



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

Tribunal Reference: EA/2013/0175
Appellant: Mrs D Havercroft
Respondent: The Information Commissioner
Judge: NJ Warren
Member: A Chafer
Member: G Jones
Hearing Date: 17 January 2014
Decision Date: 10 February 2014

DECISION NOTICE

1. In summer 2012 NHS South of England instructed a firm of solicitors to deal with requests under the Freedom of Information Act (FOIA) made by the appellant, Mrs Daphne Havercroft. NHS South of England disappeared in April 2013 and its responsibilities, so far as concerns this appeal, have been taken over by the Department of Health Legacy Management Team.
2. On 3 October 2012 Mrs Havercroft wrote to NHS South of England asking for a copy of the contract with the firm of solicitors containing their instructions to it in respect of her and a group to which she belonged including instructions on the handling of requests under FOIA and the Data Protection Act. She also asked what costs had been incurred. The solicitors responded on behalf of NHS South of England. They sent Mrs Havercroft a copy of their standard terms of contract. They also told her that the costs incurred so far were about £3,000. They declined to explain the charging rates on the grounds that this information was commercially sensitive, thus invoking section 43 FOIA. They also declined to disclose the

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instructions on the ground that these were exempt information under Section 42 FOIA (which deals with legal professional privilege).

3. Mrs Havercroft complained unsuccessfully to the ICO and now appeals to the Tribunal against the ICO decision notice. Originally, Mrs Havercroft asked for a hearing of her appeal but on 23 November 2013 she indicated to the Tribunal that she had changed her mind. Both sides consent to the case being decided without a hearing and we are satisfied that we are able to do that.
4. In a skeleton argument dated 8 January 2014 Mrs Havercroft describes the breakdown of the solicitors' costs as being of secondary importance. That being so, we can deal with that issue briefly. We entirely accept the ICO's conclusion in his decision notice that the exemption in Section 43(2) FOIA which concerns information the disclosure of which would or would be likely to prejudice the commercial interests of any person, is engaged. There is a competitive market in providing legal services to public authorities. This particular firm of solicitors should not be disadvantaged in that market by the public disclosure of their charge rates in this particular instance. We also entirely agree with the ICO's conclusion that the public interest in maintaining that exemption outweighs the public interest in disclosure of the information. Indeed, once the amount of the costs has been disclosed, the public interest in disclosure of the charge rates seem to us to be tiny.
5. We turn then to consider whether the information concerning the instructions given to the solicitors is exempt under Section 43 FOIA. There is no doubt that the exemption is engaged. We therefore carried out the public interest balancing test. Mrs Havercroft says that the purpose of her request is to establish the truth as to why NHS South of England sought to avoid subjecting itself to the test of public judgements and also to establish whether the instructions to the solicitors complied with the Data Protection Act and other statutes. She asserts there is a public interest in seeing information which will shed light on why the health authorities sought to hide from public scrutiny by engaging solicitors. We do not share Mrs Havercroft's certainty that the motives for instructing solicitors were those which she describes.

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On the evidence before us, there seems to us to be very little, if any, public interest in disclosure in the instructions; it comes no where near the weighty public interest required for us to override legal professional privilege (see the observations of the Upper Tribunal in DCLG v The Information Commissioner and WR (2012) UKUT 103 (AAC) especially at paragraphs 36-46). In our judgement the ICO correctly concluded that the balance of the public interest favoured the maintenance of the exemption.

6. Having dealt with the issues of commercial prejudice and legal professional privilege it did not seem to us that any further issues arose under the Data Protection Act – although these had been explored by the ICO.
7. We were furnished with a copy of the disputed information although in the event it did not materially affect our deliberations.
8. For these reasons we dismissed the appeal.

NJ Warren

Chamber President

Dated 10 February 2014