

Freedom of Information (Jersey) Law 2011

DECISION NOTICE

JOIC Reference	CAS-02207
Date of Decision Notice	20 August 2020
Scheduled Public Authority	Andium Homes Limited
Address	33-35 Don Street St Helier Jersey JE2 4TQ
Date of Request	15 September 2019
Date of Response	8 October 2019
Date of request for Internal Review	14 October 2019
Date of Internal Review	29 October 2019
Date of appeal to Information Commissioner	11 November 2019

Summary/Decision

1. On 15 September 2019, the Complainant requested certain information from Andium Homes Limited (the **SPA**) relating to a certain development carried out by the SPA (the **Project**) and monies paid to a third party contractor (**TP1**) in relation thereto (the **Request**).
2. The SPA wrote to the complainant on 8 October 2019 (the **Response**) providing some information but also stating that some of the other information sought in the Request was being withheld (the **Withheld Information**), citing the exemption at Art.33 of the

Freedom of Information (Jersey) Law 2011 (the **Law**). The Complainant did not agree with the Response and requested an internal review on 14 October 2019 (the **IR Request**).

3. The SPA responded to the IR Request on 29 October 2019 (the **Internal Review**).
4. The Complainant did not agree with the outcome of the Internal Review and so appealed to the Information Commissioner (the **Commissioner**) on 11 November 2019 (the **Appeal**).
5. The Commissioner's decision is to partially uphold the Complainant's appeal. Whilst the SPA lawfully withheld certain information, it should not have withheld certain other information and that information should be provided to the Complainant.

The Role of the Information Commissioner

6. It is the duty of the Commissioner to decide whether a request for information made to a SPA has been dealt with in accordance with the requirements of Part 1 of the Law.
7. This Decision Notice sets out the Commissioner's decision.

The Request

8. The Complainant's Request was in the following terms:

"In relation to the States of Jersey Housing Department construction project titled, LE SQUEZ REDEVELOPMENT PHASE 2

Question 1; Has the final account been settled yet? If so what is the final figure?

Question 2; Have all retentions been released?

For you (sic) information we have in our possession a copy of the main contract, base date is 9 April 2010, signed by Carl Mavity (client) and Andy Fleet (contractor). The 'contract sum' in Article 2 is recorded as, £9,440,837.42

Question 3; What is the exact time that has been granted under the contract for 'Extension of Time'.

For you (sic) information we have in our possession a copy of the main contract, base date is 9 April 2010, the date for completion for 'Section Number One' is 15 October 2011 and the date for completion of 'Section Number Two' is 24 March 2012.

We also have a copy of a Supplementary Agreement to Revise the Dates of Contract' which states;

*Item 1. The Contract completion date of 7th October 2011 for Phase 2a (Section 1 of the Contract) and the Contract completion date of 16th March 2012 for Phase 2b (Section 2 of the Contract) are to be revised to a single completion date of 9th January 2012." (the **Requested Information**).*

9. On 8 October 2019 the SPA provided the Response in the following terms:

"Response

I write further to your information request of 15th September 2019, under reference AH-FOI-29 requesting information about the Le Squez Phase 2 redevelopment, later confirmed as relating to Phase 2a & 2b.

Please find our response below:-

<i>Question 1</i>	<i>Has the final account been settled yet? If so, what is the final figure?</i>
<i>Answer</i>	<i>We confirm that we hold this information. However, this information is exempt under Article 33 of the Freedom of Information (Jersey) Law 2011 and cannot be released. We consider that the public interest in withholding is greater than the public interest in releasing this information on the basis of commercial sensitivity.</i>
<i>Question 2</i>	<i>Have all retentions been released?</i>
<i>Answer</i>	<i>All retention monies have been released.</i>
<i>Question 3</i>	<i>What is the exact time that has been granted under the contract for "Extension of Time"?</i>
<i>Answer</i>	<i>We confirm that we hold this information. However, this information is exempt under Article 33 of the Freedom of Information (Jersey) Law 2011 and cannot be released. We consider that the public interest in withholding is greater than the public interest in releasing this information on the basis of commercial sensitivity.</i>

We hope this is helpful, although we appreciate it may not provide the response you were hoping for. We always try to be as helpful as possible when responding to FOI requests, but must consider the commercial sensitivity of parts of our business. We would again encourage you to meet with Ed Poynton at TP1 to discuss your ongoing concerns regarding this contract."

