First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2021/0082 & 0101

Heard by CVP
On 11 January 2022
Panel Deliberations on 31 January 2022
Representation:
Appellant: In person
First Respondent: Did not appear
Second Respondent: Mr. Metcalfe (Counsel)
Third Respondent: Mr. Hopkins (Counsel)

Before

JUDGE SOPHIE BUCKLEY
NAOMI MATTHEWS
PIETER DE WAAL

Between

PHILIP SWIFT

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

NATIONAL HIGHWAYS (formerly HIGHWAYS ENGLAND)

Second Respondent

KEIR HIGHWAYS LIMITED (0101 only)

Third Respondent

DECISION

1. The tribunal dismisses the appeal in EA/2021/0082.

2. The tribunal allows the appeal in EA/2021/0101 in part and substitutes the following decision notice.

SUBSTITUTE DECISION NOTICE IC-40443-T6L2

Organisation: National Highways (Formerly Highways England)

Complainant: Philip Swift

For the reasons set out below National Highways did not hold any information within the scope of the request relating to Area 10.

In relation to the requested information relating to Area 9 National Highways were entitled to rely on s 41 of the Freedom of Information Act 2000 (FOIA) to withhold the requested information.

National Highways is not required to take any steps.

REASONS

Introduction

1. The second respondent, National Highways ('NH') was formerly known as Highways England ('HE').

2. There are two joined appeals.

3. EA/2021/0082 is an appeal against the Commissioner's decision notice IC-47981-R2Q1 of 24 February 2021 (EA/2021/0082) which held that NH did not hold information within the scope of the request.

4. EA/2021/0101 is an appeal against the Commissioner's decision notice IC-40443-T6L2 of 8 April 2021 which held that NH did not hold information within the scope of part of the request and that they were entitled to rely on s 41(2) of the Freedom of Information Act 2000 (FOIA) to refuse to confirm or deny whether it held information within the scope of the other part of the request.

5. The Commissioner did not require the public authority to take any steps.

Factual background to the appeals

6. This tribunal is hearing a number of related appeals involving Mr Swift and NH. The following factual background is taken largely from the tribunal's decision in EA/2021/0048.

7. NH is responsible for the operation, improvement, maintenance, renewal and repair of the strategic road network. This work is carried out for NH by contractors. Contracts are divided into 12 numbered areas, referred to in this judgment as, for example, 'Area 9'. Where damage is caused to the strategic road network by a third party, the contractor for the relevant area is responsible for carrying out the necessary repairs (these are referred to in these proceedings as 'DCP' repairs which stands for 'damage to crown property'). DCP repairs are a small part of the contractual operations which mainly consist of planned maintenance projects known as scheme work.

8. Some of the contracts are known as 'ASC' (Asset Support Contracts). Others are known as 'AD' (Asset Delivery).

9. The contracts provide that DCP repairs are carried out on a costs reimbursable basis. This means that contractors claim for their actual costs plus a fee. The elements of those costs which are recoverable are defined by the contract ('defined costs').

10. At the relevant times in these two appeals, the Area 9 contract was with Balfour Beatty Mott MacDonald (BBMM) and the Area 10 contract was with Kier Highways (Kier).

Request, Decision Notice and appeal - Appeal number EA/2021/0082

Request - EA/2021/0082

11. Mr. Swift made the following request to NH on 23 July 2019:

> 1. I am seeking the schedule of Damage to Crown Property (DCP) rates for the above threshold works held and used by BBMM when pricing DCP matters in Area 10. The schedule of rates was used in the ASC pre-04/2019 when the contract concluded. This is the schedule of DCP rates by which BBMM charge / charged [NH] where incident costs exceed £10,000, a schedule of rates that are apparently subsidised by the lump-sum payment.
>
> 2. Please ensure the date the schedule was produced and the period to which it relates is provided. It would assist to be advised when and how often the schedule is revised.
>
> 3. The subsidy should also be explained, to the extent that I am able to reverse engineer the charges and establish the actual rate i.e. cost presubsidy. BBMM clearly possess the schedule; it is used to bill [NH]. BBMM has declined to provide the schedule in the course of ordinary business but has referred to in Court. I understand you are seeking a copy of HH Godsmark's judgement in which the schedule is specifically referenced.
> http://www.englandhighways.co.uk/15-02-2018-derbycounty-court-bbmm-for-highways-england/
>
> Please also provide all information relating to:
> A. your attempts to secure the information from BBMM to date; approached and responses on the subject fo [sic] the schedule – what is held, how and seeking a copy of them.
> B. Investigation of the rates having been stated to exist

C. Enquiries of the statements (to HH Godsmark) that the rates are subsidised
D. The subsidy; whether this does, in fact, apply – this should be confirmed by the response to '3' above
E. Please also provide BBMM's responsibilities under the Act; their obligations, that Balfour Beatty is permitted contractually to respond substantively on such requests without client instruction and the instructions sought/provided to date.

