



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No: EA/2015/0223

ON APPEAL FROM:

The Information Commissioner's
Decision Reference: FS50556618

Appellant: London Legacy Development Corporation

Respondent: Information Commissioner

Second Respondent: Richard Hunt

Dates of oral hearing: 25 January 2016 and 17 March 2016

Date Decision Promulgated: 11th April 2016

Before

Melanie Carter
(Judge)

and

Alison Lowton
Marion Saunders

DECISION OF THE FIRST-TIER TRIBUNAL

1. This case concerns a request for information by the Second Respondent, Mr Richard Hunt, to the London Legacy Development Corporation ("LLDC") under the Freedom of Information Act 2000 ("FOIA"). The request was for sight of the concession agreement held by West Ham Football Club ("West Ham") for use of the Olympic Stadium. When that request was refused, the Appellant complained to the Information Commissioner ("Commissioner") who

ordered LLDC to make disclosure. That order was then appealed by LLDC to this Tribunal.

2. The decision of this Tribunal, the reasons for which are set out below, is to reject the appeal.

Background

3. LLDC is a Mayoral Development Corporation. LLDC has responsibility for the regeneration of the Queen Elizabeth Olympic Park and the surrounding area. The Olympic Stadium ("the Stadium") has been developed as a substantial, multi-use venue. Its conversion from an Olympic Stadium into a multi-use venue has required substantial public funding. One of LLDC's key objectives is to maximise the effective use of the Stadium with a view to contributing to the long term regeneration of the local area and thereby ensuring that tax payers receive a satisfactory return on their investment in the Stadium. Along with its joint venture partner, the London Borough of Newham, LLDC has set up a partnership, E20 Stadium LLP ("E20") to manage the Stadium.
4. On 22 March 2013, West Ham, acting through its holding company, entered into a concession agreement with E20 under which West Ham would be permitted to use the Stadium as a football ground ("the Agreement"). The Agreement did not give an exclusive right to use the Stadium.
5. At the time of the request E20 was directly responsible for securing third party agreements relating to the usage of the Stadium and other important commercial rights, including in particular naming rights. However, it was always intended that the operation of the Stadium (along with responsibility for securing other users and events) would be assigned to a third party Stadium Operator. In February 2015, LS185 was appointed as the Stadium Operator. LS185 is incentivised to strike deals for usage of the Stadium and in respect of related rights, such as signage and catering rights.
6. As noted above, this appeal concerns a request made under FOIA by the Second Respondent for disclosure of a range of provisions in the Agreement. A significant amount of information has since been disclosed in response to

Mr Hunt's request. However, a number of provisions of the Agreement continue to be withheld by LLDC. This is on the basis that they comprise exempt information under s. 43(2) FOIA ("the Disputed Information").

7. Section 43 provides:

43. Commercial interests

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

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

8. There are two issues which fall to be determined in this appeal:

(1) Was the Commissioner right to conclude in his Decision Notice dated 3 September 2015 that s. 43(2) was not engaged in respect of the Disputed Information at the time which LLDC was dealing with the request? ("the Section 43(2) Issue")?

(2) If the Commissioner reached the wrong conclusion on the s. 43(2) issue, did the public interest balance under s. 2(2) FOIA weigh in favour of the s. 43(2) exemption being maintained?

9. In relation to the first issue, the Commissioner concluded in the Decision Notice that section 43(2) FOIA was not engaged in this case. The relevant test for these purposes, which was not disputed by the parties, was whether disclosing the Disputed Information would have 'a very significant and weighty chance' of causing prejudice that is 'real, actual or of substance': Department for Work and Pensions v (1) The Information Commissioner, (2) FZ [2014]

UKUT 0334 (AAC). LLDC maintain that there is a strong likelihood of serious, weighty prejudice that would be faced by LLDC, E20 and Newham Council.

10. The decision of this tribunal is that under issue (1) in paragraph 8 for the reasons set out below, the Commissioner was correct in concluding that section 43(2) was not engaged. As such, the tribunal did not proceed to consider the public interest balancing test (issue (2) in paragraph (8)).