10. The SPA declined to provide the information requested in Question 1 and Question 3 (together, the **Questions**), citing the exemption provided for at Art.33 of the Law (the **Withheld Information**).

11. The Complainant wrote to the SPA on 14 October 2019 seeking an Internal Review.

12. The results of the Internal Review were communicated to the Complainant on 29 October 2019, as follows:

"Further to your request for an internal review of your information request, I can confirm I have completed the review and have the following findings.

Your Freedom of information request asked three questions.

- Question 1 asked if the final account for the Le Squez Phase 2 development had been settled and if so what was the final figure. The response indicated that this was a matter of commercial sensitivity.
- Question 2 asked if all retentions had been released and the answer confirmed that they have. My review confirms that from Andium Homes perspective this part of your request has been answered.
- Question 3 asked for the exact time that has been granted under the contract for Extension of Time and the response indicated that this was a matter of commercial sensitivity.

I requested your confirmation that you wished the internal review to reconsider answers given to questions 1 and 3 and to release the associated information. You chose not to reply to confirm or clarify this so my review has proceeded on this basis.

In relation to Questions 1 and 3, as a Scheduled Public Authority under the Freedom of Information (Jersey) Law 2011, Andium Homes is required to undertake a three part prejudice test when considering a prejudice based exemption such as commercial sensitivity. I have reviewed the basis for making the test in relation to Questions 1 and 3 of your Freedom of Information response.

Under Part 5, article 33 Andium Homes is entitled to exempt information that may affect its commercial interests if its disclosure would, or would be likely to prejudice the commercial interest of a person (including the scheduled public authority holding the information).

In relation to applicable interests, my review has confirmed that the release of the answers to Questions 1 and 3 would, or would be likely to, prejudice the commercial interests Andium Homes, and / or our contractual partner for the development concerned, [TP1]. I have received confirmation from [TP1] that they continue to consider the information commercially confidential.

In relation to the nature of the prejudice, my review has confirmed that the prejudice is real, actual and of substance.

My review confirmed that correspondence between Andium Homes Limited's legal representatives and those of the Liquidator of the former company Air Conditioning Jersey Limited (in Liquidation) indicates that this matter involves a significant claim, is actual and, given your Freedom of Information request, is still active. My review also confirmed that this matter remains a third party dispute between Air Conditioning Jersey Limited (in Liquidation) and [TP1] in which Andium Homes has no direct interest or involvement.

My review confirmed that release of this information would, or would be likely to, cause damage to the commercial interests of [TP1] given the above, and that, given the commercial confidentiality existing between Andium Limited and [TP1], there may be consequential reputational, legal or financial consequences for Andium limited were it to release the information without the consent of [TP1], and therefore could result in prejudice to the commercial interests of either company.

In relation to the likelihood of such a prejudice to commercial interests arising, my review confirmed that this is likely to be high in relation to [TP1], given the motivation and previous actions of the Air Conditioning Jersey Limited (in Liquidation), and of former employees of Air Conditioning Jersey Limited in relation to the claim.

Therefore, my review has concluded that the information requested in relation to Questions 1 and 3 is qualified exempt and that the actions taken by those managing the Freedom of Information request were correct to indicate in this regard.

My review has not extended to whether the rights or wrongs of any action by any party has occurred, and draws no conclusions in this regard.

Should you have any concern about the way this internal review has been carried out please refer to our Complaints and Appeals procedure available on our website www.andiumhomes.je. Alternatively, you may wish to appeal to the Office of the Information Commissioner <https://jerseyoic.org/>."

