

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2018

Public Authority: Financial Conduct Authority
Address: 12 Endeavour Square
London
E20 1JN

Decision (including any steps ordered)

1. The complainant has requested information relating to the proportion of the budget for the Financial Conduct Authority's (FCA) Payment Protection Insurance (PPI) awareness advertising campaign that went towards paying for the right to use a named celebrity's image in that campaign. The FCA applied sections 40(2) (third party personal data) and 43(2) (commercial interests) of the FOIA to withhold the information.
2. The Commissioner's decision is that the FCA was entitled to rely on section 43(2) of the FOIA to withhold the information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. The complainant made the following request for information to the FCA:

"Please could you tell me how much of your budget in the PPI awareness campaign that features the head of Arnold Schwarzenegger went towards paying for the right to use Mr Schwarzenegger's image in the advertisements?"

Did you consider using any other celebrities, and if so who were they and how much were you quoted for using their images?"

5. The FCA responded on 26 September 2017. It stated that it was refusing to provide the information the complainant requested in the first part of his information request, citing sections 40(2) and 43(2) of the FOIA as its basis for doing so. With regards to the second part of the complainant's information request, the FCA confirmed that "*no other celebrities were considered as the face of this campaign*".
6. The complainant requested an internal review on 21 October 2017. The FCA sent the outcome of its internal review on 3 November 2017 in which it upheld its original position. However, the FCA provided the complainant with a breakdown of its current estimated forecast spend for the total campaign budget. The breakdown provided the likely expenditure across a number of different elements of the campaign, including the production element, which includes the fee paid to Mr Schwarzenegger, alongside other cast members and production costs.

Scope of the case

7. The complainant contacted the Commissioner on 21 January 2018 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the FCA was correct to apply sections 40(2) and 43(2) of the FOIA to withhold the requested information.

Reasons for decision

Section 43 – prejudice to commercial interests

9. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
10. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and

- Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.
11. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case, the withheld information relates to the fee paid to a named individual in respect of the FCA's PPI awareness campaign. The Commissioner is satisfied that the information relates to the purchase and sale of services and is therefore commercial.
 12. The FCA has argued that disclosing the fee paid to the named individual would be likely to prejudice both its own commercial interests and those of the named individual.
 13. It is therefore necessary to consider whether the FCA has demonstrated that disclosing the withheld information would cause both its own and the third party's commercial interests to be prejudiced.
 14. In relation to the commercial interests of third parties it is not appropriate to take account of speculative arguments which are advanced by public authorities about how any prejudice may occur. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects arguments advanced by the public authority to be based on its prior knowledge of the third party's concerns.
 15. In the FCA's submission to the Commissioner, it has stated that as part of the internal review process and the Commissioner's investigation, it consulted the named individual's production company in respect of the disclosure of the withheld information. The production company confirmed that it considered the disclosure of the withheld information would be likely to harm the third party's commercial interests.
 16. The FCA and the production company are both of the view that the disclosure of the withheld information would be likely to hinder the ability of the named individual and the FCA to participate competitively in commercial activity, negotiate effectively in relation to similar future contracts, and successfully enter into comparable transactions with other commercial entities.
 17. The FCA has explained that its PPI awareness campaign is an innovative and effective way of getting an important message across to consumers to help them understand the potential issues of financial mis-selling of PPI and how they can complain if they are dissatisfied. The FCA has stated that it therefore does not want to undermine its ability to

undertake a similar campaign with another high profile individual in the future because it had previously disclosed the named individual's fee (and may therefore disclose the fee of any future high profile individual it wished to work with).

18. The FCA has referred to the Commissioner's 'commercial interests (section 43)' guidance¹. In particular a public authority should take into account, when considering whether to disclose commercially sensitive information, whether it is prevented from making the disclosure by any legislation used to obtain the information or by a duty of confidence. The FCA has stated that the latter applies in this case, as the contract with the named individual's production company contains a confidentiality clause.
19. The Commissioner has considered the arguments put forward by the FCA and the named individual's production company. The Commissioner considers that it is reasonable to accept that disclosing the information is likely to create a 'benchmark' of the amount the FCA would be willing to pay, and that this would therefore prejudice the FCA's ability to achieve value for money in future negotiations. Additionally, should high profile individuals believe that their fees may be publicly disclosed, this may damage the FCA's ability to attract high profile individuals to support public service campaigns in the future. The Commissioner therefore accepts that disclosure of the withheld information would be likely to prejudice each of the specified interests.

Public interest arguments in favour of disclosure

20. There will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority such as the FCA carries out its functions. This public interest is heightened where the information relates to the spending of public money.
21. The complainant is not convinced that in 'all the circumstances' the balance of public interest would fall in favour of maintaining the exemption and withholding the requested information. The complainant is of the view that this case is unique and therefore there is a heightened public interest in the fees associated with this campaign, particularly as a very well-known celebrity has supported this campaign. The complainant therefore believes there is a genuine public interest in

¹ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

how much that has cost the FCA, especially as it takes funds from the companies it monitors.

