



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2011/0288

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50404069
Dated: 8 November 2011**

Appellant: LONDON BOROUGH OF NEWHAM

Respondent: THE INFORMATION COMMISSIONER

Heard at: Field House

Date of hearing: 5 September 2012

Date of decision:

**Before
CHRIS RYAN
(Judge)
and
DAVE SIVERS
DARRYL STEPHENSON**

Attendances:

For the Appellant: Matt Hutchings
For the Respondent: Robin Hopkins

Subject matter: Confidential information s.41
Commercial interests/trade secrets s.43
Prohibitions on disclosure s.44

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 8 November 2011 is substituted by the following notice:

Public Authority: London Borough of Newham
Address: Newham Dockside
1000 Dockside Road
London, E16 2QU

Complainant: Hogan Lovells International LLP on behalf of Apollo Resorts and Leisure Limited and Apollo Genting London Limited

For the reasons set out in the Reasons for Decision below the information identified in the first and second columns of the confidential annex to those Reasons shall be disclosed, with or without redactions, as indicated in the third column of that annex.

REASONS FOR DECISION

Introduction

1. We have decided that the Appellant was entitled to withhold some, but not all, of the information that the Information Commissioner has directed it to disclose. The information that should be disclosed is identified in the confidential annex attached to this decision.

Background information

2. On 25 February 2010 the Appellant (which we will refer to as “the Council”) awarded a licence to Aspers Stratford City Limited (“Aspers”) to operate a casino in the Westfield Stratford City complex in East London. This was the first of a total of 16 licences which the UK Government authorised certain local authorities to award.
3. The criteria for the award of a licence are set out in Schedule 9 to the Gambling Act 2005 (the Gambling Act”). It required the Council in this case to select the bid which *“would be likely if granted to result in the greatest benefit to the authority’s area”*.

4. The procedure for casino licensing is also governed by the Gambling Act. Its effect on the facts of this case is that the Council was required to operate a two stage process. The first was a regulatory stage, during which the Council tested each applicant's proposal for compliance with various regulatory requirements, including the Gambling Commission's codes of practice and guidance. This stage was required to be conducted in public and it gave rise to no freedom of information issues in this case. The second stage was a competitive bid stage, during which those going forward from the regulatory stage had their proposals evaluated by the Council by reference to the Gambling Act criterion referred to above. This stage started in September 2010 and concluded with the award of the licence to Aspers in March 2011.
5. Asper was in competition during the second stage with a joint bid from Apollo Resorts and Leisure Limited and Apollo Genting London Limited (together "Apollo") and a bid from Great Eastern Quays Casinos Ltd ("GEQ").
6. In advance of the competitive tendering process the Council published an evaluation framework which set out a number of criteria and the manner in which each would be evaluated, by reference to a scoring mechanism, which was also disclosed. There were five "Lead Criteria", namely:
 - a. Clear and proven financial ability/commitment to deliver the scheme in totality;
 - b. Commitment to maximise job creation and regeneration opportunities;
 - c. Financial consideration terms that met the Council's value objectives;
 - d. Imaginative, yet realistic approach to creating a sustainable leisure destination;
 - e. Prevention, monitoring and safeguards.

The evaluation framework made it clear that it included a scores weighting mechanism that had the effect of attributing up to 50% of the total available score to the first of those Lead Criteria. Aspers was judged able to take full advantage of that aspect of the evaluation process because, unlike its competitors in the second stage of the process, it already had secured premises at the Westfield complex for its proposed casino operation.

7. The procedure designed by the Council included a requirement for a written agreement between any proposer and the Council, setting out the benefits offered and the compensation proposed in the event that, having been awarded the casino licence, the casino development was delayed or the benefits failed to materialise. Such an agreement was permitted under paragraph 5(3)(b) of Schedule 9 to the Gambling Act.

It will be referred to as “the Schedule 9 Agreement”. Aspers’ proposal included a draft Schedule 9 Agreement which, following the licence award in its favour, was formally signed by both Aspers and the Council on 10 March 2011.