LLDC submissions/evidence

11. LLDC's evidence was primarily by way of the two statements and oral evidence of Ms Murphy, the Executive Director of Finance and Corporate Services at LLDC. The public authority argued that the interests which are most heavily at stake here are the interests of E20/LLDC (and by extension the tax payer) in ensuring that E20/LLDC is able to: (i) maximise the effective use of the Stadium and as a result (ii) ensure a proper return on the public investment in the Stadium. The potential prejudice to these interests are said to be:

- a. to E20 (and by extension LLDC and Newham Council) and to LS185 (the new Stadium Operator):
 - i. West Ham is not the sole occupant of the Stadium. The public's ability to maximise a return on its investment is predicated on E20 and the appointed Stadium Operator, LS185, being able to negotiate with a range of third parties in connection with leasing rights, usage rights and naming rights;
 - ii. any disclosure of terms on which concession was granted to West Ham is likely to seriously undermine the negotiating position with third parties. This is because it would amount to E20/LS185 unilaterally showing its hand in a way that a third party would be bound to exploit in the negotiations to the substantial detriment of the public purse.
 - iii. the Disputed Information discloses the precise commercial terms on which West Ham is able to lease and use the Stadium.

- b. This could lead to loss of significant sums to the public purse; substantial income for LS185; prejudice to E20's ability to negotiate best possible terms for any new agreement with a new concessionaire if terminated early; and prejudice to ability to compete with other commercial stadia for Agreements/concessions and naming rights partners; loss of income by West Ham and E20 in the event of a sale of West Ham.

12. LLDC have told the Tribunal that the Stadium is one of a number of stadia in London. All stadia owners are in competition with one other to attract third party users, so as to maximise income derived from their respective stadia.

13. LLDC argue that in order to maximise the return on the public's investment in the Stadium, it is essential that E20 is able to approach negotiations with potential third party users of the Stadium with a 'clean slate' in terms of proposed concession arrangements and not allowing the Disputed Information to operate as a bench-mark or starting point for the negotiations.

14. There was, it was said, further potential prejudice in terms of competitor stadia being given a unique insight into how E20 approaches concessionary use of the Stadium. This is something which would inevitably, it was said: (a) inform their own strategy for competing with the Stadium and (b) create an uneven playing field as between the Stadium and its competitors, as competitor stadia are not subject to any comparable duty to 'show their hands' in the context of negotiations for use of their own stadia.

15. The Agreement was itself reached following an open, competitive process which, it was said, the High Court had itself held was a lawful process: *R(Leyton Orient Football Club) v London Legacy Development Corp & United Football Club* [2013] EWHC 3653 (Admin).

16. The logical inference to be drawn from the fact that the Agreement was entered following a fair, competitive process is, it was argued, that the deal was the best which could be secured in the circumstances.

17. The principal provisions have been scrutinised by the European Commission ("Commission"). This scrutiny was undertaken in response to a complaint made to the Commission by a member of the public that the Agreement fell

foul of EU rules on State Aid. Following an informal investigation, the Commission concluded that the evidence which it had received from the UK authorities did not support a conclusion that the Agreement was unlawful for the purpose of State Aid rules. It was argued that this was presumably because the Commission accepted the UK's argument that there is no unlawful State Aid in circumstances in which an entity is granted non-exclusive use of a publicly financed multi-use stadium following a fair and lawful competitive tender process.

18. Ms Murphy explained, partially in open and partially in closed evidence, how, if the provisions in the Agreement which represent the Disputed Information were to be disclosed, they could be used by third parties, it was said, to prejudice the negotiating position of E20 and those to which it delegates its managerial functions (i.e. LS185). In summary, those provisions relate to:

- a. the usage payments in relation to West Ham's occupancy of the Stadium, including adjustments for performance, cost and revenue sharing allocations or provisions which apply if there is a sharing of the ground with another club;
- b. terms pertaining to the sale of Stadium naming rights to a (yet to be appointed) naming Rights Partner; and
- c. the consequences if the owners of West Ham sell the club.