12. In the absence of a reply Mr. Swift requested an internal review by email dated 22 August 2019.

NH's reply - EA/2021/0082

13. NH replied on 25 October 2019. NH stated that it did not hold the information requested in parts 1, 2, A, B, C and D. In relation to part 3 it stated, 'There is no subsidy'. In relation to part E it stated, 'A disclosure request is defined in the contract as "a request for information relating to this contract received by the Employer pursuant to the Freedom of Information Act 2000, the Environmental Information Regulations 2004 or otherwise".'

14. Mr. Swift submitted a further request for an internal review on 26 October 2019. NH upheld its original response on an internal review communicated to Mr. Swift by letter dated 2 December 2019.

15. Mr. Swift referred the matter to the Commissioner on 18 December 2019.

The Decision Notice - EA/2021/0082

16. In a decision notice dated 24 February 2021 the Commissioner decided, on the balance of probabilities, that NH did not hold information about DCP rates or information relating to NH's attempts to secure information from Balfour Beatty.

17. In relation to parts A-D the Commissioner accepted that the requests were asking for information that did not exist. She had no reason to dispute NH's representations that it has never sought this information from BBMM.

18. In relation to parts 1 and 2, the Commissioner concluded, on the balance of probabilities, that NH did not hold a schedule of DCP rates for the above threshold works held and used by BBMM when pricing DCP matters in Area 10. In reaching this conclusion she drew on the FTT decision in EA/2019/0119.

Notice of Appeal - EA/2021/0082

19. Mr. Swift's ground of appeal is that the rates do exist. He relies on a statement by a NH manager, Mr Read formerly employed by BBMM, the contractor in Area 10. Mr. Swift states that under cross examination (EA/2019/0390) Mr Read further confirmed the existence of the rates.

The ICO's response - EA/2021/0082

20. The ICO did not file a response.

NH's response - EA/2021/0082

21. In summary NH assert that any schedule of costs referred to by Mr. Read was a reference to one held by BBMM not by NH. No information was held by NH within the scope of the request.

Mr. Swift's reply - EA/2021/0082

22. Mr. Swift relies on the following as evidence that the requested rates are held by NH:
    22.1. On the basis of Mr. Read's evidence they were, at the very least, held by BBMM on behalf of NH.
    22.2. The statement of Luke Ellis, formerly of BBMM to HHJ Gosmark.
    22.3. The fact that Luke Ellis refused to provide the rates.
    22.4. The rates associated with claims show consistency and that they are all amended at a particular date.
    22.5. The fact that BBMM was billing NH.

23. The information is held by BBMM on behalf of NH. The information was solely used to bill NH and obtain payment, provide NH evidence to pursue recovery and to address a pain/gain share reconciliation at the end of the contract. DCP rates information was only used to bill NH, they had use of it and could request it at any time.

24. NH is in breach of FOIA in failing to approach BBMM.

25. Mr. Read's evidence is that BBMM's finance department presented average rates to NH. Mr. Swift is seeking the information presented to NH on a regular basis: the back up data or rates used on all claims billed to NH.

26. Whether or not the rates were expressly agreed is irrelevant to the question of whether they fall within the scope of the request. The request is for rates presented to NH and then utilised by BBMM.

Request, Decision Notice and appeal - Appeal number EA/2021/0101

Request - EA/2021/0101

27. Mr. Swift made the following request to NH on 25 November 2019:

> I am seeking all information relating to:
>
> Area 9

> The audit /investigation/enquiries of Area 9 / Kier Highways Ltd. following my meeting with Highway England 21/06/2019 progressed, in part, by KPMG under 'Project Verde'. The information will extend, but not be restricted to, exchanges with KPMG and the contractor also all draft reports received.
>
> Area 10
>
> The audit/investigation/enquiries of Area 10 / Balfour Beatty Mott MacDonald (BBMM) subsequent the judgement of HH Godsmark, Case No: C08YP765 and the contradictions arising/conveyed. The information will extend but not be restricted to, exchanges with the contractor following my attempts to obtain information from BBMM.
>
> You may wish to cross-reference this to FoI 100162 'Area 10 BBMM Above Threshold Rates & Subsidy'

28. In the absence of a reply Mr. Swift requested an internal review by email dated 4 January 2020.

NH's reply - EA/2021/0101

29. NH replied on 6 February 2020. In relation to Area 9 NH neither confirmed nor denied that it held information within scope of the request, relying on s 41 FOIA. In relation to Area 10 NH stated that it did not hold the requested information.

