the Department during the period to which the request relates. We accept Ms New's evidence that by the time it came to a re-tendering exercise several years later, the precise figures would be 'slightly stale', but that they would still provide a useful starting point.

101. We accept also that release of the requested information would give an informed competitor some, albeit limited, insight into the current contractors' operating model. The detail of Ms New's evidence on which this finding is based is provided in closed.

102. We find that there is a real and significant risk that bidders knowing the agreed unit price for likely competitors and/or previous contractors along with some limited insight into their method of delivery would distort any competitive tendering exercise in the near future.

103. We find that at the relevant date the Department and the contractors knew that the current contracts were coming to an end in the near future. It was originally intended that the Department would undertake a procurement exercise for PIP contracts from 1 August 2021. In July 2020 it was announced that the contracts would be extended for a further two years up to July 2023. Therefore at the time of the Department's response to the request in December 2020, it was anticipated that there would be a competitive re-tendering exercise in time for new contracts

to commence in July 2023. The procurement exercise for FAS (Functional Assessment Services) was launched in November 2021 which is, we find, about the date that would have been anticipated in December 2020 as the likely start date for a procurement exercise.

104. We find that release of the requested information would have enabled potential bidders in December 2020 to have calculated the current contractor's unit costs in 2019 and between 01 January 2020 to 31 August 2020. Although this information would have been slightly stale by the time the anticipated re-tendering would be likely to take place, it would only have been approximately 12 months old, and would, as Ms New stated, have provided a useful starting point.

105. We accept that there is a causative link between this knowledge and a real and significant risk of prejudice to the Department's commercial interests in running an effective and undistorted competitive tendering exercise, commencing in about late 2021. Further we accept that a competitor knowing the specific price points of others along with some limited insight into their method of delivery in advance of a competitive tendering exercise is likely to be disadvantageous in that exercise to those others, and thus we accept that there was a causative link between that knowledge and a real and significant risk of prejudice to the current contractors' commercial interests.

106. We accept that a distorted tendering exercise carries with it a real risk that the Department would not get best value for money. We do not accept that there is a real and significant risk of this having some of the other adverse consequences identified by the Department or its witnesses. For example, we do not accept that there is a real and significant risk of the Department accepting a bid that was priced at unsustainable levels, or that this would be likely to lead to the ultimate collapse in delivery of the service. As Mr. Clark highlighted, contracts are not awarded on price alone.

107. The procurement exercise that was ultimately launched in November 2021 was for the procurement of functional assessment services (FAS) not just for PIP health assessments. It related to functional health assessments for PIP, Employment and Support Allowance (ESA) and Universal Credit (UC). These were to be provided through a single supplier in each geographical area, or Lot. The extent to which these changes were anticipated by the Department in December 2020 is unclear to the tribunal, but it seems likely that it would have known of the proposed changes in December 2020.

108. Even though the service was being redesigned, on the basis of Mr. Clark's evidence we find on the balance of probabilities that at the relevant time it was anticipated that the contracts in relation to the delivery of PIP assessments would remain 70-80% the same as the current contracts. In those circumstances, whilst the anticipated changes would reduce the value of the information to some extent, it would still retain some value to future bidders.

109. For those reasons we accept that the exemption is engaged.

110. Whilst the requested information would also give competitors insight into the levels of service credits under the current agreements, we do not accept that there is any real and significant risk of prejudice arising out of this insight. First, there is no guarantee that service credits would be set at similar levels in any future tendering exercise, which creates a large element of risk in building the historic service credit levels into any bid. Second, unlike knowledge of price points and insight into competitor's operating model, we do not accept that knowledge of the level at which service credits were agreed gives any competitive advantage. If all bidders know the levels, then none are at an advantage and the competitive exercise is not distorted.

111. Although one way of achieving a level playing field in relation to knowledge of the levels of service credits under the previous agreements is to create, as the Department did, an 'ethical wall' between the bid team and the rest of the staff at the incumbent contractor, another way would be to make all bidders aware of the service credit levels. When Mr. Clark was asked why this would not also achieve a level playing field, he referred to the other prejudice identified above in relation to insight into operating models. Mr. Lockwood's evidence, in summary, was that the ethical wall was ineffective, and the current contractors did not want to lose the advantage that they held by knowing about the service credit arrangements. We do not accept that losing an unfair advantage amounts to prejudice to commercial interests.

112. For those reasons we do not accept that disclosure would have led to any prejudice either to the Department or current contractors arising from other potential bidders becoming aware of service credit levels.