The Investigation

Scope of the case

13. On 11 November 2019, the Complainant contacted the Commissioner to appeal the SPA's decision to withhold the Withheld Information. The Complainant asked the Commissioner to review the Complainant's request and the responses received from the SPA in order to ascertain whether the response provided was in accordance with the Law.
14. The Commissioner has set out in this Notice the particular issues he has had to consider in respect of the relevant exemption cited by the SPA and the applicable public interest test.
15. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both the Complainant and the SPA. He is satisfied that no matter of relevance has been overlooked.
16. The Commissioner does not punish scheduled public authorities or compensate complainants. We cannot investigate other matters that may lie behind the request. We focus on only whether the scheduled public authority has complied with the Law.

Chronology

17. On 27 April 2020, the Commissioner wrote to the SPA to advise that the Complainant had made an Appeal to the Commissioner, pursuant to Art.46 of the Law. The SPA was asked to provide their written submissions in response to the complaint made by the Complainant.
18. The SPA responded to that letter on 12 May 2020, providing detailed explanations as to why it considered the Art.33 exemption applied to the Withheld Information and why the public interest test fell in favour of withholding disclosure of the information sought in respect of the Questions.
19. The Commissioner has also received very comprehensive written submissions from the Complainant (which have been of great assistance to the Commissioner), including copies of the correspondence which had passed between the Complainant and the SPA.

Analysis – The Appeal

20. The Complainant considers, in essence, that:
 - a. the Response is defective both on its terms and in its apparent reasoning;

- b. the relevant decision maker has, *inter alia*, been unduly influenced by irrelevant factors;
- c. it is possible that the application (either *ab initio* or upon the purported review) has been improperly influenced or even largely determined by the third party;
- d. the Internal Review was not conducted properly and introduces new grounds of refusal and advances justifications that were not cited in the original Response, suggesting that such were constructed after the event and to justify the original Response.

General principles relating to Art.33

- 21. The SPA has relied on the exemption set out at Art.33 of the Law, the full text for which can be found in the Legal Appendix at the end of this Notice. It relies on this exemption for both Questions. The general principles relating to the application of Art.33 apply equally to the Questions and so that will be dealt with first, followed by an analysis in the context of Question 1 and Question 3 separately.
- 22. Art.33(b) provides an exemption from disclosure if the information would, or would be likely to, prejudice the commercial interests of any person (including the scheduled public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.
- 23. In order for a prejudice based exemption such as Art.33 to be engaged, the Commissioner considers that three criteria must be met:
 - a. First, the actual harm which the SPA alleges would, or would be likely, to occur if the Withheld Information was disclosed has to relate to the applicable interests within the relevant exemption;
 - b. Secondly, the SPA must be able to demonstrate that some causal relationship exists between the potential disclosure of the Withheld Information and the prejudice which the exemption is designed to protect¹. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - c. Thirdly, it is necessary to establish whether the likelihood of prejudice being relied upon by the SPA is met – i.e. disclosure ‘would be likely’ to result in prejudice, or disclosure ‘would’ result in prejudice. In relation to the lower threshold, the Commissioner takes the view that the chance of prejudice occurring must be more than a hypothetical possibility; there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the SPA.

¹ See DWP v. Information Commissioner, Decision of the Information Tribunal (Lower Tier) EA/2014/0073

What is the definition of commercial interests?

24. The term 'commercial interests' is not defined in the Law. It is noted that the UK ICO has an awareness guidance document on the application of s.42 of the Freedom of Information Act 2000 (**FOIA**)², which states:

"...a commercial interest relates to a person's ability to participate in a commercial activity."³

25. The Commissioner also has regard to the decision of the Court of Appeal of *E&W of Department for Work and Pensions v. the Information Commissioner & Anor*⁴, which although not binding in this jurisdiction is considered useful given the similarities in legislation. In that case, the Court considered the meaning of "commercial interests" and accepted that such *"...is wide enough to include loss of income, profits and donations..."* and which followed earlier decisions of the Information Tribunal in *Student Loans Company Limited v Information Commission*, EA/2008/0092, at [42]–[43] and *University of Central Lancashire v Information Commission* [2011] 1 Info LR 1170 at [31] which said that "commercial interests" is a term which deserves a broad interpretation which will depend largely on the particular context.