30. Mr. Swift submitted a further request for an internal review on 6 February 2020. NH upheld its original response on an internal review communicated to Mr. Swift by letter dated 24 April 2020.

31. Mr. Swift referred the matter to the Commissioner on 24 January 2020.

The Decision Notice - EA/2021/0101

32. In a decision notice dated 8 April 2021 the Commissioner decided, on the balance of probabilities, that NH did not hold the requested information relating to Area 10.

33. The Commissioner decided that NH was entitled to neither confirm nor deny whether it held the requested information relating to Area 9. The Commissioner was satisfied that if the information was held, it would be information provided by another person, the auditor, and be likely to contain information provided by third parties. She was satisfied that the information, if held, would have the necessary quality of confidence. She was satisfied that there was no information in the public domain that would indicate whether or not what Mr Swift had requested was held or not held.

34. The Commissioner concluded that audit information is considered to be provided in confidence and unauthorised release has the potential to cause reputational damage to an audited organisation and the auditor. She concluded that NH

would not have a public interest defence to any breach of confidence proceedings which may arise from a confirmation or denial that the information is held.

35. Finally the Commissioner concluded that NH was in breach of section 10(1) FOIA.

Notice of Appeal - EA/2021/0101

36. Mr. Swift's grounds of appeal are, in essence:
    36.1. That the Commissioner was wrong to conclude that the information was not held. He understands that Area 10 was the subject of audits. He anticipates that inquiries were undertaken, Mr Swift having raised concerns about the conduct of the contractor.
    36.2. The use of the neither confirm nor deny approach is perverse because the authority has already released some auditing information to Mr Swift.

The ICO's response - EA/2021/0101

37. The ICO did not file a response.

NH's response - EA/2021/0101

38. NH stated that it no longer relied on section 41(2) and confirmed that it held information within the scope of the request in relation to Area 9, namely a draft report prepared by KPMG dated 31 January 2018 and related correspondence between NH, KPMG and Kier Group. NH made no further submissions in relation to that information because of the application of Kier Group to join as third respondent.

39. In relation to Area 10 NH submits that Mr Swift's reading of Mr Read's evidence is in error, and the statement does not contradict NH's statement that it does not hold a schedule of costs. No information was held by NH within the scope of the request.

Mr. Swift's reply to NH - EA/2021/0101

40. Mr. Swfit's reply is extensive. The tribunal has read and taken account of all relevant points. The following is a summary of the most relevant points.

Area 9

41. The KPMG 'audit' relating to Area 9 was instigated partly because of Mr Swift's complaints. KPMG were privy to the DCP rates which NH would later say did not exist. This would lead to the creation of a set of rates (the National Schedule of Repair Costs or 'NSoRC') to support the not held stance. The audit is highly likely to be commercially embarrassing.

42. The audit was a specific piece of work to look at specific allegations in relation to the use of a contract non-compliant process leading to third parties being overcharged.

43. No sensitivity attaches to the rates, which have been disclosed. The reputational damage is in withholding the information, which Mr. Swift believes is being withheld to protect those who misled parties, avoid recovery action against NH and undermine s 77 withholding allegations.

Area 10

44. The judgment of HHJ Godsmark is unequivocal. DCP rates are held above threshold and are subsidised. The request was made having raised concerns about Area 10. NH was alerted to his concerns but seemingly failed to progress an investigation or is withholding it.

Response from Kier Highways – EA/2021/0101

45. Parts of the in-scope information, including but not limited to the draft report by KPMG, are exempt under s 43(2) and s 41(1).

46. Kier agreed to the audit exercise on the understanding that information about this audit would be confidential, at least until such time as a final report was produced for dissemination. Kier's intention was that such a report would assist in resolving the types of concern Mr Swift persistently raised, reducing the need for multiple rounds of engagement on the same issues.

47. The draft KPMG Report was shared with Kier by NH on 9 July 2019. NH invited Kier's comments. Kier rebutted numerous points made in the draft KPMG Report. Neither NH nor KPMG has ever reverted back to Kier to dispute Kier's rebuttals. As far as Kier is aware, no final report was ever produced.