8. The Council had also included a Procedure Note in the application pack which was made available to potential bidders. This set out how the Council proposed to run the tendering process. It included, at section 7, this promise:

“All information submitted to [the Council] at any time during Stage 2, including in the form itself and associated documents, will be treated as confidential...”

The Council also published a Protocol for the Management of Information and Handling of Confidential Data which reiterated its commitment to keep all stage 2 information private and confidential.

The request for information and the Information Commissioner’s investigation of the Council’s response to it.

9. On 21 March 2011, shortly after the award of the casino licence to Aspers the law firm Hogan Lovells International LLP (“Lovells”) wrote to the Council on behalf of Apollo expressing concern that the decision might be unlawful. While it indicated that its clients were still considering the matter, it set out a number of criticisms of the decision and the process that had led to it and sought information and explanation on a number of points. It said that its clients needed the requested information in order fully to understand the reasons for the decision the Council had made. It claimed that its clients were entitled to the information as a matter of domestic public law on competitive award processes, as well as EU law and specific rules made under the Gambling Act. But the letter made it clear that it also constituted a request for information under the FOIA. We will refer to it as “the Information Request”

10. The information Lovells requested was:

“(a) A full explanation of the way in which the deliverability criteria were designed, interpreted and applied, including in particular the Authority’s understanding of the way in which these criteria relate to the statutory test of greatest benefit and their impact on the scoring of applications involving development works;

(b) All information (including internal communications and any legal advice) regarding the setting, interpretation and application of the deliverability criteria;

(c) The reports of the advisory panel and the technical panel on the successful bid, and the Committee’s full determination in respect of that bid, including in particular the approach and scoring on the greatest benefit criteria (namely Criteria B, C and D);

(d) A full explanation of, and all documents relating to, the Committee's consideration of the dependence or otherwise of the funding on the associated residential development, and AGL's further submissions and evidence on this point as well as the proof of funding provided for the casino and the LED (including whether or not they would make any difference to the outcome); and

(e) Confirmation as to whether any other bidder other than the successful bidder received full marks in respect of the deliverability criterion (Lead Criterion A)."

11. The Lovells' letter made clear that the information requested was required as a matter of urgency because of the strict time limits imposed on those contemplating challenging a decision by means of an application to court for Judicial Review. However, it added:

"For the avoidance of doubt and without prejudice to the requirement for an urgent and substantive response, this letter also constitutes an information request under the Freedom of Information Act and/or the Environmental Information Regulations as applicable, and we are therefore copying it to the [Council's] freedom of information officer."

12. On 31 March 2011 Lovells wrote again to the Council setting out its client's developed case for challenging the legality of the decision, reiterating the Information Request and seeking additional information on how the various criteria for the grant of a licence had been evaluated. Further correspondence was exchanged on this issue and Judicial Review proceedings were in fact issued. However, they were subsequently withdrawn on 15 July 2011. By that time the Council had disclosed to Lovells (under cover of a letter dated 26 April 2011) copies of the following:

- a. Minutes of a meeting on 6 December 2010 at which Aspers presented its case for being granted a licence to the Council's advisory panel. The Council redacted:
 - i. The term of Asper's lease of the proposed casino premises and the possibility of any extension of term ("the Lease Information").
 - ii. Information about an organisation called Community Action for Responsible Gaming formed by Aspers as a forum for any problems arising from the presence of a casino in a locality ("the CARG Information").
- b. Minutes of a meeting on 20 December 2010 between Aspers and a number of the Council's officers and advisors during which certain aspects of the proposal were discussed. The Council redacted :
 - i. A comment by Aspers about the nature of the bidding process, the challenge it presented in relation to the financial element of its proposal and the general

