IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2015/0143

Heard at Fleetbank House on 3 December 2015

Between

Secretary of State for the Home Department

Appellant:

-and-

The Information Commissioner

First Respondent

-and-

Phil Miller

Second Respondent

Before:

Judge Peter Lane
Dr Henry Fitzhugh
Mr Narendra Makanji

Appearances:

For the Appellant: *Ms Jennifer Thelen,* instructed by the Government Legal Department

For the First Respondent: *Ms Laura Elizabeth John*, instructed by the Solicitor, Information Commissioner's Office

The second respondent appeared in person

DECISION

Introduction

1. As a part of her responsibilities for immigration, the appellant makes use of Immigration Removal Centres ("IRCs"). Two of these are situated respectively at Harmondsworth and Colnbrook, near Heathrow Airport. These are run by commercial companies, pursuant to contracts with the appellant.

2. Mr Miller is a member of Corporate Watch, an independent research group that investigates the social and environmental impacts of corporations and corporate power. On 25 July 2014, he requested from the appellant certain information about Harmondsworth and Colnbrook IRCs which were then respectively being run by companies called GEO and SERCO. This was his request:-

> "On 24 February 2014, Immigration Minister James Brokenshire told Parliament that the contractual staffing levels for GEO at Harmondsworth Immigration Removal Centre (IRC) and for SERCO and Colnbrook IRC are monitored by the on-site Home Office Immigration Enforcement Team and through monthly staffing and self-audit reports detailing the hours worked by detainee custody officers and managers.
> I request copy of these monthly staffing and self-audit reports for the month of May 2014, to ascertain the total number of hours worked by detainee custody officers and managers at each of these centres (Harmondsworth and Colnbrook IRCS). If you are unable to provide me with full copies of these reports, please just extract the total number of hours worked by detainee custody officers and managers at each of these centres."

3. On 12 September 2014 the appellant confirmed that she held the information within the scope of the request but was withholding it on the basis that it was considered to be exempt from disclosure by reason of section 31(1)(f) of the Freedom of Information Act 2000 ("FOIA"). That provision provides that information is exempt information if its disclosure under FOIA would or would be likely to prejudice the maintenance of security or good order in prisons or in other institutions where persons are lawfully detained.

4. Mr Miller sought an internal review of that decision, which resulted in the upholding of the original decision. On 7 October 2014 Mr Miller complained to the first respondent about the appellant's handling of his request. In the course of the ensuing investigation, the appellant clarified that the withheld information would not, in fact, enable Mr Miller to ascertain the total number of hours worked by detainee custody officers and managers, as he stated was his hope, since that information was not routinely included in the reports then provided by the GEO and SERCO to the appellant. Mr Miller nevertheless

confirmed that he still wished to have disclosure of the requested information. Also during the course of the investigation, the appellant withdrew its reliance on section 31 but maintained instead that the information requested should be withheld by reason of sections 41 and / or 43(2) of FOIA.

The decision notice

5. On 15 July 2015, the first respondent issued his decision notice. In summary, the first respondent considered that:-

(a) the exemption in section 41 from disclosing information which, if disclosed, would constitute an actionable breach of confidence, was not engaged. This was because the requested information, though confidential, would not, if disclosed, lead to a successful breach of confidence action, as there would be available the public interest defence;
(b) section 43(2), which exempts information which, if disclosed, would be likely to prejudice commercial interests of any person holding it, was engaged, since the information would be likely to produce the interests of GEO and SERCO. However, the first respondent decided that the public interest lay in favour of disclosure;
(c) certain of the information requested comprised personal data, within the scope of section 40(2), which should be withheld as it would be unfair and a breach of the first data protection principle to disclose it.

The first respondent's view of the public interest in relation to the section 41 (breach of confidence) exemption set out in his decision notice, was as follows:-

> "26. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test in relation to qualified exemptions. That test is whether the public interest in maintenance of the exemption outweighs the public interest in disclosure. The test here is whether the public interest in disclosure of the information exceeds the public interest in the maintenance of confidence.
> 27. The view of the Commissioner is that an obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. There must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence.
> 28. Turning to whether there may be any such factors in this case, the operation of IRCs in general is an issue that has been the subject of scrutiny and concern. As well as media coverage that suggests that the operation of IRCs has been a problematic area generally, reports of

unannounced IRC inspections by HM Chief Inspector of Prisons are publicly available. The most recent reports for the two IRCs in question here – Harmondsworth and Colnbrook - are, to varying degrees of severity, critical of their operation.

29. The introduction to the report on Harmondsworth refers to "inadequate focus on the needs of the most vulnerable detainees", "shocking cases where a sense of humanity was lost" and to the centre as "dirty and bleak" and "in a state of drift". The Colnbrook report is less negative overall, but the introduction does include criticism, such as stating the Centre's "cleanliness and decorative state needed improvement. Ventilation too was problematic."

30. Given this publicly available criticism of the operation of these centres, the Commissioner's view is that there is in general a very strong public interest in other information about their operation. The published inspection reports pre-date the self-audit reports that are the subject of this notice. In particular, therefore, there is a strong public interest in favour of disclosure in order to reveal whether, according to the contractors' own accounts, the operations of these IRCs improved during the interim between the reports.

31. It is also highly relevant that the contractors are paid with public money to operate these IRCs. The disclosure of the self-audit reports would add to public knowledge on the extent to which a value for money service is being provided to the taxpayer, which is also in the public interest. Furthermore, all of the factors in favour of disclosure are made more acute by the vulnerable nature of people held within IRCs.

32. The protection provided by the duty of confidence here is to the process by which contractors provide to the Home Office details of the operation of IRCs. There is a public interest in preserving a space within which contractors and the Home Office can communicate freely about the operation of IRCs. However, where the provision of performance data is a contractual requirement, that process should not be impacted by the possibility of disclosure under the FOIA.

33. The conclusion of the Commissioner is that, such is the weight of the public interest in favour of the disclosure of this information, there would be a public interest defence to an action for breach of confidence. As this means that a breach of confidence through disclosure of the information in question would no longer be actionable, the Commissioner finds that the exemption provided by section 41(1) of the FOIA is not engaged.