48. By the time Mr Swift made this FOIA request, work was underway to improve transparency and certainty about how future cost recovery charges would be determined as between NH and all of its contractors (via the NSoRC).

S 43(2)

49. A reduction in the costs Kier is able to recover associated with highways incidents would constitute real, actual or substantial harm to Kier's commercial interests. Disclosure of the disputed information would be very likely to have that effect. To at least some extent, there is a significant chance of numerous parties from whom Kier seeks to recover costs achieving their objective of using the information to challenge the sums Kier seeks to recover, regardless of the flaws and errors in the report.

50. If the costs recovery process became more drawn out and resource intensive this would also prejudice Kier's commercial interests.

51. This could have knock on effects for the public purse and the commercial interests of NH, because Kier's ongoing ability to deliver cost effective services would be prejudiced.

52. Insofar as the disputed information contains misplaced and unfair criticisms of Kier, it would expose Kier to a risk of reputational damage.

53. The public interest balance favours maintaining the exemption. There is a weighty public interest in avoiding the unwarranted prejudicial consequences. It is not in the public interest for cost recovery claims to be driven down in unmeritorious circumstances. There is an inherent public interest in maintaining confidentiality. Disclosure would further private not public interests because of the errors within the disputed information. Ample transparency is already delivered about Kier's Area 9 services. The disputed information has no ongoing utility given the introduction of the NSoRC.

S 41(1)

54. Under the Area 9 contract Kier is owed duties of confidence. Even if KPMG consent to disclosure, Kier is owed duties of confidence. NH and KPMG owed Kier duties of confidence at common law by virtue of the nature of the information and the circumstances in which it was provided. Disclosure would contravene those duties resulting in the prejudice set out above.

55. There would not be a public interest defence to an action for breach of confidence, for the reasons outlined above.

Evidence – 0082 and 0101

56. We heard evidence from Mr. Swift; Brian Read and Jonathan Drysdale on behalf of NH; and Neil Pendlebury-Green on behalf of Kier.

Closed session – gist

57. We held a closed session in which we heard evidence from Neil Pendlebury-Green. The evidence was closed because it revealed the nature of the withheld information and hearing it in open session would have defeated the purpose of the proceedings.

58. In accordance with **Browning** Mr Swift was provided with an agreed oral gist of the closed session and with a document from the closed bundle (p395-396 of the closed bundle) which, after discussion with Mr. Hopkins, did not appear necessary to withhold.

59. The gist of the closed session was as follows:

First of all there was a discussion about the email at page 395-396 and whether or not that could be made open and that was then sent to Mr. Swift. Then Mr Hopkins took the tribunal through the closed bundle, setting out what those documents were. Then there were some questions to Mr. Pendlebury- Green from the tribunal.

The Judge asked if the reconciliation process was done on a claim by claim basis or on a broader basis. Mr Pendlebury-Green confirmed that it was not done on the basis of each incident or each claim but was done on a broader basis.

The Judge asked Mr Pendlebury- Green what his expectations of confidentiality were when he entered into the audit process and what he understood about whether the audit would remain confidential. Mr. Pendlebury-Green said that his understanding was that the final audit was not intended to remain confidential.

Mr. Pendlebury-Green confirmed, in response to a question from Mr DeWaal, that if the audit report had been finalised and he still disagreed with it then he wouldn't have expected it to remain confidential. Mr. Pendlebury-Green would have expected the final report to be made public. He stated that he objected to it being made public because it was a draft report which has not taken into account Kier's response.

Ms Matthews asked Mr Metcalfe whether there was any additional correspondence which might have fallen within the scope of the request after the date of the draft audit, including for example, any correspondence between NH and KPMG about whether the report would be finalised. Mr Metcalf said that searches had been carried out and there weren't any further emails other than those in the bundle that fell within the scope of the request.

Submissions

Mr. Swift EA/2021/0082 – skeleton argument supplemented by oral submissions

60. Mr. Swift withdrew his challenge in relation to parts (A)-(E) of the request.

61. The judgment of HHJ Godsmark states that the BBMM witness said that there were agreed rates.

62. He initially approached BBMM directly for the rates and they referred him to NH.

63. Mr Read used the term costs and rates synonymously in his evidence. Mr Read stated in evidence that the rates would be held by the people who carried out the periodic audit and that they were regularly audited or checked by NH who would suggest amendments. The authority either was aware of the rates or could reasonably have required them to be provided.