26. The distinction between 'commercial' and 'financial' information remains key: the latter is not caught by Art.33(b) of the Law.

27. The Commissioner does consider that the Withheld Information in respect of both Questions relates to the commercial interests of both the SPA and TP1. Accordingly, Art.33 of the Law is engaged.

What is the nature of the prejudice?

28. As a prejudice-based exemption, a SPA seeking to rely on Art.33 must be able to demonstrate a causal link between the commercial interests described and the harm that it considers may arise through disclosure. The wording of the exemption makes plain that it covers communal interests rather than those of the individual; concerning information that would, or would be likely to damage the commercial interests of the SPA and/or TP1.

29. Based on the arguments presented by the SPA, the Commissioner accepts that there is a causal link between the disclosure of the Withheld Information and the prejudice that may be caused to the SPA's and/or TP1's commercial interests in respect of both Questions.

30. The SPA then needs to be able to establish that disclosure of the Withheld Information would be likely to lead to the harmful consequences claimed. Further, the risk of prejudice occurring must be real and significant.

What does likelihood of prejudice mean?

31. The Commissioner will then consider whether there was a sufficient likelihood of the prejudice occurring to engage Art.33. At para.26 of his Guidance Note⁵, the Commissioner notes that in establishing whether prejudice would or would be likely to occur, it is necessary to consider:

² s.43 of FOIA is the equivalent to Art.33 of the Law.

³ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

⁴ [2016] EWCA Civ 758

⁵ https://jerseyoic.org/media/tl4pgtq2/joic-19a-the-prejudice-test_2.pdf

- a. The range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations);
 - b. How frequently the opportunity for the prejudice arises i.e. how likely it is for these circumstances to arise); and
 - c. How certain it is that the prejudice results in those circumstances.
32. He also notes that "*The terms 'would' and 'would be likely' have separate and distinct meanings in this context*".
33. Whilst not binding in this jurisdiction, the Commissioner has found certain UK case law of assistance in this matter. In the (UK) case of John Connor Press Associates v. Information Commissioner⁶, the Information Tribunal stated that, when determining whether prejudice would be likely to occur:
- "We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk"* (para.15).
34. This interpretation followed the judgment of Mr Justice Munby in R (on the application of Lord) v Secretary of State for the Home Office⁷. In this case the Court concluded that "likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not". With regard to the alternative limb of 'would prejudice', the Tribunal in Hogan v Oxford City Council & The information Commissioner⁸ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
35. In other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.
36. As Art.33 is a qualified exemption, the Commissioner will consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
37. A scheduled public authority can withhold information that has been provided to it by a third party on the basis of prejudice to the commercial interests of that party. However, to do so it must follow the same steps and arguments that it would for its own information. When a scheduled public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the scheduled public authority to speculate on the prejudice which may be caused to the third party by the disclosure. The Commissioner appreciates that there will be situations where a scheduled public authority cannot seek the views of a third party, for example due to time constraints for responding to requests. In such circumstances, the scheduled public authority may present arguments regarding the likelihood of prejudice based on its prior knowledge of the third party's concerns. In doing so, a scheduled public authority will need to provide evidence that its arguments genuinely reflect the concerns of the third party involved. If it is established that a third

⁶ EA/2005/0005

⁷ (2003) EWHC 2073 (Admin)

⁸ EA/2005/0026 & 0030

party does not itself have any arguments or concerns about prejudice to its commercial interests, then the public authority should not present speculative arguments on behalf of that third party.