6. The decision notice had this to say about the appellant's contention that the public interest in maintaining the exemption outweighed the public interest in disclosing the information:-

> "36. The reasoning given by the Home Office for this exemption being engaged was twofold. First, it argued that its own commercial interests would be prejudiced through third party suppliers being less likely to want to contract with the Home Office and that this would disadvantage the Home Office position in contract negotiations.

Secondly it argued that the commercial interests of the contractors that operated the IRCs would be prejudiced.

37. Covering the argument of prejudice to the Home Office first, the Commissioner does not find this convincing. His view is that the Home Office is likely to be in a sufficiently strong position when negotiating contracts for services at IRCs that it could withstand the impact of disclosure without it having a significant effect upon its commercial interests. The Commissioner would accept that third party contractors may prefer that a report of the kind in question here would not be disclosed, but he would not accept that they would allow this preference to reduce their chances of securing Home Office contracts, which for companies that provide services to IRCs would represent a significant success.

38. A more convincing argument is that disclosure of this report would be likely to prejudice the commercial interests of the contractors. As the Home Office stated in correspondence with the ICO, the reports contain "detailed breakdowns and insight into the [contractors'] performance as service providers" which "could be used by [the contractors'] competitors at future biddings". The Commissioner accepts that disclosure of the information in question would be more probable than not to prejudice the commercial interests of the contractors. On this basis, the conclusion of the Commissioner is that the exemption provided by section 43(2) of the FOIA is engaged.

39. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the transparency of the Home Office, as well as specific factors that apply in relation to the information in question.

40. Covering first arguments in favour of maintenance of the exemption, the Commissioner recognises that there is a public interest in preserving a situation in which private sector suppliers can contract with public authorities without prejudice to their commercial interests. Whilst the Commissioner was not convinced that prejudice to the commercial interests of the Home Office was more probable than not in this case, he does recognise that a number of disclosures that result in prejudice to the commercial interests of private sector contractors could lead to a less favourable environment for public authorities seeking to contract with private sector contractors. Avoiding that outcome is in the public interest.

41. Turning to the arguments in favour of disclosure, the same factors as covered above at paragraphs 25 to 33 apply here; for those reasons the Commissioner believes there to be a very strong public interest in the disclosure of the information in question. It is of particular relevance to section 43(2) that disclosure would add to public knowledge on the extent to which the contractors were providing a value for money service.

42. In conclusion, the Commissioner has recognised that it is in the public interest to maintain the exemption in order to avoid a situation in which the commercial interests of private sector contractors are prejudiced as a result of working in the public sector. He does not, however, consider the weight of that public interest to match that in

favour of disclosure, the grounds for which are set out in more detail under the section 41(1) heading above. The Commissioner finds, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

7. It is common ground between the parties that the personal data of individuals contained in the disputed information should not be disclosed, having regard to the Data Protection Act 1998. The relevant passages would, accordingly, be redacted, in the event of the appeal being dismissed.

Legislation

8. Section 41 of FOIA provides:-

> " **Information provided in confidence**
> 41(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.
> …
> **Commercial interests**
> 43(1)…..
> (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).
> …

9. Although the section 41 exemption is stated by the section 2(3)(g) to be absolute, it is common ground that the exemption does not apply if it is shown that an action for breach of confidence would not succeed because of the strength of the public interest in disclosure. In the case of section 43, the public interest in maintaining the exemption, so as not to prejudice the relevant commercial interests, must outweigh the public interests in disclosure.

The "Le Vay" decisions

10. It is convenient at this point to mention two decisions involving Mr Julian Le Vay, since they featured in submissions of the parties. In Le Vay v Information Commissioner and Home Office (EA/2014/0091), the First-tier Tribunal heard an appeal by Mr Le Vay against the decision of the first respondent, who found in that case that the present appellant (the Secretary of State) had correctly applied the exemption in section 43(2) to Mr Le Vay's "request for the actual annual cost of each Immigration Removal Centre ("IRC") for the last year for which information was available, together with other information concerning the costs of operating IRCs".

11. The Tribunal found that providing the actual annual cost was commercially sensitive information, particularly given that the actual annual payments may differ from the total costs expected at the time the contract was awarded and that payments may not be flat across the contract term. As a general matter, the objections of the suppliers could not be regarded as irrelevant in conducting the balancing exercise. Disclosure of the actual annual costs would reveal the exact amount that the State was prepared to pay for a service, thereby prejudicing the State's ability to achieve best value in any further tendering exercises from the limited market of suppliers. Although the disclosure of actual annual costs would assist other potential contractors when considering whether or not to tender for future contracts, enabling more bidders to enter the market, the Tribunal agreed with the first respondent that, taken in the round, the public interests in favour of maintaining exemptions outweighed those in favour of disclosure. If, contrary to the wishes of contractors, disclosure were to occur, it would undermine confidence and trust in the Secretary of State, with ramifications for the future. The Tribunal concluded that the information already disclosed by the Secretary of State satisfied the various public interests that Mr Le Vay identified in his grounds of appeal.

12. The Tribunal in Mr Le Vay's case heard evidence from Mr Colin Welch, the Assistant Director, Supplier Relationship Management Lead in the Corporate Services Commercial team of the Home Office. Having heard Mr Welch, the Tribunal was persuaded that non-disclosure did and would continue to result in significant savings to the Home Office in the tendering process. In conclusion, the Tribunal dismissed Mr Le Vay's appeal.

13. On 8 April 2015, the first respondent issued decision notice (FS50533359), in respect of a further request from Mr Le Vay to the Secretary of State. Here, Mr Le Vay requested, for each of the IRCs, its performance against the published operating standards and the number of performance points deducted in terms of the performance regimes set by the contracts or service level agreements and any associated financial deductions applied to the service providers. The first respondent upheld the Secretary of State's reliance on the exemption contained in section 43 of FOIA, on the basis that disclosure would reveal parts of the business models used by the Secretary of State and the contractors. The balance of public interest favoured maintaining the exemption of this information. However, the first respondent did not uphold the Secretary of State's application of Secretary of State's application of section 43(2) and 41(1) to the performance information held by her or by the performance points information so held, except to the extent that that would make public parts of the business models used.