64. It is clear from the evidence that the Commissioner did not pursue the question of what searches had been undertaken and why the rates were not held. No search had been made for the information requested even though Mr Drysdale had the facility to do that.

65. At the very least, NH is aware that BBMM do hold the rates. They are held on behalf of NH. The information is used solely to bill NH and obtain payment, provide NH

with evidence to pursue recovery and to address a pain/gain share reconciliation at contract end. Mr Read's evidence was that if the rates were not agreed NH would not have paid them. BBMM have not objected to the disclosure of the rates.

66. Mr Swift believes that the information is held by NH and there is a legal requirement to keep accounting records for six years.

NH EA/2021/0082 - skeleton argument supplemented by oral submissions

67. Public authorities are not expected to go behind the phrasing of the request and there is no obligation to seek clarification of an ambiguous request. In the absence of any clarification a public authority is bound by the terms of the request as read objectively.

68. Objectively understood, the request for a schedule of DCP 'rates' should be construed as a request for something which has been agreed in advance and is fixed by reference to some constant factor other than its cost. This is implicit in the concept of 'rates'.

69. Mr Read's evidence was that there was no schedule of agreed rates. There is no independent prior rate which has been agreed between the parties according to which work should be charged.

70. To the extent that Mr. Read refers to 'rates', this was not specific to DCP and was an internal document held by BBMM's own finance department not NH.

71. The question of whether or not something is held on behalf of the public authority is a question of fact to be determined on the evidence. There is no evidence of any sort to show that the internal document used by BBMM for its average rates referred to in para 16 of Mr. Read's witness statement is held on behalf of NH or at the behest of NH.

72. Mr. Drysdale made appropriate enquiries of the Area 10 operations commercial team, who would know if any such schedule existed. He consulted with the General Counsel. It's clear that Mr Drysdale perfectly conveyed the information and there was no basis upon which to undertake a separate independent search for information which the commercial operations team in relation to Area 10 had already satisfied itself was not held.

Mr. Swift EA/2021/0101 – skeleton argument supplemented by oral submissions

73. The concerns raised were specific, few and unsophisticated which undermines any suggestion that KPMG did not grasp the issues. Kier have a legal remedy for an erroneous report. KPMG are a substantial organisation and their Head of Forensic, a chartered accountant, oversaw the investigation. There has been no complaint about their conduct by NH. Kier have had the opportunity to challenge the content

of the report. Kier disagreeing with the draft report does not warrant withholding it.

74. There is clear evidence of Kier not complying with the contract and inflating its charges. Others have also raised concerns, not just Mr. Swift.

75. NH are not an independent auditor.

76. Audits do not rely on an obligation of confidence. They have been disclosed to Mr. Swift and others. NH has not demonstrated that the information has the necessary quality of confidence. There is no evidence that Kier were passing on information in confidence. NH did not consider the report confidential and were content to share the outcome with Mr. Swift. The issues raised by Mr. Swift are already public.

77. The interests served by disclosure of information that finds overcharging outweighs the private interests of a commercial entity recorded as having inflated claims.

78. The fact that Kier may believe that the report is incorrect does not render the contents commercially sensitive. The issue of overcharging or inflating costs was acknowledged by Kier (p 530). Kier do not like the result of the KPMG report so they do not want it released.

79. Any harm to the tendering process has already been done because NH have the report.

Kier EA/2021/0101 skeleton arguments and oral submissions

80. Many of the points made in submissions are set out in Kier's response and summarised above.

81. There is clear and compelling evidence that the draft KPMG report is fundamentally wrong:
    81.1. The evidence of Mr Pendlebury-Green is that the report is wrong.
    81.2. Mr Pendelbury-Green and Kier provided KPMG with a rebuttal of each of the concerns raised in the draft audit.
    81.3. The NH audit in 2016 into essentially the same or similar matters reached diametrically opposed conclusions to the audit. It is not a good enough answer to say that NH are not reliable because they are party to the contract.
    81.4. The draft audit is dated January 2018. It was not sent to Kier until July 2019. It is not plausible that NH would not have sent it to Kier earlier if they thought the audit was well founded and persuasive.
    81.5. When it was sent to Kier they provided a detailed rebuttal and never had any response from NH. This is implausible if the KPMG report was well founded.

81.6. In the interim in July 2018 NH emailed Kier (p396 of the closed bundle) to discuss closure of the Green claims issues. This is not plausible if NH had a considered position that KPMG were right and NH were wrong.