Question 1

The Complainant's position

38. The Complainant does not consider that the information sought by Question 1 (namely information about whether a final account has been settled and if so, how much), should have been withheld. The Complainant considers that there is considerable public interest in knowing the how much the SPA has paid in respect of a project and which ultimately has been funded by the public purse.
39. Specifically, the Complainant does not believe it is reasonable to consider that the answer to Question 1 would be 'commercially sensitive' and that all that is being sought is a simple 'yes' or 'no'. The Complainant says that the SPA has not demonstrated how anyone could be prejudiced by the fact that the knowledge of whether the final account had been settled or not was made public; it is a standard FoI question.
40. Further, the Complainant submits that in providing a positive answer in respect of Question 2 and confirming that all retention monies have been released, that such would suggest that the final account has been settled, otherwise, it would be difficult to calculate retentions.
41. The Complainant does not agree with the SPA's assertion that disclosure of the Withheld Information may affect the business of either TP1 or the SPA. The SPA is free to award a contract, after a fair tendering process, to any approved contractor and confirmation of the final cost of the Project should have no bearing on the ability to provide a response to the question asked.
42. Ultimately, the Complainant submits no potentially 'sensitive' information has been sought, such as a breakdown of costs, labour, plant, materials, profit, discounts with local companies, etc. It is purely a final cost figure and that, accordingly, knowledge of public spending by a SPA is in the public interest and to suggest the final figure should be withheld is unreasonable in the circumstances.

The SPA's position

43. The SPA has submitted that disclosing the Withheld Information in respect of Question 1 would harm the SPA's commercial interests with TP1 as it would result in the disclosure of information which both the SPA and TP1 have agreed represent their respective commercial interests. As such the SPA contends that if it were to disclose the answer to Question 1 without the prior written consent of TP1, the SPA would have breached an obligation of mutual trust and confidence with TP1 and thus would be exposed to civil action by TP1 for the loss suffered by disclosing that information and furthermore would irreparably damage the relationship between the SPA and one of the key large construction contractors in the Island. Whilst the SPA cannot exactly quantify what that loss would be at present, they say that this is unlikely to be a *de minimus* amount.
44. Similarly, the SPA believes that if the answer to Question 1 was provided, other contractors on the SPA's open projects could seek to re-negotiate contract sums on the basis that there would be evidence in the public domain that the SPA has or may have done so in the

past. The SPA always provides feedback to unsuccessful tenderers but never reveals the price that has been accepted as this would inhibit the SPA's negotiating power for future capital projects.

45. The SPA also submits that if the Withheld Information pertaining to Question 1 is released, contractors on the SPA's open projects may then believe that they could easily obtain extensions of time awards because the SPA were willing to award extensions of time on this particular Project. This would result in the SPA incurring unnecessary additional costs in dealing with such applications particularly when they are meritless and thus would prejudice the SPA's commercial interests in ensuring that capital projects do not cost more than the original contract prices.
46. The SPA foresees that contractors could use the contract sum for the Project as a baseline for tender submissions for similar projects when in fact the actual cost for the project may be considerably less. If this happened, this would obviously be prejudicial to the SPA's commercial interest stated above, namely ensuring that capital projects do not cost more than absolutely necessary.
47. Overall, the SPA submits that each of these scenarios are more probable than not. Jersey has a limited pool of construction firms in the Island each of whom are competing for the same work and releasing the Withheld Information could lead to a potential overspend on capital projects which is contrary to its commercial interest and thus the public at large.
48. In respect of the public interest test, the SPA indicates that it took into account, amongst other things, the following arguments in favour of making the disclosure:
 - a. There is always a general public interest in governmental bodies and or entities wholly owned or funded by a government to be open and transparent;
 - b. There is a public interest in promoting transparency about the States of Jersey government and those other entities subject to the Law;
 - c. There is a public interest in providing a "full picture" of activities undertaken by government entities;
 - d. The Project involved the use of public funds;
 - e. Ensuring that a tender process is fair and transparent;
 - f. Ensuring that the public authority can be held accountable for its decisions and is providing value for money;
 - g. Providing insight into the nature of a procurement process and winning bids, so that other companies are encouraged to take part in the process and improve future bids, serving to increase competition and achieve value for money for public authorities; and
 - h. The Project has been completed for some time and as such the information relating to it may be regarded as less topical or sensitive.
49. In respect of the arguments in favour of withholding the information, the SPA indicates that it considered the following:
 - a. There is an inherent public interest in upholding private companies' expectations that commercially sensitive information will be protected from disclosure when

they engage in public authority tenders and avoiding reputational and financial damage to private companies.