- approach Aspers adopted in its dialogue with the Counsel on that element ("the Financial Offer Information").
- ii. Two out of the four options for local projects which might receive funding from Aspers ("the Community Funding Information").
 - iii. A discussion about the level of risk Aspers would be assuming if its bid succeeded ("the Risk Information").
 - iv. A statement made on the Council's behalf about possible changes to Aspers' proposal ("the Offer Changes Information").
 - v. Information about the recruitment process for jobs Aspers expected to be created ("the Recruitment Information").
 - vi. Five issues raised by the Council's legal advisors ("the Legal Issues Information").
 - vii. Information about the status of Aspers' proposed up-front payment ("the Up Front Payment Information").
 - viii. A statement about the Council's legal fees ("the Legal Fees Information").
- c. Minutes of a meeting on 7 January 2010 at which the Council's officers reported to its advisory panel on certain matters. The Council redacted:
- i. The identity of the guarantor proposed by Aspers ("the Guarantee Information").
 - ii. A comment about the proposed guarantor ("the Guarantor Information").
- d. Minutes of a meeting on 20 and 21 January 2011 of the Council's advisory panel, from which the Council redacted further elements of the CARG Information.
- e. The Evaluation Report of the Council's Advisory Panel dated 21 February 2011. The Council redacted:
- i. Information about the number of jobs that would be created, the recruitment process and the salaries likely to be paid ("the Employment Information").
 - ii. Estimates of the net present value elements of certain aspects of Aspers' proposal and the periods for which estimates had been made, including a table summarising the data ("the NPV Information").
 - iii. Further information which falls within the definition of the CARG Information
 - iv. Information, distinct from information about CARG, regarding measures to prevent and monitor problem gambling, ("the Responsible Gambling Information").
 - v. Information about security arrangements at Westfield Stratford City ("the Security Information").
- f. The Schedule 9 Agreement, from which the Council redacted:
- i. The Guarantee Information.
 - ii. Information about the specific obligations which the proposed guarantor would guarantee ("the Guaranteed Liabilities Information")

- iii. The address of the person who witnessed the signature of those signing for Aspers and the guarantor (“the Witness Information”).
 - iv. The whole of Schedule 1, which summarised the benefits proposed by Aspers in a three column chart with column headings of “Benefit”, “Starting Date” and “Liquidated and ascertained damages: sum payable”
13. The Council refused to disclose any part of a Technical Panel Report submitted to the Council on 28 January 2011. This was a report by the Council’s internal and external experts on each of the criteria listed above.
14. In addition to the redacted material identified above the Council also redacted from the disclosed information passages that contained information about the other proposals (from GEQ and Apollo). Although originally presented by the Council as having been redacted because subject to an available exemption, it was common ground during the hearing before us that this information should in fact be regarded as falling outside the scope of the Information Request. Indeed, when the Information Commissioner subsequently came to issue the decision notice referred to below, he came to the same conclusion when dealing with an argument by Lovells, to the effect that the Council had not identified or disclosed all the information requested. That part of the Decision Notice was not appealed and we have accordingly dealt with the relevant parts of the documents in the Closed Bundle as falling outside the scope of this appeal. For clarity, however, we have identified the relevant passages in the confidential annex to this decision in order to record, formally, that they are to remain redacted.
15. The Witness Information did not form any part of either the Information Commissioner’s Decision Notice or the case presented by either side on the appeal. However, it seems clear that it represents the personal data of the individual concerned and that, there being no legitimate public interest in it being made public, its disclosure would be an unwarranted interference in that individuals right to privacy.
16. The Council initially justified its withholding of information on the exemption from the obligation of disclosure set out in FOIA section 43(2) (prejudice to commercial interests). It raised that argument after it had, quite properly, consulted with Aspers. When the Council subsequently undertook an internal review of that refusal it added FOIA section 42 (legal professional privilege) as an additional basis for refusing to disclose the withheld information. When Lovells then complained to the Information Commissioner about the refusal, the Council abandoned the section 42 case. However it maintained its case under FOIA section 43(2) at that stage and argued, in addition, that FOIA section 44 (disclosure prohibited under statute) also applied.

The relevant law considered by the Information Commissioner

17. FOIA section 1 imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

“in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

18. The first exemption considered by the Information Commissioner is set out in FOIA section 44(1). It provides:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment...”