81.7. Kier have made this point throughout the proceedings. At no point have NH taken issue with anything Kier have said about the errors in the report.

82. The report fails to engage with Kier's response or deal with why Kier's rebuttal of aspects of the report is wrong.

83. Mr Swift has not made good his allegations that Kier is abusive and exaggerating its charges on a consistent, concerted and systematic basis. Where a calculation system was not working, they changed it. Mr. Swift refuses to accept the possibility that his analysis might not be correct and that KPMG are right.

84. The Cardiff judgment contain a carefully confined specific finding that the witness was unable to find authority within the contract for uplifts that were included. That is not an admission that they were charging for things which they were not allowed to do under the contract.

85. The tribunal is not the right forum to undertake the number crunching which Mr Swift asks the tribunal to undertake to support a conclusion that his analysis is right.

86. Two heads of commercial harm flow from disclosure.

87. Disclosure of the Disputed Information, insofar as it contains misplaced and unfair criticisms of Kier, would expose Kier to a risk of reputational damage in respect of its highways services. It would impact Kier's prospects in the Area 9 tender and harm its ability to secure other contracts.

88. A reduction in the costs Kier is able to recover would constitute a prejudice to its commercial interests. This is very likely to happen.

89. It is not a good enough answer to this to say that Kier can explain why they do not agree with the draft report. A party shouldn't be expected to have to endure the publication of wrong documents and then explain why those errors should not be believed. In terms of publicity, who is really going to give sufficient coverage or an adequate fair hearing to the explanations as to why the documents are wrong?

90. The public interest favours maintaining the exemption. There is evidence of the harmful effects of disclosure. There is no public interest in disclosure of an error ridden report.

91. By the time the request was made, the system was being changed so there is no forward-looking public interest. This would limit the public interest in disclosure even if the report were well founded.

92. In relation to s 41 there is an actionable breach of confidence. The report and its accompanying materials were plainly obtained by NH from another party. It was a work in progress, not a final report, and would be expected to remain confidential. There is no overriding public interest defence to an actionable breach of confidence.

NH EA/2021/0101 – Skeleton argument and submissions

93. In relation to Area 9, NH confirms that it holds information in scope.

94. In relation to Area 10, Dana Bourne's evidence confirms that no audit, investigation or enquiries were initiated as a result of the court judgment.

Legal framework

Was information held?

95. This is determined on the balance of probabilities.

Information provided in confidence

96. S 41 provides, so far as relevant:

> *S 41 – Information provided in confidence*
>
> (1) Information is exempt information if –
> (a) it was obtained by the public authority from any other person (including another public authority), and
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

97. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

    (i) Does the information have the necessary quality of confidence?
    (ii) Was it imparted in circumstances importing an obligation of confidence?
    (iii) Is there an unauthorised use to the detriment of the party communicating it?

98. The common law of confidence has developed in the light of articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of 'private' information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.

99. S 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence. The burden is on the person seeking disclosure to show that the public interest justifies interference with the right to confidence.

S 43 – Commercial interests

100. 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)

101. '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.

102. 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.

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

The role of the tribunal

104. 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 it should have been exercised differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

Did NH hold information within the scope of the request – 0082?

1. On the balance of probabilities did NH hold information within the scope of the request?
2. Did BBMM hold information within the scope of the request on behalf of NH?

Did NH hold information within the scope of the request – 0101?

3. On the balance of probabilities did NH hold information within the scope of the request?

Commercial interests

4. Are the relevant interests 'commercial interests'?
5. Is the prejudice to commercial interests claimed by NH real, actual or of substance?
6. Has NH shown that there is some causative link between disclosure and the claimed prejudice?
7. Has NH shown that the occurrence of prejudice is more probable than not or, if not, that there is a real and significant risk of the occurrence of that prejudice?
8. If so, does the public interest favour maintaining the exemption?

Section 41

9. Is any of the disputed information confidential within the meaning of s.41(1) FOIA?
10. For any information which is confidential, would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

Discussion and conclusions – 0082

105. First we deal in brief with parts A-E of the request. Mr. Swift withdrew his challenge to this part of the Decision Notice during the appeal. In any event the evidence is clear that NH held no recorded information which fell within the scope of these parts of the request, primarily because they did not make any investigations or enquiries or attempts to get the information from BBMM. We conclude that the requested information is not held.

106. In relation to the remainder of the request, we are concerned with whether or not NH held a schedule of DCP rates for the above threshold works held and used by BBMM when pricing DCP matters in Area 10.

