Public interest versus commercial prejudice

George Mackenzie discusses the high evidential thresholds for suppressing commercial information following a Freedom of Information request

The push for transparency and accountability across central and local government results in releases of information on an almost daily basis. Barely a week goes by without new information leak taking place and being widely publicised. But there is, it seems, no limit to the public’s appetite for access to even more information, especially where that information is of a commercial nature.

Section 43(2) of the Freedom of Information Act 2000 (FOIA) exempts from the duty to disclose information which ‘would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption because even if section 43(2) is engaged, the information must still be disclosed unless ‘in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’ (section 2(2)(b) FOIA).

The judgment of the Court of Appeal in the recent case of Department for Work and Pensions v Information Commissioner and Zola [2016] EWCA Civ 758 is a reminder of how high the evidential thresholds are in any case in which the section 43(2) exemption – or, by extension, the exemption under regulation 12(5)(e) of the Environmental Information Regulations 2004 (EIR) – is said to be engaged. The interested party, Mr Zola, asked the Department for Work and Pensions (DWP) for information consisting of the names of charities and private sector companies participating under certain controversial ‘workfare’ schemes.

No exemption

The Information Commissioner’s Office (ICO) ordered the DWP to release the information. The DWP’s appeals to the First-tier Tribunal (FTT) and the Upper Tribunal were dismissed. In each case the DWP argued that release of the names of the placement hosts would, or would be likely to, lead to a loss of customers in the case of private placement hosts and a loss of donations in the case of charities. The DWP also argued that release of the information would be likely to lead to the placement hosts leaving the scheme altogether, thereby losing the benefit of volunteer labour.

The relevant fact-finding tribunals, the ICO and the FTT, both held that in principle this would amount to commercial prejudice but found that the evidence was insufficient to demonstrate that there would in fact be, or be likely to be, a causal link between the release of the information in question and the commercial harm relied upon. Accordingly, the ICO and the FTT decided that the section 43(2) exemption was not engaged.

The Upper Tribunal and the Court of Appeal held that the correct test for approaching the section 43(2) issue was set out by the Information Tribunal in Hogan and Oxford City Council v Information Commissioner [2011] 1 Info LR 588. That decision makes it clear that there is an evidential burden on the public authority to show that:

- Release of the information in question would be ‘more probable than not’ to result in the occurrence of the prejudice relied upon or, alternatively, that there is a ‘real and significant’ chance of that prejudice occurring, even if it cannot be said that it would be more likely than not; and
- The magnitude of the prejudice relied upon is ‘real, actual, or of substance’ as opposed to de minimis.

As to the first point, it is noteworthy that the second, and more elastic, formulation (‘a real and significant chance of prejudice’) is not available under the equivalent exemption for commercially sensitive information in regulation 12(5)(e) EIR, which refers to disclosure that ‘would adversely affect’ rather than ‘would be likely to’. Zola demonstrates that even where it is possible to hypothesise a state of affairs that may arise as a result of the disclosure of commercial information, that is insufficient to engage the section 43(2) exemption unless there is actual evidence that this future state of affairs would, or would be likely to, arise as a direct result of the release of the information at issue. To speculate is not enough unless that speculation is backed by credible evidence.

Evidence could come in the form of similar scenarios in the past, or in the form of asking the affected parties what they would do in the event that the information at issue were released (see, for example, Derry City Council v Information Commissioner [2011] 1 Info LR 1105). But the threshold is a high one and practitioners need to ensure that narrative assertions in witness statements are supported by a comprehensive and robust evidence base.

James Joyce referred to secrets as ‘tyrants willing to be dethroned’. For the evidentially unwary, that description certainly holds good so far as section 43(2) FOIA is concerned.