- b. Avoiding discouragement of prospective tenderers from tendering for public sector contracts, for fear of disclosure of their commercially sensitive information to competitors, and that this may adversely affect the number of contractors available for selection by public authorities for capital projects, the quality of tenders for public sector contracts, and public authorities' ability to negotiate them effectively and in the public's best interests;
- c. Maintaining a competitive market and driving competition as this benefits public authorities and public finances, and this could be threatened by disclosure of companies' commercial information. Disclosing the contract value of the Project could influence current and future bids, and in turn prejudice the SPA's commercial interests and such would be contrary to the public interest in ensuring that the government's financial resources are not exploited by the private sector resulting in government funds being unnecessarily wasted. Furthermore, it cannot be in the public interest to use the provisions of the Law to inhibit the commercial interests of an affected party. The SPA maintains that disclosing the Withheld Information would inhibit TP1's ability to compete in other tenders as its competitors could use the contract sum for the Project to try and estimate and under-cut TP1 in future bids resulting in TP1's ability to secure contracts being compromised. This could ultimately result in TP1 being permanently lost from the market. From the SPA's perspective this would mean that the SPA, by disclosing the Withheld Information had, in effect, shrunk the already small pool of contractors available on the Island for government capital project work. This cannot be in the public interest as to do so would force the SPA into accepting higher prices for capital projects. The information sought in the Request is not typically made available to the public. The SPA has indicated that aside from one specific instance, they are not aware of the States of Jersey (including the Housing Department (as the former contracting party for the Project in question)) having previously disclosed information of a similar nature to that being the subject to the Request. Accordingly, with no similar information already being readily available in the public domain the Withheld Information is unlikely to, in and of itself promote transparency and provide a 'full picture'.
- d. There is limited public interest in the Project given that it has been completed for some time. At the same time, the Project represents only a small part of a major capital investment in and around the Project area. For instance, there is presently a Phase 4 being undertaken with a different contractor to TP1. As such there would be a public interest in not disclosing the Withheld Information, particularly as there are further projects (similar to the Project) being undertaken in and around the same area and, which could prejudice the negotiations in those ongoing projects, which would not be in the public's interest.
- e. The disclosure of the Withheld Information must serve the wider public rather than the private interests of the applicant. As noted above, the Project has been completed for some time and the SPA contends that the public interest in the information sought under the Request is considerably diminished. The fact that the Withheld Information surrounding the Project may be of particular interest to the Complainant and potentially other contractors in Jersey to obtain some intelligence as to 'acceptable' benchmarks for tendering for Government funded capital project work, it does not necessarily follow that its disclosure is in the wider public interest.

- f. There is a public interest in ensuring fair commercial competition in a mixed economy. Releasing the information could hinder this process as tenderers believe that there are always opportunities to obtain extensions of time and additional sums from the SPA. This would fundamentally undermine the SPA's procurement process. This is not in the public interest.
- g. There is a public interest in having disputes between parties settled before the Royal Court if alternative forms of resolving disputes have been exhausted, if that is the appropriate forum. The Law should not be used as a method to obtain pre-action disclosure and/or circumvent any usual Royal Court procedures for discovery.
- h. The SPA would be exposed to civil action from TP1 were it to disclose the Withheld Information without its consent. Accordingly, the SPA considers that it cannot be in the public interest, that the Office of the Information Commissioner which they say is an emanation of the state, funded by Government money, compels another Government owned entity to disclose information which would expose it to civil action and thus resulting in it diverting government's financial resources away from other functions.