107. NH interpreted the request as a reference to a schedule of rates that was agreed in advance between the parties. As a result Mr. Drysdale's enquiry as to whether or not the requested information was held by NH was limited. He walked over to the Area 10 commercial team and asked them if they held those rates. They said no. He also spoke to NH's General Counsel. The limited nature of this enquiry must be seen in the context of Mr. Swift's previous requests and tribunal appeals. This is not the first time that NH have been asked whether they hold a schedule of DCP rates.

108. We accept on the basis of Mr. Drysdale and Mr. Read's evidence that no schedule of DCP rates, agreed between the parties in advance of the charges being made, was held by NH.

109. Mr. Swift argues that NH's interpretation of the scope of the request was too narrow, and that it would include the rates described by Brian Read in his evidence. Broadly this consists of certain averaged people and plant rates used by BBMM as the basis of their charges to NH carried out on a defined costs basis, including DCP work.

110. We do not need to determine whether or not this information, held by BBMM, fell within the scope of the request, unless we find that it was held by NH or held by BBMM on behalf of NH.

111. On the balance of probabilities we conclude that NH did not hold this information.

112. Mr. Read's evidence was that:
    112.1. BBMM used certain averaged people rates and plant rates as the basis of their charges to NH carried out on a defined costs basis, which included DCP work.
    112.2. These were presented to NH in meetings on a regular basis, so that NH could verify that the costs that were being charged from time to time were correct.
    112.3. A record of those rates applicable at the time was kept internally by the BBMM finance department, and they could be obtained by BBMM afterwards by going to the records of each individual claim.

113. There was no positive evidence before us that NH held a copy of those rates at the time of its response to the request, nor was there any evidence of a business need to keep a copy of those rates even if they had been held by NH at the time of the meetings. Mr. Read's evidence was that NH only needed them to verify that the costs being charged from time to time were correct, so they only needed to look at 'the most recent batch coming up'.

114. On the evidence before us, despite the reference to 'agreed rates' in the judgment referred to as the 'Godsmark judgment' (p 1094 of the bundle, Case Number C08YP765), it is clear on the basis of Mr. Read's evidence that they are only 'agreed' to the extent that NH 'agreed them by virtue of the fact that they paid them'. Unlike the existence of a prior agreement, this limited level of 'agreement' does not increase the likelihood of HE holding a copy of such rates (as they do in relation to notional average people rates in Area 9 which were subject to prior agreement).

115. Taking all the above into account, even though the extent of the enquiries carried out by NH were limited, we conclude on the balance of probabilities that NH

did not, at the relevant time, hold the information referred to by Brian Read in his statement.

116. We note that our findings are consistent with the findings in EA/2019/0390. The evidence given in that hearing by Patrick Carney, Paul Brown and Brian Read was that although in Area 9 there was an explicit agreement of average banded notional property rates, this did not operate in Area 10. The findings of the tribunal in that appeal at para 46 were as follows: 'The evidence was that there was nothing equivalent in use in Area 10. I am confident that if similar schedules to those provided by Mr. Ash had been available then HE would have made that clear in this appeal.'

117. Was the information nonetheless held by BBMM on behalf of NH? There is no evidence upon which we could reach the conclusion that the information described by Brian Read was held on behalf of NH. We have not been pointed to any contractual provision which provides that or has the effect that such information would be held by BBMM on behalf of NH. There is no other evidence before us that points to such a conclusion. The fact that BBMM used those rates to calculate the amounts that it charged NH is not sufficient in our view to found a conclusion that it was held on behalf of NH.

118. On this basis the appeal in EA/2021/0082 is dismissed.

Discussion and conclusions – 0101

119. The part of the appeal relating to Area 10 is not pursued. It is accepted by Mr. Swift that no audit/investigation/enquiries were carried out. In any event there is no evidence before us to support a finding on the balance of probabilities that any information was held in relation the part of the request dealing with Area 10 and we conclude that no information was held.

120. In relation to Area 9, the disputed information comprises i) the Draft KPMG Report (ii) Kier's document referred to as a "Response and Briefing Paper" (iii) correspondence relating to KPMG's investigation held by NH (including Kier's Response and Briefing Paper).

121. We have concluded that the information is exempt under s 41 and therefore have not gone on to consider s 43.

122. As a preliminary point we consider our remit in determining what contractual authority Kier had to make certain uplifts or calculate defined costs by particular methods. Mr. Hopkins urged to us to find that the KPMG report was 'riddled with errors'. Mr. Swift made detailed mathematical points in cross-examination and in submissions about what he said were specific examples of overcharging in breach of contract.