The prohibition relied on is set out in a code of practice entitled “Code of Practice: Determinations under Paragraphs 4 and 5 of Schedule 9 to the Gambling Act 2005 relating to Large and Small Casinos” (the “Code of Practice”). It was issued by the Secretary of State for Culture, Media and Sport on 26 February 2008 under a power given to him by paragraph 6 of Schedule 9 to the Gambling Act, which reads:

*“(1) The Secretary of State may issue a code of practice about –
(a) The procedure to be followed in making the determinations [about awarding a casino licence], and
(b) Matters to which a licensing authority should have regard in making those determinations.
(2) A licensing authority shall comply with a code of practice under sub-paragraph (1)”*

19. The relevant part of the Code of Practice reads:

“5.4 The procedure a licensing authority propose to follow in making any determination [under the stage two process] must provide for the following:

...

5.4.5 A licensing authority may not, during the second stage, discuss the details of a person’s application with the other competing applicants without the person’s permission

5.4.6 A licensing authority must put in place a protocol governing the storage of confidential information submitted to them during the second stage, so as to maintain the confidentiality of that information”

20. The section 44 exemption is categorised as an absolute exemption.

21. The second exemption is set out in FOIA section 43(2), which reads:

“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)”

This exemption is categorised as a qualified exemption.

The Information Commissioner’s Decision Notice

22. At the conclusion of his investigation the Information Commissioner issued a Decision Notice on 8 November 2011. He concluded that the statutory prohibition relied on to support the Council’s case on FOIA section 44 lasted only until the conclusion of the stage 2 process so that it had fallen away by the time the Information Request was submitted, 10 days after the conclusion of stage 2. The Information Commissioner’s conclusions under FOIA section 43(2), by reference to each element of the withheld information identified in paragraph 12 above, was as follows:

The Lease Information	Exemption engaged due to likely prejudice to Aspers’ landlord to negotiate with other potential tenants, but public interest balance in favour of disclosure.
The CARG Information	Exemption not engaged.
The information redacted from the meeting minutes of 20 December 2010	Exemption not engaged in respect of any of the redacted information because the Information Commissioner considered that the withheld information largely took the form of a general commentary on options regarding potential changes to Aspers’ proposal. He was not satisfied that disclosure would prejudice Aspers’ ability to participate in any other of the 16 licence competitions authorised by the Government.
The Guarantee Information and the Guarantor Information	The Information Commissioner considered that the withheld information was already in the public domain and that no prejudice was likely to result from further disclosure. Accordingly, he concluded, the exemption was not engaged. However, it has

	subsequently been conceded that the information was not in the public domain at the relevant time.
The information redacted from the meeting minutes of 20/21 January 2011	Exemption not engaged in respect of any of the redacted information because the Information Commissioner considered that the withheld information largely took the form of a general commentary on options regarding potential changes to Aspers' proposal. He was not satisfied that disclosure would prejudice Aspers' ability to participate in other of the 16 licence competitions authorised by the Government.
Evaluation Report of 21 February 2011, Schedule 1 to the Schedule 9 Agreement and the Technical Panel Report	The Information Commissioner concluded that the exemption was engaged, despite the absence of evidence on the precise effect disclosure was likely to have on other casino proposals submitted by Aspers. However he concluded that the public interest in favour of maintaining the exemption did not outweigh the public interest in disclosure, particularly in light of the importance of transparency in what he described as the "controversial nature of the casino licence" and his doubts as to whether any of the information could be transported into any other casino bid.
The Guaranteed Liabilities Information	The exemption was engaged but the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

The Appeal to this Tribunal

23. On 2 December 2011 the Council lodged an appeal against the Decision Notice. Directions were given for the appeal to be determined at a hearing, for the preparation of an agreed bundle of documents and the service of witness statements, if required. The Council was also permitted to include the withheld information in a confidential "closed" bundle.
24. The Council served a witness statement signed by Janet Fasan, a Principal Lawyer in its Legal Services Department. However it consisted largely of submission and argument and, although the Information Commissioner indicated at one stage that he wished to cross examine the witness, he ultimately decided not to. The witness statement did serve the purpose of introducing into evidence a number of documents, which were exhibited to it. These included a document dated 21 May 2012, six months after the date of the Decision Notice, and headed "*Statement of the position of [Aspers] in relation to the*

London Borough of Newham's appeal to the First-Tier Tribunal (Information Rights) under section 57 of the Freedom of Information Act 2000 (Appeal no: EA/2011/0288). It included a considerable quantity of factual information which, if it was to be relied upon before us, should have been set out in a witness statement, signed by an identified individual who confirmed its truth and made himself or herself available for cross examination, if required by another party to the appeal. We allowed the statement to form part of the materials available to us, but on the basis that the weight that we gave to it would be measured by reference to the manner in which it had been presented.