113. We do not accept that the release of the figures would be likely to cause any reputational damage to the current contractors. The minutes that have been made public contain details of any failure to comply with required standards and state whether a service credit or no pay amount has been imposed. The only information missing is the amount of that service credit or no pay amount. We are not persuaded that there is any causative link between the release of the specific amount and any reputational damage. In our view, any reputational damage that was going to occur, would already have incurred as a result of the information already released.

114. We were not persuaded that there is any risk of additional reputational damage through knowing which failings attracted higher levels of service credit. The level of the credit is not punitive, it reflects the loss to the Department. Ms New accepted in her evidence that no additional reputational damage would arise from release of the specific figure. Whilst Mr. Lockwood maintained his position that additional reputational damage would arise, he did not, in our view, explain

adequately why that was the case, given the significant levels of performance information already in the public domain.

115. We are not persuaded that any loss of trust and confidence in the Department would arise from any decision of ours to disclose the requested information. Those that contract with Government departments are well aware of FOIA and its consequences. The fact that there is a risk of disclosure should not be news to them. If a particular tribunal decides, on the facts before it, that the public interest in disclosure outweighs the public interest in maintaining the exemption under section 43 that does not mean that all similar information will be disclosed in the future. Where commercially confidential information would be likely to prejudice a party's commercial interests that will weigh in the balance. That has always been and will be the position since FOIA was brought into force.

116. For that reason, we do not accept that a decision of ours to disclose this information on these particular facts would lead to any loss of trust and confidence in the Department, or any resultant reluctance to bid in the future or any impact on the likelihood of openness either at the bidding stage or within the operation of the contract and therefore we do not accept that there would be likely to be any impact on the Department's ability to effectively manage the contracts.

117. In summary we have found that the exemption is engaged on the basis set out in paragraphs 99-109 above. We do not accept that some of the other asserted prejudice would be likely to arise from disclosure.

Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

118. Although we have accepted that the release of the requested information would be likely to distort any competitive tendering exercise in the near future, in our view such distortion is likely to be reasonably limited. First, the pricing information would have been slightly out of date by the time of the anticipated procurement exercise. Second, we have found it was anticipated that the new contracts, in so far as they related to PIP, would be approximately 70-80% the same as the old PIP contracts. This reduces the value of the information to a competitor in the anticipated procurement process. Third, we have rejected some of the direr consequences that were claimed to flow from this distortion.

119. Having said that, it is clearly in the public interest that such an important contract for such a large sum of money is awarded to the right contractor, at the right price and on the right terms. Therefore even though we have found that the distortion to any anticipated further competitive tendering exercise was likely to be reasonably limited, we find that there is still a reasonably strong public interest in avoiding that. There is therefore, we conclude, a reasonably strong public interest in maintaining the exemption.

120. Turning to the public interest in disclosure, there is a strong public interest in knowing what the Department is doing to enforce targets in contracts which involve health assessments for a social welfare scheme. There is a strong general public interest in transparency in relation to how public authorities spend and recover taxpayer funds. There are a large number of vulnerable individuals personally affected by any failure to deliver the health assessments in accordance with the contractual requirements. We accept Mr. Slater's evidence that legitimate questions have been raised in relation to delivery and performance under these contracts. Overall, we conclude that there is, in general, a very strong public interest in transparency in relation to the performance of these contractors.

121. However, we are not persuaded that the disclosure of this information would serve that public interest, except to a minimal extent. The redacted minutes of the Lot Performance Group minutes, which were made public, contain detailed information about the performance of these contractors. They include the percentages achieved by the contractors in relation to each target. They include narrative in relation to what went wrong and the mitigation put forward.

122. The only information that is redacted is the pre- and post- mitigation amounts of the service credits/no pay amounts to be applied. Service credits are based on loss to the Department or and are not punitive. No pay amounts are intended to represent a proportionate price adjustment to reflect the reduced quality of chargeable outputs under the contract. The extent to which the figures provide any additional insight into the default of the contractor is very limited.

123. We accept that the service credit figures indicate which failings led the Department to suffer more loss, and that the no pay amounts are intended to reflect the reduced quality of chargeable outputs and therefore perhaps to some extent they indicate which failings were more serious, at least in terms of their consequences for the Department.

124. On this basis we accept that the withheld numbers add to the overall picture to some extent, however in our view the extent to which it provides any additional illumination of the levels of performance or the Departments efforts to enforce targets is very limited. For those reasons we find that there is some public interest in disclosure, but it is reasonably weak.

125. Taking all the above into account, we find that the reasonably strong public interest in maintaining the exemption, as detailed above, outweighs the reasonably weak public interest in disclosure.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 3 April 2023