123. Mr. Swift relied on the findings in what was referred to in the hearing as the 'Cardiff judgment'. Having read that judgment we agree with Mr. Hopkins that it contains a carefully confined specific finding that the witness was unable to find authority within the contract for uplifts that were included. We accept that it does not amount to an admission that Kier were charging for things which they were not allowed to under the contract and it does not take us much further in this appeal.

124. In our view, it is outside our remit to determine whether Mr. Swift or KPMG or NH or Kier are correct in their interpretation of what is required or allowed to be charged under the contract between NH and Kier. It is outside our remit to determine if KPMG are correct in their draft findings or if Kier are correct in their responses. At the root of the different views appears to be a fundamental disagreement about the methodology that Kier is entitled to adopt under the contract. We are not in a position (nor are we required) to make a ruling as to who is correct.

125. Turning to the elements of an actionable breach of confidence, we find that the withheld information was, on the balance of probabilities, received by NH from a third party – either Kier or KPMG.

126. We accept that the information has the necessary quality of confidence and was provided in circumstances importing an obligation of confidence. The KPMG process had been started but was incomplete at the time of the request. We accept that there was an implied duty of confidence in relation to information provided for the purposes of the audit, at least until the final report was produced. In relation to the audit report, we find that the draft version was also subject to a duty of confidence until it was finalised. We accept Mr. Pendlebury-Green's evidence that this was the basis on which Kier entered into the process. This is supported by Mr. Pendlebury-Green's evidence that the draft version sent to Kier was specifically stated to be confidential. The draft report states that it is strictly private and confidential.

127. As Coppel puts it at 34-021,[1] it is an 'open question' whether detriment is an essential ingredient for an action for breach of confidence. However, in this case we are satisfied that disclosure of the report in its current state, whether or not 'riddled with errors', would cause a detriment. We make this finding because KPMG has not, in the draft report, considered or engaged with the responses from Kier. Even if those responses were published in a separate document we accept that there is a real and substantial risk that publication of the draft report and related correspondence would lead to commercial harm of the nature identified by Mr. Pendlebury-Green in his evidence.

128. We must then consider if the public interest in protecting this confidential information is outweighed by sufficiently significant matters of public interest

[1] Information Rights, Fifth Editon. Philip Coppel QC.

in disclosure. In undertaking this exercise we take account of the wider public interest in preserving confidentiality and the commercial impact on Kier as outlined by Mr. Pendlebury-Green.

129. We have concluded that the public interest in protecting this confidential information is not outweighed by sufficiently significant matters of public interest for the following reasons.

130. As set out above, it is outside our remit to determine if KPMG are correct in their draft findings or if Kier are correct in their responses. As stated, there appears to be a fundamental disagreement about the methodology that Kier is entitled to adopt under the contract. What we can conclude is that there is no clear evidence of misfeasance or wrongdoing sufficient to outweigh the public interest in maintaining confidences.

131. We accept, given the concerns raised by Mr. Swift and others, that there is a clear public interest in transparency in relation to these concerns and, in particular, how NH dealt with these concerns and therefore there is a public interest in the KPMG report and related correspondence. We conclude that this public interest is limited for a number of reasons.

132. First, this is a draft report not a concluded report. It has not been finalised. KPMG have not dealt with or engaged with the detailed response provided by Kier. As a draft, it clearly does not represent the final considered conclusions of KPMG. It was not intended to be published in this form. We note in passing that what were NH's final conclusions on the issues, set out in an email at p 395-396 of the closed bundle, have now been made available to Mr. Swift.

133. Second, the public interest identified above is served to some extent by the internal NH audit in 2016, which was provided to Mr. Swift. We accept that NH are not entirely independent. However, the audit considers and reached conclusions in relation to many of the concerns raised by Mr. Swift and dealt with in the KPMG report.

134. Third, at the date of the request work was underway to improve transparency and certainty about how cost recovery charges would be determined via the NSoRC. Whether or not this ultimately was successful is not relevant to the question of the public interest at the relevant time. We accept Kier's submission that this reduces the public interest in disclosure.

135. Taking all the above into account, we conclude that there is not sufficient public interest in disclosure to outweigh the public interest in maintaining the duty of confidence.

136. For the above reasons, we find that NH was entitled to rely on s 41 to withhold the disputed information.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 2 March 2022
Promulgated: 3 March 2022