22. The FCA has acknowledged that there is a general public interest in promoting openness and transparency about the mechanisms it uses to ensure the delivery of its strategic and operation objectives, and in this particular case, the arrangements and costs of the campaign to make the public aware of the deadline to make a complaint about mis-sold PPI.
23. The FCA has stated that this will not only improve its accountability but also facilitate informed comments on its approach to managing its resources (including the firms that it received funding from) and ensuring that it makes best use of its time and budget to get the best results possible.
24. The FCA has stated that it has to adhere to an 'efficiency' principle to ensure that the resources it has access to are used in the most effective and efficient way. The FCA has explained that the disclosure of the information will show that the FCA is providing 'value for money'.
25. The FCA has also stated that there is a general public interest in favour of making publically available the payments it makes to its suppliers. The FCA has explained that this would further the understanding of the individual aspects of the contracts awarded, providing consumers and potential suppliers with additional information on which they can base decisions about their dealings or possible dealings with the FCA.

Public interest arguments in favour of maintaining the exemption

26. The FCA has stated that there is a strong public interest in it being able to carry out its functions in the most effective way possible. It has explained that the ad-hoc disclosure of information relating to its contractual arrangements with its suppliers, and in this case with the named individual, has the potential to unnecessarily prejudice its bargaining position when negotiating similar contracts in the future. The FCA says this could undermine its position to undertake a similarly innovative and effective approach in the future to get an important message across to consumers.
27. It has stated that the named individual and the FCA operate in a highly competitive environment, and there is a clear risk that the details of the amount paid to the named individual to use their image would be used in future sensitive negotiations about similar contracts and transactions. The FCA has explained that third parties armed with this knowledge would be able to discern the financial circumstances relating to the

contract with the named individual, and could therefore adjust their own payment demands or negotiating position accordingly.

28. It has also stated that it is undesirable that future suppliers of services to the FCA gain an understanding of the level of charges it accepts by reference to the fee of the named individual. It has explained that if the level of charges can be predicted, this might affect how future potential suppliers consider how much the FCA would be willing to pay for similar services in the future, which it says would allow suppliers to set their pricing structure with this in mind rather than offering the FCA the most competitive terms available. The FCA says that this in turn will impact on its ability to obtain best value.
29. The FCA has stated that it is likely that the named individual's commercial interests would also be harmed by the disclosure of the withheld information because other potential customers will gain an understanding of what level of pricing the named individual, their agency, or the production company were prepared to offer the FCA. It has explained that this may be more or less than the customer would otherwise have anticipated and be prepared to accept. The FCA has gone on to explain that any high profile individuals that it might approach in the future would be deterred if it were to now disclose the named individual's fee.
30. The FCA considers that the release of the withheld information might prejudice the commercial interests of any third parties associated with its advertising campaign, including voiceover artists and other actors, by compromising their position to negotiate work in the future. It also considers that the disclosure could risk setting a precedent that might deter other celebrities from supporting public service campaigns.
31. The FCA has explained that the process of the named individual's production company providing the confidential pricing information for using the named individual's image was conducted in confidence, and it was understood that the information should remain commercially sensitive.
32. The FCA has stated that the underlying information is both current and will have future relevance as the PPI awareness campaign continues to run until the final deadline to claim mis-sold PPI at the end of August 2019. The FCA has explained that its research has shown that consumers had 'switched off' from the issue of PPI, but the use of the named individual's image in its PPI awareness campaign has served to generate impact in getting consumers to pay attention because the named individual is a recognised character and delivers a clear message. The FCA has stated that it does not want to risk jeopardising future campaigns, and thereby the public's understanding, if other high profile

individuals were put off from participating by the named individual's fee being disclosed publicly.

33. The FCA has concluded that it considers that considerable caution is required where commercial interests would be likely to be prejudiced by disclosure and it remains of the view that the public interest in maintaining the section 43(2) exemption, in the present case, is stronger than the public interest arguments in favour of disclosure.
34. The disclosure of the information would not be in the public interest from the FCA's perspective, as it would reduce the FCA's ability to negotiate or compete in a commercial environment, cause reputational damage, and negatively impact future negotiations for public service campaigns.

Balance of public interest arguments

35. The Commissioner has considered both the factors in favour of disclosure and those in favour of maintaining the exemption and she fully acknowledges the general public interest in transparency and accountability. Additionally, in this case, disclosing the fee paid to the named individual would give an insight into the spending of the FCA in respect of its PPI awareness campaign. That being said, the Commissioner notes that the FCA has provided a breakdown of its current estimated forecast spend for the total campaign budget, which provided the likely expenditure across a number of different elements of the campaign. This included the production element, which includes the fee paid to the named individual.
36. Beyond increasing transparency, the Commissioner does not consider there to be any other compelling public interest arguments in favour of disclosing the information.
37. Balanced against this, the Commissioner has accepted that it would be likely to prejudice the FCA's commercial interests through disclosure of this information and she considers that any arguments in favour of disclosure are somewhat diminished by the information the FCA has provided in respect of the breakdown of the total campaign budget. The Commissioner considers that there is significant public interest in not prejudicing the commercial interests of the FCA, not only in securing value for money, but in ensuring it can operate efficiently in its duty to inform consumers and help them understand the potential issues of mis-selling of PPI and how they can complain if they are dissatisfied.
38. The Commissioner therefore finds that section 43(2) has been properly engaged and that in all the circumstances of the case, the public interest test favours maintaining the exemption. As the Commissioner has found

that section 43(2) is engaged, she has not gone on to consider the FCA's subsequent additional reliance on section 40(2) in respect of the named individual.

Right of appeal

39. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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