The Commissioner's decision

50. For the avoidance of any doubt and particularly in response to the SPA's submission as referred to at para.49(i) above, the Commissioner's office is an independent regulatory authority separate from the Government of Jersey. In respect of its functions relating to the Law, it is obliged to consider appeals made to it regarding information that has been withheld by a scheduled public authority and may order it to release information if it is deemed to have unlawfully withheld information that ought to have been provided to the requester. It carries out this function without fear or favour, as it must do in order to fulfil its obligations under the Law.
51. The Commissioner does not consider that the SPA has been able to demonstrate that the release of a yes/no answer as to whether the final account has been settled would prejudice the commercial interests of either the SPA itself or TP1 particularly noting the confirmation already given by the SPA in response to Question 2 that retention monies have been released. The Complainant suggests that the response to the relevant part of Question 1 showed inconsistency on the part of the SPA given its response to Question 2 and the Commissioner agrees with the Complainant's stance in this regard.
52. In addition, the Commissioner considers that the SPA should have taken more stringent steps to ascertain why TP1 felt that disclosing the information requested at Question 1 would prejudice their commercial interests and they should have done more and obtained a fulsome explanation from TP1 at the time. This failure meant that at the time of providing the response, the SPA was not in a fully informed position as whilst TP1 had advised the SPA that their commercial interests would be prejudiced no further information was provided in support of this assertion and the SPA did not test this stance in any way, simply accepting matters at face value.
53. The Commissioner recognises that there is a significant public interest in the SPA being open and transparent about the relationships it enters into with commercial organisations and that disclosure of the amount of money paid would provide a clear insight as to monies paid by the SPA to TP1 in respect of a particular project and how taxpayer's monies have been utilised. There is an inherent, and very strong, public interest in ensuring that a scheduled public authority's ability to secure value for public money is not undermined.

54. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in his view it would be firmly against the public interest if a company's commercial interests are harmed simply because they have engaged in business with a scheduled public authority and it is important they remain competitive in their rates and disclosing the final figure could have the very real effect of putting them at a competitive disadvantage, both in terms of going up against other companies for contracts and tenders and in terms of negotiating over rates. However, the Commissioner does accept the arguments advanced relating to the final figure referred to in Question 1 and that release of the requested information would prejudice the SPA's commercial interests in the manner suggested and also TP1.
55. In this case there does not appear to be any significant public interest argument for disclosing the final figure and whilst the information may be of interest to the requester it is not clear it would be of wider public interest.
56. He also accepts the SPA's argument that the public interest favours withholding the information and maintaining the Art.33 exemption insofar as regards the second part of Question 1 relating to the "final amount" and the Commissioner has found no public interest factors which outweigh that prejudice.
57. Having considered the information provided by the parties, the Commissioner considers that the SPA has misapplied Art.33 in relation to the part of Question 1 regarding whether or not the amount has been paid but that the SPA has appropriately applied Art.33 in relation to the amount paid as the "*final figure*".

Question 3

The Complainant's position

58. The Complainant has indicated that they are aware that claims were made for extension of time due to late instructions, and a subsequent award was made on 10 June 2013 confirming the new completion date of 10 April 2012.
59. The Complainant believes that there is significant public interest in providing the information in Question 3 and that there is no prejudice to either the SPA or TP1's commercial interests in providing the information sought.

The SPA's position

60. The SPA's position relating to Question 3 are identical to the grounds referred to at paras.41-49 above relation to Question 1. Accordingly, they are not repeated.

The Commissioner's decision

61. The Commissioner has reviewed the responses provided by both parties including those provided by the SPA and as set out above. Whilst TP1 has indicated to the SPA that it considers that disclosure of the Withheld Information relating to Question 3 would prejudice its commercial interests, it has not said how or in what particular way. The Commissioner's guidance is clear that if a SPA seeks to assert that the commercial interests of a third party would be prejudiced by disclosure, they need to provide cogent evidence of this rather than just a blanket assertion as in this case. Accordingly, and given the failure of the SPA to properly record TP1's views on this point, the Commissioner does not consider that the SPA has demonstrated that TP1's commercial interests would be prejudiced by disclosure, as they have asserted.