14. The decisions involving Mr Le Vay have potential relevance to the present proceedings in two ways. First, the appellant contends that the first respondent's stance in the present proceedings is inconsistent with that taken

by him (and the First-tier Tribunal) in EA/2014/0091 and by the second respondent in decision notice FS50557400. Secondly, the appellant informs us that, in the course of seeking to disclose information in the reports relating to performance points, the appellant inadvertently disclosed to Mr Miller information which comprises part of the disputed information in the present appeal.

The second respondent's position

15. Mr Miller accepts that, following the first respondent's decision, the appellant disclosed parts of the self-audit reports for May 2014. However, information about the size of the penalties imposed for performance breaches (by reference to the performance points allocation to which we have made reference) was redacted. Mr Miller's case is that this withheld information is itself highly revelatory and will "substantially enhance transparency and accountability around the reporting regime". Publishing the disputed information, according to Mr Miller, will show how the appellant has enforced the penalty regime against criteria, as well as showing how the contractors have performed. Some of the redactions, Mr Miller says, mask important information, such as deaths and escapes. Disclosing only what the appellant has seen fit to put in the public domain gives "no insight into the performance of contractors in running the centres or the operation of the contractual structure which in matters of considerable public interest".

16. Mr Miller submits that the contracts with which the appeal are concerned are generally long-term and may not be re-tendered for considerable periods of time. This, he says, should limit the appellant's ability to rely upon damage due to the release of commercially sensitive data. In September, a company MITIE Care and Custody took over the running of both Colnbrook and Harmondsworth IRCs under an eight year contract, with a possible three year extension. According to Mr Miller, the prospect of the historic information sought being utilised by competitors at the next tendering opportunity in 2022 or 2025, is unlikely.

17. Besides this, the detention centre contracts involve a small number of large companies, with "an overlapping pool of managers, at least one of whom has worked for the markets possibly only customer – the appellant". Mr Miller categorised this market as a "oligopoly with extremely limited competition". This, again, in his view reduces the commercial harm of disclosing the information.

18. Mr Miller considers the inadvertent disclosure of certain withheld information, in response to the 2015 decision notice concerning Mr Le Vay, undermines the appellant's case regarding the sensitivity of this information, as well as raising the question of whether the appellant is "competent to manage disclosure of information which it claims to be confidential".

19. Mr Miller believes that "if the withheld data was published, one might expect competitors to learn from the failures of the incumbent contractor and seek to avoid making the same mistakes, pricing accordingly". But if, on the other hand, the recorded failures were due to "inherent and unavoidable problems in the system itself" then, according to Mr Miller, the appellant "should not disguise this to bidders. Otherwise, the appellant is obtaining lower prices on the basis of inadequate information, which would be contrary to the Home Office's duty of transparency and procurement law."

20. Mr Miller observes that the Ministry of Justice ("MoJ") does, in fact, disclose performance deductions, thereby undermining its case for withholding information in the present proceedings. Mr Miller disputes Mr Welch's contention that the appellant is able to achieve 10% greater value for money on a "per bed basis" in her detention centres, compared with Ministry of Justice prisons etc.

Rule 14 directions

21. On 4 November 2015, the Tribunal's Registrar issued directions under rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, following the unintentional disclosure of certain of the information. The Registrar ordered relevant material to be destroyed and for the information contained therein not to be further disseminated, pending the outcome of the appeal. At the hearing on 3 December 2015, following submissions from the parties, we decided that, in all the circumstances, and notwithstanding the period of time that had elapsed between the inadvertent disclosure and the appellant's approach to the Tribunal, it could not be said for the purposes of FOIA that the information was now in the public domain. In particular it was plain from the Government Legal Department's letter of 13 November 2015 to Mr Miller that only a small portion of the material in question had been posted on the website of Corporate Watch.

22. In all the circumstances, we decided to maintain the Registrar's directions of 4 November 2015, subject to the deletion of the requirement for Mr Miller to destroy the relevant material; and to the addition of a direction, to the effect that any such material as is mentioned in paragraphs 2.1 and 2.2 of the Registrar's directions, which is on a website under Mr Miller's control, shall be removed from that site.

23. As we explained, the maintenance of the rule 14 direction was without prejudice to the ability of each of the parties to make submissions regarding the effect (if any) on the relevant balancing exercises of the inadvertent disclosure to Mr Miller.

The evidence of Colin Welch

24. Mr Welch remains in the post described in paragraph 12 above, in which role he has responsibility of the commercial management of an extensive portfolio of contracts for immigration enforcement, including a contracts service level agreements for all IRCs. He has held this position since January 2007.

25. Mr Welch explains that what Mr Miller sought was the staffing and self-audit reports for May 2014, concerning Colnbrook and Harmondsworth IRCs. The suppliers running these two centres provided monthly monitoring information to the appellant. Mr Miller was given the reports, in redacted form, and the redacted versions were also posted online. Redactions relate to performance measures, on which the appellant requires suppliers to monitor and report, together with the related contractual deductions for performance failures, referred to as "performance points". Mr Welch gives as an example a performance measure entitled "Failure to observe key/lock safety procedures". Suppliers would report on how many times such a failure had occurred. The appellant attaches "performance points" to such failures. An accumulation of performance points would impact on the contract price paid to a supplier, in that deductions from the contract price will be made for failures.

26. Mr Welch states that delivery plans and pricing structures (including performance measures) are unique to individual companies and are kept confidential in order to prevent competitors from knowing about them and using them to their advantage. In his view, therefore, disclosing this kind of information "would seriously compromise a supplier's commercial position".

27. When a supplier is bidding, it will seek to identify any associated risks; in particular, financial ones. However, risks can also be reputational in nature. A would-be supplier would seek to mitigate its position regarding financial risk. Thus, information about the number of failures and the areas in which they occur can be used by suppliers "to ensure those potential loses are off-set by increasing costs elsewhere in the bid". According to Mr Welch:-

> " Alternatively, suppliers may price into their bids a financial cushion to allow them to "manage out" any operational failure. For example, to guard against the risk of operational failures arising out of staff ratios, suppliers would need to increase the staff availability; more staff time means an increase in operating costs".