19. It was Ms Murphy's evidence that there would be sufficient days available for a groundshare with another club, including potentially a Premier League club. She told the tribunal that this could happen if there was cooperation with West Ham, cooperation being required under the Agreement (which incorporated Premier League club rules). It was relevant that clause 47.3 provided for compensation to be paid by West Ham to LLDC in the event that West Ham does not recognise the importance of the Stadium operating as a multi-use Stadium and does not act reasonably in co-operating to deliver this outcome. Mr Hunt argued that realistically no other football club would seek to or be in a position to take a concession in respect of the Stadium. LLDC did not accept Mr Hunt's analysis of this issue based in part on an existing fixture list which assumed no capacity for any ground-sharing.

20. It was further stated by LLDC, that there was a particularly competitive market around naming rights with just a small group of companies/parties interested. Whilst it would be necessary to disclose the arrangements with West Ham at some point, it needed to be at the appropriate time.

21. It was submitted by LLDC that for the purposes of assessing the likelihood of prejudice under section 43(2), it was not necessary to consider the likelihood of an event arising in which prejudice could occur. Rather it is the likelihood of the prejudice if the event were to take place.

The Commissioner's submissions

22. The ICO initially drew the Tribunal's attention to Clause 41 of the Agreement which deals with the confidentiality of the Agreement's terms. This states:

"41.1 Confidential information

(a) The Concessionaire and the Grantor agree that the provisions of the Concession Document [the Agreement] shall, subject to paragraph (b), not be treated as Confidential Information and may be disclosed without restriction.

(b) Paragraph (a) shall not apply to provisions of this Agreement designated as Commercially Sensitive Information and listed in Part 1 (Commercially Sensitive Agreement Provisions) and Part 2 of Schedule 8 (Commercially Sensitive Material) West Ham shall, subject to this Clause 41 (Confidentiality and Announcements) be kept confidential for the periods specified in those Parts."

(emphasis added)

23. Under Schedule 8 of the Agreement, (see Clause 41.1(b)), the parts of the Agreement designated as "Commercially Sensitive Agreement Provisions" are Clauses 11, 18, 20 and 22, and Schedule 9. The Disputed Information does not correspond with this list.

24. The Commissioner accepted that the position set out in the Agreement is not determinative. However, the Commissioner submitted that it impacts significantly on the weight that can be attached to the evidence adduced by the Appellant. LLDC did not consider large parts of the Disputed Information to be commercially sensitive when the Agreement was signed on 22 March 2013, but rather specified in express terms in Clause 41.1(a) that they “may be disclosed without restriction”. LLDC’s response on this point is that the Agreement was not very well drafted.

25. The first witness statement of Ms. Murphy identifies that the parts of the Disputed Information disclosure of which would allegedly prejudice the Appellant are: Clauses 9, 10, 11, 15, 16, 18, 20, 28, 47 and Schedules 9, 12 and 15. The Disputed Information that is not designated confidential/commercially sensitive in the Agreement are Clauses 9, 10, 15, 16, 28, 47 and Schedules 12 and 15. The Commissioner maintained that if it were likely that the Appellant would suffer prejudice as a result of this information being disclosed, one would have expected it to have recognised this at the time the Agreement was concluded and to have designated it as such.

26. The Commissioner further argued that:

- a. It is not clear how information on the Usage Fee (Clause 20) could impact on the Appellant’s negotiations with other prospective users. The terms on which other users would access the Stadium would necessarily be completely different (for example: temporary/short-term; for a different purpose; for fewer days in the year), and charging structures and prices would be set accordingly.
- b. Ms Murphy highlights various other instances where, she suggests, access to the Disputed Information could lead to a prospective user demanding the same terms as have been given to West Ham: for example, on Pitch-Side Signage (Clause 11.2(b)(xiv)); improvements or alterations and maintenance (Clauses 15 and 16); catering (Clause 18) and key obligations (Clause 47). It is not clear, however, that

prospective users would not request such terms in any event, or that, if they did so, that would lead to the Appellant being prejudiced. There is no suggestion that the Appellant would not be able to reflect such terms in the price, if they were to be requested and agreed.

c. Ms Murphy highlights instances where, she suggests, access to the Disputed Information could compromise the Appellant's position in negotiations with a potential naming rights partner, but it is not clear how the Appellant could conduct those negotiations without revealing the information in any event: for example, Clause 11.2(b)(xiv) and Schedule 9 para 3.2 demarcate the pitch-side signage space available to West Ham and to a stadium rights naming partner respectively on days West Ham is using the Stadium. It is not clear that the Appellant could withhold from a prospective naming rights partner the fact that only a certain percentage of the pitch-side signage on match days is available as part of a naming rights deal, because the remaining percentage has to be given to West Ham.

d. Finally, Ms Murphy highlights instances where, she suggests, access to the Disputed Information could deter a potential naming rights partner because it relates to areas of the contract which are uncertain. It is particularly unclear why a naming rights partner would be deterred by knowing this.