62. However, the SPA has provided cogent arguments as to why they believe disclosure of the Withheld Information would prejudice their own commercial interests and the Commissioner accepts the SPA's submission that release of the requested information would prejudice the SPA's commercial interests in the manner suggested.
63. The Commissioner recognises the Complainant's point of view and acknowledges that they are already aware of certain extensions of time having been granted to TP1 in respect of the project. The Commissioner also accepts that there is a significant public interest in the SPA being open and transparent about the relationships it enters into with commercial organisations and the reasons for projects taking, perhaps, longer to complete than as originally envisaged.
64. However, in the Commissioner's opinion there is also very strong and inherent public interest in ensuring fairness of competition and in his view it would be firmly against the public interest if a company's commercial interests are harmed simply because they have engaged in business with a scheduled public authority and the Commissioner considers that the prejudice claim is real, actual and of substance and that on this basis Art.33(b) of the Law was correctly engaged insofar as it relates to the SPA.
65. As Art.33 is a qualified exemption, the Commissioner has then gone on to consider the public interest arguments in this case. The public interest arguments advanced by the Complainant and the SPA have been well articulated by both parties. On balance, however, the Commissioner considers that the SPA's arguments are the more compelling in terms of the public interest in disclosure regarding the answer to Question 3.
66. Accordingly, the Commissioner finds that the public interest in withholding disclosure outweighs the public interest in ordering disclosure and that the SPA correctly applied Art.33 in its Response, as upheld at the Internal Review.

The Decision

67. In respect of Question 1, the SPA must advise whether the "final amount" has been paid but it does not need to divulge the amount paid. It must provide this information within 28 days of the date of this Notice.
68. In respect of Question 3, there is no further action the SPA needs to take.

Right of Appeal

69. An aggrieved person has the right to appeal against this Decision Notice to the Royal Court of Jersey.
70. Information on how to do so can be found on www.jerseyoic.org.
71. Any Notice of Appeal should be served within 28 (calendar) days of the date on which the Decision Notice is issued.

Dated this 20th day of August 2020

Signed.....

A handwritten signature in black ink, appearing to read 'Paul Vane', with a horizontal line underneath.

Mr Paul Vane

Deputy Information Commissioner

Office of the Information Commissioner

5 Castle Street

St Helier

Jersey

8 General right of access to information held by a scheduled public authority

If a person makes a request for information held by a scheduled public authority –

- (a) the person has a general right to be supplied with the information by that authority; and
- (b) except as otherwise provided by this Law, the authority has a duty to supply the person with the information.

9 When a scheduled public authority may refuse to supply information it holds

(1) A scheduled public authority may refuse to supply information it holds and has been requested to supply if the information is absolutely exempt information.

(2) A scheduled public authority must supply qualified exempt information it has been requested to supply unless it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.

(3) A scheduled public authority may refuse to supply information it holds and has been requested to supply if –

- (a) a provision of Part 3 applies in respect of the request;
- (b) a fee payable under Article 15 or 16 is not paid; or
- (c) Article 16(1) applies.

13 Time within which a scheduled public authority must deal with a request for information

(1) A scheduled public authority must deal with a request for information promptly.

(2) If it supplies the information it must do so, in any event, no later than –

- (a) the end of the period of 20 working days following the day on which it received the request; or
- (b) if another period is prescribed by Regulations, not later than the end of that period.

(3) However, the period mentioned in paragraph (2) does not start to run –

- (a) if the scheduled public authority has, under Article 14, sought details of the information requested, until the details are supplied; or
- (b) if the scheduled public authority has informed the applicant that a fee is payable under Article 15 or 16, until the fee is paid.

(4) If a scheduled public authority fails to comply with a request for information –

- (a) within the period mentioned in paragraph (2); or

(b) within such further period as the applicant may allow,

the applicant may treat the failure as a decision by the authority to refuse to supply the information on the ground that it is absolutely exempt information.

(5) In this Article "working day" means a day other than –

(a) a Saturday, a Sunday, Christmas Day, or Good Friday; or

(b) a day that is a bank holiday or a public holiday under the Public Holidays and Bank Holidays (Jersey) Law 1951^[4].

18 Where a scheduled public authority refuses a request

The States may, by Regulations, prescribe the manner in which a scheduled public authority may refuse a request for information.

33 Commercial interests

Information is qualified exempt information if –

(a) it constitutes a trade secret; or

(b) its disclosure would, or would be likely to, prejudice the commercial interests of a person (including the scheduled public authority holding the information).