28. Disclosure of performance failures which the incumbent supplier has experienced enables bidders better to identify where failure is likely to happen, as well as its frequency. Bidders can then include the costs of likely failure in their prices, thereby ensuring they can maintain their profit margin.

This, however, means that the overall price of the contract will increase. Without actual performance data, a bidder would only be able to make a rough estimate or approximation of the likely rate of failure.

29. Mr Miller considers that if un-redacted performance reports were released, this would also disclose what the appellant is prepared to accept as delivery for the services in question, without terminating the contract. That would allow a prospective bidder in future rounds to submit a bit within the parameters of what is currently delivered, based on an understanding of what the appellant is prepared to accept, rather than based on the optimum level of service that could be provided by a supplier. This would reduce the bidder's exposure to the risk of performance failures.

30. Mr Welch gives the following example. If the appellant has a contract for £100k per annum, the amount of performance deduction is, say, averaged out at £1k (1%) so that the actual total payable to the appellant is £99k. If that information were released, then the market would know that the appellant has a budget of £99k. That could then be transposed into a costs model, which suppliers would use to work out their profitability margin. If the margin were 5% on £100k, the suppliers would assess the value of performance deductions of £1k into their base costs and thereby maintain the profit gap. This would result in bid prices increasing accordingly. Without this information, a supplier might have bid £99k.

31. Mr Welch believes that, over time, all suppliers in the market "would converge around the service level of what was actually being delivered – rather than what could be delivered". This would damage the appellant's commercial interests and, more importantly, her ability to deliver value for money for the public purse.

32. The present system means that the public purse is, in effect, holding suppliers to account, in the sense that where suppliers fail, it impacts upon *their* profitability. Suppliers are, accordingly, focussed on delivering the services to the correct standard and seek to avoid failure, rather than merely accepting it as a consequential cost.

33. Mr Welch believes that each supplier will have a different approach to how it treats the various elements of service in terms of the risk of operational failure. Having access to actual performance information enables a picture of how suppliers structure their approach to risk to be built up as the years pass.

34. Mr Welch considers a supplier who is aware of the other suppliers' operational weaknesses, as demonstrated by the performance failings, could use that information in its own bid to obtain a commercial advantage.

35. Mr Welch's statement records that, as part of responding to Mr Miller's request, Mr Welch contacted various suppliers contracted by the appellant to

run IRCs, to seek their views on disclosing the actual performance of their contracts. Mr Welch said that all the suppliers "confirmed that they viewed the actual un-redacted information as commercially sensitive and not suitable for disclosure. In summary, the reasons given were that each supplier has a different view on, and approach to, risk". As a result, any information one supplier has about another's pricing strategy will enable it to adjust its prices and strategies accordingly.

36. So far as Mr Miller's points regarding the life of the Harmondsworth and Colnbrook contracts are concerned, Mr Welch states that there are termination clauses in the relevant contracts. The fact that the contracts are referred to in the Home Office's annual report and accounts for 2014-15 as "non-cancellable" does not mean that the contracts cannot, as a matter of law, be terminated; merely that it is unlikely from the appellant's point of view that such a course would be commercially beneficial. As for Mr Miller's point that the market of suppliers is limited and personnel move from company to company, Mr Welch states that companies "would have protected their positions with respect to confidential information within their contracts of employment".

37. Mr Welch says:-

> "There comes a point at which the amount of information disclosed removes a leverage that the Home Office has in the market place. Any amount of information that is released by the Home Office – even if only for one month – provides an insight into likely levels of failure and thereby it inhibits the ability of the Home Office to ensure it has a competitive market to deliver VFM."

38. Performance information is disclosed by the Ministry of Justice in respect of prisons, including both financial information (payments) and performance deductions (actual as a financial figure). The appellant, however, has elected not to release the same information in respect of similar services etc. Mr Welch considers it is difficult to make direct comparisons between MoJ and Home Office contracts in this area because the Home Office costs are "pure contract costs", whereas MoJ contracts include prison-related costs which make it difficult to isolate "pure contract costs". Nevertheless, it is his view that disclosure of actual running costs undermines ability to achieve value for money and prejudices the appellant's commercial interests. Even allowing for the fact that there are additional costs included in the MoJ figures, Mr Welch considers that that Ministry prejudices its own commercial interests by disclosing the actual performance information and annual costs; and that the appellant gets better value for money by not disclosing the same information. Taking account of the difficulties of comparisons, Mr Welch estimates that, on average, the appellant achieves greater value for money of around 10%, compared with MoJ custodial facilities of a similar nature.

39. In examination in chief, Ms Thelen asked Mr Welch about specific aspects of the May 2014 Colnbrook report where at schedule H there is a table setting out specific performance measures, along with columns relating to monthly performance points for that measure, failures, "details of accepted failures", "details of mitigation". In respect of B2(a) - "failure to observe key/lock security procedures (50 per failure)" - the monthly performance points have been redacted, as have details of accepted failures. This contrasts with, say, 2(b) - "incident of concerted indiscipline (10 per incident)" - where each of the columns have 0 and there are no redactions.

40. Mr Welch explained that, for accountancy purposes, a failure which, in practice, does not result in penalisation in terms of penalty points needs to be recorded because the lack of penalty amounts to a "writing off of public money".

41. Mr Welch reiterated the view taken in his statement, that by revealing the number of failures and number of performance points invoked would be suppliers would learn where failures are in practice occurring and would be able to price accordingly, with consequent disadvantage to the public purse. At pages 36 and 37 information had been redacted because it related to staff numbers, which were a sensitive matter. Getting value for money involves suppliers providing the fewest numbers of staff who are needed to deliver the required performance. If a rival saw that a contracted supplier was using "X" staff, then the rival might be inappropriately encouraged to use the same number for that particular function. Mr Welch said that the format of the Harmondsworth report was somewhat different (p39 *et seq*), in that each supplier was able to chose how to present its data. At pages 62 and 63, under the heading "daily staffing statistics" information regarding contract hours and actual hours worked by staff had been redacted. Mr Welch said that the number of hours required to be worked under the contract was determined against the occupancy level and the appellant would be concerned where staffing was not at 100% of that level.