25. Late in the process the Council submitted amended Grounds of Appeal, which it then, belatedly, sought permission to rely on. The most significant aspect of the proposed amendment was the introduction of a further exemption, that provided under FOIA section 41 (third party confidential information).

26. FOIA section 41 reads:

“(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.”*

27. The Information Commissioner did not object to the amendment, although he made certain representations to us about the manner in which he thought the Tribunal should handle proposed amendments that introduced an exemption that had not been relied on previously.

The issues to be determined on this appeal

28. In the course of the appeal the Council conceded that neither the Lease Information nor the CARG information should be exempt from disclosure. We do not therefore give further consideration to those elements of the withheld information although we record, in the confidential annex to this decision, the information that should be disclosed as a result of the Council's concession.

29. The Information Commissioner asserted that, although the Code of Practice should be treated as an “enactment” for the purpose of FOIA section 44, the prohibition on disclosure which it imposes ceased once the second stage of the tender process had been completed. The Council contended that there was no time limit. We consider **whether the statutory prohibition continued to apply at the date of the Information Request** in paragraph 33 to paragraph 37 below.

30. The Information Commissioner found that the section 43(2) exemption did not apply to some parts of the withheld information. We consider, **the application of FOIA section 43(2) to the withheld information** in paragraph 38 to paragraph 0 below.
31. We have been forced to explain, in the confidential annex to this decision, particular elements of the withheld information in respect of which the Information Commissioner concluded that, although the section 43(2) exemption applied, the public interest in maintaining the exemption did not outweigh the public interest in disclosure. However we include a **general assessment of the public interest balance under FOIA section 43(2)** in paragraph 42 to paragraph 51 below.
32. Finally, in paragraphs 52 to 59 below we assess the argument that disclosure would leave the Council vulnerable to a claim by Aspers for breach of confidence in respect of some or all of the withheld information so that the **exemption provided by FOIA section 41** would apply.

Did the statutory provision continue to apply at the date of the Information Request, so as to engage FOIA section 44.

33. Mr Hutchings, representing the Council, relied on sub-paragraphs 5.4.5 and 5.4.6, set out in paragraph 19 above. He argued that the obligation under 5.4.5 not to discuss one bidder's proposal with a competitor was a separate prohibition and it was not permissible to read across the time limit for it into the separate obligation, under 5.4.6, to maintain confidentiality generally. Mr Hutchings relied, in support of that contention, on the importance of the withheld information, disclosure of which was likely to cause commercial harm, certainly during the period of time when a bidder might be involved in one or more of the other 15 competitions for casino licences being run by local authorities at around the same time.
34. Counsel for the Information Commissioner argued that sub-paragraph 5.4.5 clearly imposed a duty on the Council, which did not extend beyond the end of the second stage. It referred, not to an obligation attaching to information obtained during the second stage but to the local authority's behaviour during that stage. The obligation under sub-paragraph 5.4.6, he said, required the local authority to put in place practical arrangements for the secure storage of confidential information it received, but did not impose an obligation to maintain confidentiality forever.
35. Our conclusion on this point is that the Code of Practice did not impose an obligation of confidence that extended beyond the end of the second stage. Indeed, it creates no obligation of confidentiality, as such. Sub-paragraph 5.4.5 imposes a quite restricted obligation to ensure that the competition is fair by prohibiting discussions about one bidder's proposal with a competing bidder without the consent of the

first bidder. It may be implied from that obligation that disclosing information more generally, so that it might come to the attention of a competing bidder, is also prohibited. But we do not think it appropriate for us, by implication, to introduce such an obligation into an instrument having (as the parties have agreed) statutory effect.