27. The Commissioner further maintains that the Appellant has not established that there is a "very significant and weighty chance" of disclosing the Disputed Information causing prejudice to West Ham as alleged:

a. First, very limited weight can be attached to the letter sent by West Ham on 6 January 2016:

i. As set out above, certain of the Disputed Information is not designated confidential/commercially sensitive in the Agreement (Clauses 1, 4.1(d) and 9 and Schedule 15).

- ii. West Ham have not sought to participate in these proceedings. If, as the 6 January 2016 letter maintains, the disclosure of the Disputed Information would be likely to cause it prejudice, one might have expected West Ham to have sought to be joined. At the very least, however, they could be expected to have produced a witness, who could be tendered for cross-examination. That they have not done so must diminish the weight that can be attached to their evidence.

28. The Commissioner rejected the argument that disclosure would have a chilling effect on third parties preparedness to enter into agreements with LLDC on the basis that their agreements would be in the public domain. Everyone knows LLDC is publically owned and subject to FOIA. Any entity which contracts with a public authority subject to FOIA, does so with its eyes open.

29. In light of the above, the Commissioner considers that section 43(2) FOIA is not shown to be engaged in respect of the Disputed Information. The public interest balancing does not arise.

Mr Hunt's submissions

30. Mr Hunt argued that the way in which football clubs were financed was very widely known and understood. Thus disclosure of the Agreement was very unlikely to cause prejudice.

31. Mr Hunt challenged Ms Murphy's assertion that the Disputed Information could act as relevant benchmarks for other potential tenants or occasional users of the stadium. None of the potential users alluded to by Ms Murphy remotely compare in scale of use to West Ham which has committed to a 99 year lease. It is an anchor tenant, akin to shopping mall anchor tenants. Even if someone seeking to rent a small or temporary unit at the mall knew the anchor tenant's terms, there is no way the mall operator would countenance a negotiation with a smaller tenant based on those terms.

32. Mr Hunt relied upon evidence from “competitors” of West Ham which he said categorically rejects the assertion, that they could gain commercial leverage over LLDC if they have sight of the Agreement.

33. The claimed availability for and intention to hire the Stadium for an extended rental by another party is highly questionable in the light of modelling of the Event Calendar made possible by the last release of clauses in the Agreement. It was argued that it would be all but impossible for another football club to share the Stadium with West Ham. This in turn indicates that the potential loss of revenue has been exaggerated not just because the ability to negotiate is not impaired to the extent the Appellant has claimed, but also because the Stadium will be occupied by West Ham for far more days than has been publicly asserted.

34. Mr Hunt submitted that the European Commission only considers Unfair State Aid issues under its own terms relating to the function of a European Single Market. It remains entirely within the gift of the UK public and its political representatives to determine if public money has unfairly benefitted one entity in a UK commercial market at the expense of competitors.

Conclusion

35. The test to be applied for these purposes, which was not disputed by the parties, was whether disclosing the Disputed Information would have ‘a very significant and weighty chance’ of causing prejudice that is ‘real, actual or of substance’.

36. The tribunal noted that LLDC had agreed to further disclosure during the hearing.

37. The tribunal considered first the contractual backdrop and took into account that the bulk of the Disputed Information was not designated as confidential. Whilst accepting that this was not determinative, it was however highly relevant to the weight that it considered should be given to LLDC’s evidence of any putative prejudice from disclosure. LLDC had negotiated this aspect of the Agreement using a leading firm of solicitors. The wider provisions of the

Disputed Information, not included within the Schedule setting out the confidential information for the purposes of the Agreement, were said by LLDC to be “ancillary” to the ones so listed. On a close analysis of the Disputed Information, there were a material number of examples where this could not be said to be the case. The tribunal finds it unlikely that well-advised parties negotiating this high value, long term (99 years) commercial Agreement failed to spot that certain provisions in the Agreement, not listed in the Schedule, were also commercially sensitive at the time.