42. So far as concerns the issue of "non-cancellable" contracts, Mr Welch explained that the expression was used in the appellant's audit reports in order to describe a contract where cancellation by the appellant would be likely to have adverse financial consequences for her. All contracts with suppliers, however, had termination provisions contained in them.

43. Mr Welch said that the appellant received may Freedom of Information Requests concerning the suppliers of services at the detention centres, including other requests for monthly reports.

44. When cross-examined by Ms John, Mr Welch said that he tried to follow the appellant's transparency agenda, which meant that redacted versions of the contracts with suppliers had been put on line. The performance points which applied to a performance measure [for example 50 per failure for

"failure to observe key/lock security procedures: B(2)(a)] had not been redacted but the actual points deducted for failures had been redacted.

45. Mr Welch said that the information published by the appellant meant it was possible to see what the appellant paid to a particular supplier each month; but not by reference to a particular contract. Although the appellant did not publish performance data, it did publish the average cost per night of holding a person in a particular contained environment. Mr Welch said that the appellant had been able to achieve a deduction over five years from £120 per night to the present total of £92.10.

46. Mr Welch confirmed that the appellant's policy was not to disclose to the public how much money had been deducted from the sum otherwise due to suppliers on account of performance failures. Nor did she publish information where it had been decided not to deduct points in respect of a particular failure.

47. Ms John explored with Mr Welch the impact on the appellant of disclosing the withheld information. Mr Welch agreed that, notwithstanding the redactions (or, rather, as a result of them occurring at various places in the relevant tables) it was possible for a reader to ascertain where a failure had occurred. However, Mr Welch said that the impact upon the supplier of the failure was not apparent. He said that the value "0" had been left in as a result of the first respondent's decision (which the appellant had not challenged) arising from the requests emanating from Mr Le Vay.

48. Ms John asked whether it would not be the case that a new supplier would, in practice, encounter the same failures as had the present one. Mr Welch replied that this was possible; but revealing the information would show where failure occurs and so identify where there was a risk to the new supplier's profitability. When asked why the same failures would be likely to occur also with the same frequency between suppliers, Mr Welch said that the transfer of undertakings legislation meant that the same individuals could be performing the same tasks at the hearing centre, following a change of supplier. The more information the potential supplier had, the more they could mitigate the risks in carrying out the work. A potential supplier would be able to refine its sensitivity analysis, the more information it had.

49. Although the present request related only to a particular month in 2014, the appellant had received other requests for reports from other months, including from Mr Miller. When the proposed new contract was put out to tender, certain information would be given to bidders concerning the performance regime but bidders would never be given an un-redacted version of the performance of the existing supplier. If a proposed supplier had the withheld information, based on its own knowledge of other contracts, it could make a good guess as to how points deducted in respect of

performance failures at Yarlswood and/or Colnbrook translated into monetary terms.

50. Mr Welch stated that each Immigration Removal Centre has its own independent risk profile, making each site different in terms of risks.

51. So far as concerns differences between the approaches of the appellant and the MoJ, Mr Welch said that he could prove that the former was not getting value for money. He had contacted relevant suppliers and they supported the appellant's position and considered that the information withheld is commercially confidential. Although the relevant emails were not in the appeal bundle, he was constantly talking to suppliers.

52. Cross-examined by Mr Miller, Mr Welch said that the information concerning staffing levels depended on each contract. If the staffing level information in the Colnbrook report was released, one could see the relevant staffing levels for that month.

53. Mr Miller asked whether the existing suppliers could be trusted to report on performance failures. Mr Welch replied that they could; and that the appellant in any event had staff on site, as well as a contract compliance monitoring team. In addition, the HM Chief Inspector of Prisons carried out audits. The appellant had Safe Delivery Managers. The appellant's staff was trained to observe what was going on, in the normal course of their duties, which was also a form of monitoring.

54. Upon receipt by the appellant of a monthly report, it would be scrutinised by the on-site team and also the commercial team. Mr Welch disagreed with Mr Miller that the public interest in knowing how much suppliers are penalised by the appellant outweighs the public interest in protection of commercial interests. Mr Miller asked Mr Welch about the table at tab 4, page 59, comprising part of the May 2014 Colnbrook report, where under the heading "self harm resulting in death (being any known incident of deliberate self harm resulting in death which involves any failure to follow laid down procedures)" the penalty is described, not as a number of points, but as "£10,000 per incident". Mr Miller asked whether Mr Welch considered that £10,000 was a large sum of money in respect of a death and whether one could infer from this that the deductions which were redacted would be for lesser sums. Mr Welch replied that he understood the figure of £10,000 arose as a result of contract law, which was beyond his control.

55. Mr Miller asked about the passage in the appellant's grounds of appeal which stated that if the information in question was disclosed, "current contractors and competitors would be likely to build cover for such shortcomings into their contract costs to offset any potential impact on their profit margins. This could in turn prejudice the Home Office's ability to achieve value for money". Mr Welch said that it was a standard business

model to mitigate against risk. One could, in theory, mitigate every risk by employing very large numbers of staff, etc; but that would not be in the public interest in terms of value for money, which required contractors to manage commercial risks. In other words, if a contractor decided that it could do a certain category of work with ten staff but that number turned out to be insufficient, then the contractor would have to bring in additional staff, at its own cost.

56. Mr Welch was asked whether there was any actual evidence of a supplier's staff signing commercial confidentiality agreements when moving to another employer. Mr Welch said that this was the practice and it applied also to former employees of the appellant, who might move to work for a supplier. In the case of one individual known to Mr Welch, he had signed a commercial confidentiality agreement that precluded him from working on contacts in areas with which he had been concerned, whilst with the appellant.

57. Mr Welch said that he had been in post for almost nine years and had not in that time had to terminate any contract with a supplier.