36. In our view the absence of an express prohibition on such disclosure suggests that those devising the Code of Practice recognised that each bidder would have the benefit of the general law on confidentiality (which we consider in respect of FOIA section 41 below), and concluded that, as this underpinned any express statutory prohibitions, it was appropriate to limit those prohibitions to the specific circumstances anticipated in sub-paragraphs 5.4.5 and 5.4.6. We regard sub-paragraph 5.4.5 as being limited, as we have indicated, to the manner in which the competition should be conducted as between bidders. And sub-paragraph 5.4.6 creates a quite separate (and, again, narrow) obligation to put in place systems that are intended to ensure that, to the extent that information submitted by a bidder is entitled to confidentiality under the general law, the right is not compromised by inadequate arrangements being put in place for the safe keeping of materials submitted by a bidder.
37. It follows that none of the withheld information is capable of being exempt from disclosure under FOIA section 44.

The application of FOIA section 43(2) to the withheld information

38. Mr Hutchings criticised the Information Commissioner for having, in his view, placed too little weight on the commercial value of the withheld information. He said that this had led to the erroneous conclusion that the exemption was not engaged in respect of the Guarantee Information, the Guarantor Information, the Financial Offer Information, the Community Funding Information, the Risk Information, the Offer Changes Information, the Recruitment Information, the Legal Issues Information, the Up Front Payment Information and the Legal Fees Information.
39. Mr Hutchings argued that all the information had been disclosed to the Council against an express promise of confidentiality and the maintenance of that confidentiality was of great importance to any bidder, particularly one that was likely to be involved in other casino bids after the conclusion of the Stratford one. The information, and the manner in which Aspers handled discussions with the Council and its Advisory Panel, would be of great value to a competitor in such other competitions. Although it is frequently said that freedom of information requests must be assessed without regard to the motives of the person submitting the Information Request, Mr Hutchings suggested that the identity of the requester in this case, one of the unsuccessful bidders for the Stratford casino licence, supported the contention that the withheld information did have significant commercial significance. He

also drew attention to the fact that the Information Request was submitted very shortly after the licence award had been announced and at a time when there was a risk that, if the threatened Judicial Review proceedings succeeded, the Stratford casino competition might have been re-run. On that occasion Apollo and other bidders (who must be regarded as having access to it because a freedom of information disclosure has the practical effect of disclosing the information in question to the public at large) would have had access to the whole of Aspers' original proposal.

40. Mr Hopkins argued that the commercial significance was diluted because each competition would be very different and knowledge of the approach adopted in one would not assist a competitor in another. He said that the burden of establishing a likelihood of prejudice to commercial interests lay on the party asserting it and suggested that the Council had not provided the evidence of specific harm.
41. In our view the threshold for engaging FOIA section 43(2) was achieved in respect of all of the categories of information identified in paragraph 38 above. We reach that conclusion on the basis of our inspection of the information in the Closed Bundle, which has satisfied us that, although the strength of the case put forward by the Council was less convincing in respect of some categories than others (particularly in cases where the Council itself put the information into the public domain), some commercial disadvantage was likely to have been suffered by Aspers had the information in question been disclosed at the time when the Information Request was made.

A general assessment of the public interest balance under FOIA section 43(2)

42. It follows from our conclusion that the section 43(2) exemption was engaged in respect of all the withheld information that we should proceed to assess the public interest balance (under FOIA section 2(2)(b)) in respect of it all. We deal with each category of information in the confidential annex to this decision, in which we specify the redactions that may be made before further disclosure is made. At this stage we explain our assessment of the general arguments presented to us and then make a few general comments about certain of the categories of withheld information, which we believe we can do without disclosing the information itself.
43. Mr Hutchings relied upon the arguments, summarised above, about commercial harm. He said that the avoidance of that harm gave rise to a public interest that outweighed the public interest in disclosure. He urged that conclusion on us in part, he said, because the Information Commissioner had over-estimated the counterbalancing public interest in disclosure. He argued that, although the establishment of a casino in Stratford had generated public debate, the identity of the particular company licensed to operate it (still less the tendering process) had not. He relied, again, on the fact that it was a competitor, and not a

member of the public or an interest group, that had made the Information Request. Mr Hutchings also drew attention to the large amount of information that had been disclosed or placed in the public domain by other means. This included the Evaluation Report (subject to limited redactions) which made it very clear that the competition had been won by the bidder who had comfortably scored highest on the key criterion of deliverability (despite being outscored by other bidders on several of the other criteria). The detailed information that had been withheld would not, he suggested, add to the value of the information which the public already had access to. But its disclosure would discourage organisations from participating in casino licence competitions in the future.