38. The tribunal took the view that the agreement with West Ham was self-evidently unique in that, first, it was entered into in unique circumstances when the Stadium was looking for its first major tenant and second, it was for a term of 99 years. West Ham commanded the status of an anchor tenant. Any such long term arrangement was bound to enjoy greater discounts in costs and suite of benefits, on account of the guaranteed cash flow. By definition any other party contracting with LLDC would be either for a shorter period or on different terms on account of the reduced usage. Even assuming a ground share with another Premier League football club was possible and/or likely, the tribunal took the view that, if the prospective concessionaire was aware of the particulars of the Disputed Information, this would not be likely to give rise to any material level of prejudice to LLDC (or its partners in this regard). This was on account of the ability simply for LLDC (or its partners) to argue that there was no material equivalence as between the West Ham Agreement and the one under negotiation and therefore there was a relatively easy and credible riposte to any benchmarking type argument. There would moreover inevitably be an expectation on the part of the new potential concessionaire of materially different obligations and benefits given the difference in term and any arrangement would be expected to be priced accordingly.

39. The tribunal did accept that there could be some initial reluctance to accept terms proposed by LLDC or its partners, if a prospective contractor knew the details of the Disputed Information and insofar as credibly comparable in some way to the proposed contractual arrangements. This could delay negotiations and require some fortitude of response from LLDC, but there did

not appear to the tribunal any weighty significant chance, given the uniqueness of the West Ham arrangement, of this leading to any real prejudice to commercial interests. In this regard, the tribunal accepted the Commissioner's submissions.

40. With regard to the naming rights, it appeared to the tribunal that LLDC would have to tell any prospective contractor the arrangements with West Ham at some point during any negotiations and the simple assertion that LLDC needed to make this disclosure at an appropriate time, was not a convincing basis upon which to substantiate a likelihood of prejudice.
41. With regard to the purported prejudice to West Ham's commercial interests, given that there was no testing of the evidence by cross examination, the tribunal did not accord particular weight to the evidence of Mr Kinnear. There was no other direct evidence substantiating the claimed potential prejudice to West Ham.
42. Whilst there was a risk of the contract with West Ham being terminated early, the evidence of Ms Murphy was that this was unlikely. In this regard, the tribunal did not accept LLDC's legal submission that the likelihood of an event was irrelevant to the section 43(2) prejudice test. Such a proposition would lead to prejudice that it was only remotely likely to occur, being relevant for the purposes section 43(2). This ran contrary to common sense and the plain English meaning of the words 'would be likely to prejudice'.
43. The Agreement was entered into in the full knowledge that FOIA would apply. The same would be true of any private sector entity contracting with a public authority. On this basis, it was not accepted that there would be a necessary chilling effect simply on account of the disclosure of the Disputed Information. Given also the evident differences in any contract with any company other than West Ham, there would be a reasonable expectation that the exemption at section 43(2) may apply, in an appropriate case (eg: routine contracts which would be likely to be replicated with other third parties). Insofar as relevant to the issue of likely prejudice the submission of a potential chilling

effect and therefore negative impact on ability to secure future contractual arrangements, was not accepted.

44. Further, the tribunal did not find the ruling of the EU on the State Aid investigation or the judicial review directly relevant. Neither had been considered in the same terms as FOIA, that is, the issue of likelihood of prejudice to commercial interests further to disclosure.

45. In all the circumstances, the tribunal was not satisfied that there was a likelihood of prejudice to the commercial interests of the Appellant, West Ham, Newham Council, E20 or the Stadium Operator, sufficient to engage section 43(2) (noting that there had been no evidence put forward by anyone other than LLDC and West Ham). This was not to say that there was no possibility of any prejudice to commercial interests, but rather that this did not amount to 'a very significant and weighty chance' of causing prejudice that is 'real, actual or of substance'. The tribunal rejected the appeal and ordered disclosure of the Disputed Information.

46. The tribunal's decision was unanimous.

Signed

Judge Carter

Date 8th April 2016