58. When asked about the emails at tab 5 between Mr Welch and suppliers, Mr Welch confirmed that these did not relate to Mr Miller's particular request and that reference in them to "reputational harm" did not relate to an exemption in FOIA.

59. Mr Miller asked whether the incumbent company did not possess an advantage over others, given its knowledge of its own performance failures. Mr Welch replied that this was dependent on the business model being run by the particular supplier, which could change over time. Mr Welch contended that even a historic contract would be of relevance for future business modelling by other suppliers.

60. The appellant awarded contracts not just by reference to costs but also on the basis of quality criteria, which were also given scores (for example, quality of education provided at the detention centre). At the tendering stage, the appellant was precluded by European procurement rules from using past failures by a supplier to exclude that supplier from the bidding process. When asked about paragraph 25 of his witness statement, Mr Welch said that a supplier could decide to withdraw from a particular market. This had been the case with Kalyx, which used to operate Harmondsworth. Kalyx's parent company decided to withdraw from this line of business.

61. In re-examination, Mr Welch confirmed that the error in redaction, referred to earlier in relation to the rule 14 issue, had arisen as a result of the appellant having to deal with a significant number of documents, in the light of the first respondent's decision in respect of Mr Le Vey's requests. So far as comparisons between the appellant and the MoJ were concerned, Mr Welch

said that he had applied a sensitivity analysis to take account of operational differences between the two bodies but, even having done so, he was sure that the appellant was achieving better value for money.

62. Mr Welch was asked questions in closed session. Counsel agreed (and we accept) that a correct summary can be described as follows.

63. The parties considered in more detail the pages at 29, 30, 37, 57A-E and 61-63 of the closed bundle. Mr Welch described the relationship between the redacted information and other unredacted information within the reports. The supplier provides the minimum staffing numbers as part of the contractual tendering process and the actual staffing numbers in any contract are not in the public domain.

Submissions

64. For the appellant, Ms Thelen submitted that the issue in the appeal was about striking the right balance. It was accepted by all that the exception in section 43 was engaged. Ms Thelen contended that the public interest in disclosing the information was not high. The redacted information was of a highly technical contractual nature. Disclosure would, however, be against the public interest in two ways; namely, by harming the appellant's aim of achieving best value for money and by damaging the commercial confidence of suppliers.

65. Ms Thelen said that the information in question was not otherwise accessible by reason of the inadvertent earlier disclosure to Mr Miller, particularly given the very limited nature of what had been placed on the website and the ability for it to be removed.

66. Ms Thelen submitted that the assessment of the public interest in disclosure involved an assessment of (a) the value of the information; and (b) the amount of information regarding the operation of the detention centres, which is otherwise available in the public domain. So far as (a) was concerned, the public interest in information was low. This could be seen by comparing the matters covered by those parts of the reports in which there were redactions with the matters dealt with by the reports produced on Harmondsworth and Colnbrook by HM Chief Inspector of Prisons (tab 6 and 7 of the open bundle). Although Ms Thelen accepted that the time to assess the public interest was at the date of the response and the reports at tabs 6 and 7 were for later periods (January-February 2013 and August 2013, respectively) they nevertheless were of relevance in ascertaining where the balance should be struck. The same point emerged from the "Director's overview" in, say, the Colnbrook May 2014 report, which had been disclosed. Also unredacted was information concerning complaints received in May 2014 (page 4). Similar material could be found at page 39 regarding

Harmondsworth, where there was also the unredacted centre manager's monthly summary, describing a protect involving 300 detainees which took place during that period.

67. There was, accordingly, Ms Thelen said, publicly accessible reporting material that was not tied to contractual performance. The right balance had been struck.

68. The issue regarding a penalty of £10,000 for a death needed to be considered by reference to other mechanisms, like Health and Safety Executive enquiries and a Coroner's inquest. There was no basis for saying that this figure had any correlation with the redacted material concerning points.

69. As for (b), Mr Welch had described how bidders could use the material to the disadvantage of the appellant, such that pricing would converge around what was actually being delivered as opposed to what could be delivered. Suppliers would treat failure as a consequential cost and have less incentive to meet targets. Suppliers would also have their costing strategies revealed to competitors. The appellant would, accordingly, be deprived of the benefit of a potentially lower bid. This was the key issue.

70. Staffing and occupancy level figures were significant, given that the cost of staff was the biggest item and these figures should not be available to competitors.

71. So far as the disclosure of "zeros" in the tables was concerned, Ms Thelen said that this was a result of the first respondent's decision notice FS50533359 in respect of Mr Le Vey, which drew a distinction between performance information, including performance points information, which was found by the first respondent to be not exempt, and his decision that the disclosure of information would reveal parts of the business models used by the appellants and suppliers was exempt under section 43. The correct balance had, accordingly, been achieved. Ms Thelen said that the actual number of points awarded in respect of failures was, according to this, was not disclosable.

72. Although there was unlikely to be a bidding process in respect of Harmondsworth or Colnbrook in the short term, it had been shown how the contracts in question could be terminated before their expiry date. The length of the contract term did not mean that the withheld information lost its commercial significance, in that a potential bidder would try to collect as much data as it could.

73. The categorisation of the situation as oligopolistic by Mr Miller was inapt. There was still a need to preserve confidentiality. Staff members, who moved between suppliers or from the appellant, were subject to commercial confidentiality agreements. Ms Thelen asked the Tribunal to accept

Mr Welch's evidence regarding the views of suppliers on disclosure of the disputed information. Mr Welch, she said, "knows his business". At paragraph 55 of the decision in EA/2014/0091, the Tribunal had accepted Mr Welch's evidence in this regard.

74. Ms Thelen said that the first respondent had been inconsistent, as between its approach to the decisions involving Mr Le Vey and the present case. It was not appropriate to draw a distinction on the basis that the present case concerned only two reports from a particular month. Those months were of particular significance, in that they saw protests and food refusals by detainees; but the reports did not shed any real light on those incidents. The disputed information had a confidential character which should be respected whether it involved two reports or 120 reports. Although Ms Thelen accepted that greater volumes of detail would be more helpful to suppliers than those concerning a particular month, what was relevant was the actual nature of the information. In any event, requests were being made to the appellant for the information to be disclosed on a month by month basis. The appellant's stance avoided any problems of a "slippery slope".