44. In the course of a detailed debate, in closed session, on the content of the withheld information Mr Hutchings warned of the danger to Aspers of a competitor assembling a “mosaic” of individual pieces of information which, while seeming anodyne when viewed separately, could in fact be assembled into a body of information valuable to a competitor. Evidence of that kind of activity was, again, likely to discourage companies from engaging in public sector competitive tendering exercises.
45. The Decision Notice laid stress on the need for transparency in general and Mr Hopkins argued that it was particularly important when a new process was being carried through in respect of something as controversial as a casino. The basis for the award of a licence was the benefits to be provided to the public in the Council’s area and there was therefore a strong public interest in the public seeing how the Council had gone about the task of securing those benefits. Mr Hopkins also suggested that the commercial relevance of much of the information was significantly reduced by the differences that will arise from one casino project to another and, particularly in the case of the Stratford casino, the unusual method adopted for scoring the various criteria.
46. The fact that the redacted parts of the documents in question form quite a small part of the whole body of information already disclosed is capable of impacting both sides of the argument. The Council must demonstrate that Aspers’ commercial interests will be affected to a material degree by its competitors, who already have access to a large amount of information, also acquiring the withheld information. On the other side, the Information Commissioner is faced with the difficulty of satisfying us that any public debate on the casino issue will be enhanced by the addition of the small part of the overall documentation to which the public does not already have access.
47. A particular area of dispute related to the Guarantee Information, the Guarantor Information and the Guaranteed Liabilities Information. We believe that the public interest in full disclosure of the identity and creditworthiness of whoever agrees to stand behind the obligations

assumed by a bidder is very substantial, as are the particular obligations set out in the Schedule 9 Agreement that are guaranteed. Perhaps, more significantly, a copy of the Schedule 9 Agreement with that information restored would also demonstrate the expected public benefits which the guarantor was not prepared to stand behind and the Council's acceptance of that limitation on the security obtained for the package of benefits offered. Conversely, the public interest in bidders being able to prevent competitors finding out about this part of their proposals is relatively slight. It is certainly not sufficient to equal, let alone outweigh, the public interest in disclosure.

48. In the case of the Financial Offer Information, the Risk Information, the Offer Changes Information, the Legal Issues Information, the Up Front Payment Information, the Legal Fees Information and the Responsible Gambling Information, we considered that the information recorded certain aspects of the dialogue between Aspers and the Council which did not disclose anything of significance about the negotiating strategy adopted by either side. The issues raised would not come as a surprise to anyone reading the rest of the documentation, and the resulting dialogue did not disclose any aspects of Aspers' approach that we would expect to come as a revelation to any reasonably well informed competitor. Nor do we think it would be likely to be of use to a competitor planning to bid against Aspers in tendering exercises run by other Local Authorities for different projects and, quite possibly, under different tendering rules. We do not, therefore, accept Aspers' assertion that disclosure of this information would have provided competitors with the advantage of knowing a significant part of its negotiating strategy. Accordingly the public interest balance in favour of these categories of information is in favour of disclosure.
49. The Security Information was said to have an effect on the commercial interests of the owner of the Westfield Stratford City complex, rather than Aspers. However, no evidence or other information was made available to us in order to support that assertion and the information itself seemed anodyne. There seems to be only slight public interest in either its disclosure or its retention and we conclude, in those circumstances, that the public interest in maintaining the exemption in respect of this information did not outweigh the public interest in its disclosure. It should therefore be disclosed.
50. It is not possible to explain, in the public part of our decision, the approach we have adopted in respect of the Recruitment Information, the Employment Information or the Community Funding Information and we accordingly deal with this in the confidential annex. However, our conclusion is that some parts of the Information should be disclosed and some parts should not.
51. Similarly in relation to the NPV Information (the information redacted from Schedule 1 to the Schedule 9 Agreement and the Technical Panel Report), we decided that the public interest in maintaining the

exemption did outweigh the public interest in disclosure in respect of some, but not for all of the withheld information. Our reasons for reaching that decision and precise directions as to the material that may remain redacted appear in the confidential annex.