75. In her submissions, Ms John said that there was a measure of agreement in that the issue was whether the public interest in disclosure was such as to defeat an action for breach of confidence or whether the public interest in withholding outweighed that in disclosing the information. Ms John confirmed that the first respondent did not seek to take a point that section 21 (information accessible to applicant by other means) was engaged because of the inadvertent release of certain information by the appellant. The issue of the public interest fell to be determined as at the date of the response.

76. Harmondsworth and Colnbrook IRCs had been the source of concern including, on the part of HM Chief Inspector of Prisons. There was a compelling public interest in disclosing information regarding the operation of the centres. This included what failures were occurring; how the appellant assessed those failures; how the appellant dealt with them; and what was being paid to suppliers under the contract, despite the failures. All these were, Ms John submitted, substantial factors. Whilst it was true that there was information in the public domain that described qualitatively what failures occurred, there was a public need to know what deductions were (or were not) being made on account of those failures. This involved the public's interest in the "writing off" of public money. There was, in short, an information gap. The two centres were under-performing and there was a strong public interest in knowing what happened there and how matters were dealt with. In particular, the public had a right to know what performance failures were regarded by the appellant as significant enough to lead to the deduction of points, with the consequent financial effects on the supplier. It was, however, accepted that the information in question was both confidential and commercially sensitive. It was also accepted that there was a public interest in the appellant achieving value for money. Although there

was logic in Mr Welch's concerns, these were not shared by the MoJ. There was no direct evidence to show that the MoJ was, as a result of its policy, paying more than was the appellant.

77. The issue was not just about achieving the lowest price but about what the appellant was getting for the public's money. There was a legitimate public debate to be had about this.

78. Mr Welch's evidence regarding the attitude of suppliers, as set out in the emails in the bundle, related to an earlier request, concerning the actual costs paid per contract. Mr Welch had spoken of further contacts with suppliers; but these were not contained in the written evidence. The first respondent had asked for this, in advance of the hearing, without success.

79. In the circumstances, Ms John asked the Tribunal not to accept Ms Thelen's submission that other suppliers could not be expected to take a different attitude to the present case. Ms John said it was entirely possible that they would take such a different view.

80. The argument about consistency with the "Le Vey" decisions was, Ms John submitted, a sterile one. The first respondent had to consider each case on its own merits. Were it to do otherwise it would be rightly criticised. The requests made by Mr Le Vey were different in kind.

81. Mr Miller adopted Ms John's submissions. He said, however, that he did not consider that section 43 was engaged as he did not believe commercial interests were at issue. Disclosure would benefit everyone. It was in the public interest for all suppliers to be fully informed about the risks involved when bidding for contracts involving Harmondsworth and Colnbrook. Value for money was not about financial considerations alone, in a situation where failure could result in deaths, fires and escapes. The appellant's apparent resignation to such occurrences was, Mr Miller said, deeply troubling. HMIP had called for greater transparency regarding staffing levels. Inspectors could not look at this issue, because it was considered to be commercially sensitive. The withheld information was important in that it showed how public money was being spent.

Discussion

82. As the appellant and the first respondent acknowledged, the issue in this case involves the assessment of the public interest in disclosure of the disputed information, and an assessment of the public interest in withholding the same. We do not agree with Mr Miller that there is no public interest in withholding the redacted information. Leaving aside the issue of the weight to be ascribed to the views of the appellant, as articulated by Mr Welch, there plainly is a public interest in achieving value for money, in the sense of

enabling the appellant to pay no more than market would otherwise be likely to require. By the same token, leaving aside the weight to be placed upon damage to commercial confidence, there is on any proper view a risk of such damage, were the disputed information to be disclosed.

83. There is a significant public interest in understanding the way in which the appellant discharges her statutory responsibilities in detaining persons subject to immigration control. The public has an interest in knowing how detention centres are run, what conditions in them are like for those detained, the steps taken to maintain control and security; and the measures taken to deal with self harm.

84. Although post-dating the response in this request, the reports by HM Chief Inspector of Prisons of January/February and August 2013 in relation to Colnbrook and Harmondsworth respectively are, we find, relevant, since they comprise a discrete and important mechanism by which information on these issues is brought into the public domain. Perusal of the Colnbrook report reveals information regarding living conditions, activities; safety issues (including bullying, self harm and suicide prevention), safeguarding of adults at risk and of children and the use of force and single separation. The report also dealt with the complaints process activities, preparations for removal and release and actual removal and release. Detailed recommendations on a range of these and other issues were set out. The detainee survey was appended, in which percentage answers were given to some 76 questions, ranging from the most serious (eg have you been hit, kicked or assaulted?) to ability to use the library and gym.

85. The report on Harmondsworth follows a similar pattern. The Inspector's interest and concern over details of management by the supplier are evidenced by, amongst other things, his finding "that immigration enforcement requirements were interfering with a contractors attempts to factor in the care needs of some very sick and vulnerable individuals" and that "a lack of intelligent individual risk assessment had meant that most detainees were handcuffed on escort and, on at least two occasions, elderly, vulnerable and incapacitated detainees, one of whom was terminally ill, were needlessly handcuffed in an excessive and unacceptable manner". The report identified "some significant gaps in health care", as well as noticing the effects of the centre being "divided between two older wings and newer accommodation was prison-like in character". The Inspector's conclusion regarding Harmondsworth was that it "was in a state of drift"; that it "did not seem to be progressing and some services were being poorly managed"; and that a "more careful and thoughtful analysis of need identifying new priorities and new ideas, was required. Also needed was greater management energy and thought in implementing change and driving improvement".

86. The May 2014 monthly reports on Harmondsworth and Colnbrook contain a great deal of information, which has been put in the public domain. Amongst other things, we find a table recording injury events to residents, not only as to May 2014 but also as to the total for that year to date, with averages for 2014 and 2013 (Colnbrook). At the other end of the scale, Mr Miller drew attention to the comment under the heading "garden" that "all the daffodil bulbs have now been removed and stored for later in the year". Overall, the reports as disclosed, are, we find, intended to give a comprehensive picture of a removal centre, both good and bad, from the serious to the mundane. So far as the tables are concerned where redactions occur, these also cover a wide range of activities under the heading "Performance measures". Following the decisions involving Mr Le Vey, the appellant has disclosed the points attributable to the performance measures. As explained earlier, the effect of the redactions is that the actual number of monthly performance points applied, the number of failures, details of accepted failures and certain details relating to mitigations are not disclosed. Further, information in the tables regarding staffing levels is redacted.

87. Whilst we of course accept that there is some public interest in knowing every detail about the way in which the appellant operates its contractual arrangements with the suppliers, we agree with Ms Thelen that it is of limited significance. The public knows a great deal about the way in which the contracts operate. This includes the whole range of matters that the appellant has chosen to treat as measures of the supplier's performance. The public also knows how many points are capable of being allotted to each performance measure. The public can see where there have, and have not, been failures on the part of the supplier to meet the performance measures.

88. We do not consider it has been shown that knowing how the appellant decides, in practice, to approach the issue of points deduced in respect of each aspect of performance would bring to light anything that is not already within the purview of the HM Inspector of Prisons, with the possible exception of staffing levels. Nevertheless, we acknowledge that there is some public interest in learning whether and, if so, how the appellant decides not to apply points and so apparently forgo a financial sum to which she would otherwise be entitled.

89. The Tribunal accepts the evidence of Mr Welch. Cross-examination failed to reveal any significant issue with his testimony. His background and experience lend strength to his concern, on behalf of the appellant, regarding the commercial disadvantages that would ensue from releasing the redacted information. Any public interest in seeing how the appellant in practice views performance failures would, we find, be significantly outweighed by the harm that would ensue by potential bidders being able, for the reasons Mr Welch gave, to construct a detailed business model by reference to the way in which known areas of failure have been handled.

90. Mr Miller submitted that it must be in everyone's interest for potential new suppliers to be able to learn from problems that had beset existing suppliers; particularly in the case of something as sensitive and high-profile as immigration detention. Whilst that submission has a superficial attraction, we reject it. It is plainly still legitimate for the appellant, notwithstanding the subject matter, to be concerned with achieving proper value for money for the public purse. As Mr Welch pointed out, it would theoretically be possible effectively to eliminate at least a wide range of risks, by providing abundant staff to run a detention centre. What the appellant has to do, however, is to seek to achieve a safe, efficient and humanely run centre for the best price it can achieve. We accept that that aim would be gravely jeopardised by revealing information which, we find, would enable potential suppliers to immunise themselves against certain risks, at the public's expense.

91. We do not consider that the point made regarding the length of the contracts affects this finding. The contracts have termination provisions, albeit that the appellant quite reasonably hopes that it will not be necessary to invoke them. In any event, we find that the information, if disclosed, is likely to be useful in the longer term. Mr Welch explained that some of the performance failures, at least, were likely to be ingrained; for example, because of the nature of the particular detention centre.

92. We do not consider that the limited number of suppliers in this area is a reason to diminish the weight to be placed upon the public interest in withholding the information. On the contrary, the small and specialist nature of the group heightens the concerns surrounding the risk of manufacturing business models that would have an adverse financial impact upon the appellant. We also accept Mr Welch's evidence that confidentiality clauses are a feature of the present regime.

93. We also find no reason to discount the weight given to Mr Welch's evidence concerning the attitude of suppliers to the disclosure of the disputed information. We accept that the written materials he has provided in this regard relate to Mr Le Vey's requests, rather than those of Mr Miller. The fact, however, remains that what Mr Welch has to say is more likely than not to be true. As Ms Thelen submitted, he "knows his business" in this regard.

94. In any event, as the decision notice in the present case acknowledged, a number of disclosures that result in prejudice to the commercial interests of private sector contractors could lead to a less favourable environment for public authorities seeking to contract with private sector contractors. Avoiding that outcome is in the public interest. We accept the appellant's submission that, in fact, that public interest is of greater significance than the first respondent believes it to be in the present case.

95. That brings us to the issue of the alleged inconsistency of the first respondent, as regards the "Le Vey" decisions, on the one hand, and the

present decision on the other. We entirely accept that it would be wrong to seek to straightjacket the first respondent by demanding him to regard his previous decisions as in any way determinative. It is also true that the scope of the requests made by Mr Le Vey was to some extent different from those of Mr Miller. The decision notice FS50533359 is, however, helpful in drawing a distinction between performance points information that should be disclosed and that which should not because it would reveal parts of the business models used by the appellant and the suppliers. In the present case we have found that the disclosure of the redacted material would, in reality, give a material insight into the business model of the existing supplier (now in each case MITIE) and, by the same token, would given potential suppliers the ability to construct business models that would not only take unfair advantage of the existing suppliers but also threaten the ability of the appellant to provide the public with value for money.

96. We reach our conclusions in the light of the fact that the MoJ chooses to release more information about its prison contracts than the appellant does about her IRCs. Under skilled cross-examination Mr Welch was unshaken in his testimony that the appellant's stance helps her achieve greater value for money for the public. We consider that is likely to be true.

97. We accept the evidence of Mr Welch that the figure of £10,000 for a death in detention has no bearing on the financial values to be ascribed to points for other failures. The figure of £10,000 may well be emotive but it is a measure of the appellant's attempts to achieve transparency in this area that it has been disclosed. Furthermore, as Ms Thelen in effect submitted, the imposition of such a penalty will rightly have no effect upon investigations by other authorities.

Decision

98. Overall, our unanimous conclusion is that the public interest in withholding the redacted information outweighs the public interest in disclosing it. This appeal is, accordingly, allowed to that extent. A decision notice is substituted to the effect that the redacted information is exempt by reason of section 43(2) and the appellant is not required to take any further action.

Judge Peter Lane
Chamber President
12 January 2016

[Corrected under rule 40
13 January 2016]
Amended decision promulgated 14 January 2016