Actionable breach of confidence leading to exemption under FOIA section 41

52. It was common ground between the parties that, in order to establish the notional claim for breach of confidence required to cause the section 41 exemption to be engaged, the Council had to establish:
 - a. That the information had the necessary quality of confidence;
 - b. That it was communicated in circumstances giving rise to an obligation of confidence; and
 - c. That disclosure would be unauthorised.
53. The Information Commissioner asserted that, in addition, the unauthorised disclosure had to be to the detriment of the party that had originally confided the confidence.
54. Both sides accepted that, if and to the extent that the Council would have had a defence to any claim because of the public interest in disclosure, then the breach of confidence could not be characterised as “actionable” for the purposes of FOIA section 41, so that the exemption would not apply.
55. Mr Hopkins took a preliminary point, to the effect that the exemption only applied to information that the Council had “obtained” from another. It did not apply, therefore, to the Schedule 9 Agreement as that could not be said to have been obtained from Aspers, having been signed by both parties. Nor, he said, could it apply to other elements of the withheld information which recorded dialogue between the two parties.
56. In the confidential annex we have identified which elements of the withheld information may fairly be treated as having been “obtained from” Aspers or another third party. The assessment which follows applies only to that information.
57. Mr Hutchings argued that each element of the withheld information was commercially sensitive and not publicly available, so that it had the necessary quality of confidence. Mr Hopkins disputed that, suggesting that much of it was information that anyone with knowledge of the casino business would have inferred and it could not therefore be categorised as truly confidential. That may be true of some elements of the withheld information, and others may be so trivial that they would not be regarded as capable of protection under the law of confidence. But it is not true of all the elements that we have identified as having been obtained by the Council from a third party— we have indicated

which ones they are in the confidential annex. They were, in our view, obtained by the Council in circumstances in which the confider might reasonably have assumed that they would be held in confidence. We think that would be the case in respect of any competitive tendering operation, but it is even more obviously so in this case, given the specific assurances that the Council gave when it first invited applications. Mr Hopkins argued that the circumstances were not such as to impose an obligation of confidence that would last forever and that the more reasonable reading of the legislative context, the Code of Practice and the overall circumstances is that the Council was obliged to protect relevant information only until stage two had been concluded.

58. We have already commented on the significance of the assurances given at the time, in the context of the exemption claimed under FOIA section 44. We do not think that they have the effect of limiting the period of time during which the obligation of confidence lasts, in the way that Mr Hopkins contends. But nor do we think that Mr Hutchings is right in arguing that the obligation should last forever. In our view the reasonable expectations of the confider, presenting information to a local authority in the circumstances of this case, is that confidentiality would be maintained for a reasonable period of time after the date when the licence was awarded. It is not necessary for us to determine whether that would last until the licence award was secure (in that the time for challenging it by Judicial Review had expired), other broadly comparable competitive tendering exercises had been completed or some other period of time. This is because, whatever the period of time, we are satisfied that it would have extended beyond the date, just a few weeks after the date of the decision complained of, when the Council was required to respond to the Information Request.

59. We are satisfied, therefore, that in respect of those very few elements of the withheld information that we have identified in the confidential annex as being covered by an obligation of confidence disclosure, other than under FOIA, would, have been unauthorised and would have been to the detriment of Aspers, as confider. We are also satisfied that, although the public interest in disclosure of information about a competitive tendering process in the public sector might in some cases justify breach of confidence, so as to give rise to a defence to a claim for breach of confidence, that would not be the case in respect of that particular information.

Conclusion

60. In light of the conclusions we have reached in respect of each of the exemptions relied on our determination is that some, but not all, of the information the Information Commissioner ordered to be disclosed may be withheld by the Council but that other information that he considered was exempt should be disclosed. The detail of the passages from the relevant documents affected by that determination is set out in the confidential annex to this decision.

61. Our decision is unanimous.

Judge Ryan
31st October 2012