

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2022

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information relating to costs of litigation. The above public authority ("the public authority") eventually disclosed some information but relied on section 43 of FOIA (commercial interests) and section 40(2) of FOIA to withhold the remainder.
2. The Commissioner's decision is that the public authority is entitled to rely on section 40(2) in the manner that it has done. He also finds that section 43 of FOIA is engaged in respect of the hourly rates agreed and that the balance of the public interest favours maintaining the exemption. The Commissioner does not accept that section 43 is engaged in relation to the name of the firm or chambers that has been retained. The public authority breached section 10 of FOIA as it disclosed information outside of the 20 working day timeframe.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the name of the law firm or chambers that has been withheld.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 March 2022, the complainant wrote to the public authority and requested information in the following terms:

"It has been reported that the Government is planning to spend up to £1.2 million in defending a judicial review challenge from the Good Law Project about a contract awarded to Bunzi Healthcare by the Department of Health and Social Care. This is a huge sum for what is expected to be a one day hearing. Government costs for such proceedings rarely exceed £100,000.

"I request that you provide me with any document that confirms the Government has authorised its lawyers to spend such an exorbitant sum, or alternatively justifies such spending."

6. The public authority responded on 22 March 2022. It relied on section 43 of FOIA to withhold the information – a position it upheld at internal review.

Background

7. The request refers to a judicial review, brought by a group calling itself "the Good Law Project" (GLP) against a decision, by the public authority, to award a contract for personal protective equipment to Bunzi Healthcare. In short, GLP alleges that this contract was awarded either illegally or improperly.
8. GLP sought a Cost Capping Order against the public authority when the public authority claimed its legal costs could reach £1.2m. A Cost Capping Order limits the amount of the opposing side's legal fees a party to litigation would be required to pay, in the event that they lose the case. In July 2022, GLP was granted an Order, limiting the costs, that either side would be required to pay, to £300,000. Should the Government's costs exceed that figure, the balance will fall on taxpayers.

Scope of the case

9. At the outset of his investigation, the Commissioner wrote to the public authority setting out that, based on the responses provided, the public authority may not have interpreted the request correctly. The focus of the request was on the process by which the legal spend had been approved, not the actual sums involved.

10. Following the Commissioner's intervention, the public authority revisited its approach to the request. It now disclosed a redacted version of the business case that had been put forward to justify the spend, along with four chains of emails in which the matters was discussed. The public authority continued to withhold contact details, the names of junior officials, the actual fees agreed and the name of the firm or chambers which had been instructed to defend the claim.
11. The complainant remained dissatisfied with the outcome, arguing that all the information should be disclosed.

Reasons for decision

12. Section 43 of FOIA allows a public authority to refuse to disclose information that would prejudice either its own commercial interests or those of a third party.
13. In decision notice FS50718900, the Commissioner set out why he considered that disclosing the specific rates a public authority had agreed with a barrister or their chambers would prejudice both the commercial interests of that public authority and of the barrister (or their chambers) concerned.¹ The Commissioner is satisfied that the exemption is engaged in the present case for the same reasons as set out in paragraphs 8-16 of decision notice FS50718900.
14. The complainant has argued that, by claiming such a large sum in projected costs, the public authority was intending to intimidate GLP into dropping its claim and therefore there was a public interest in understanding what the costs were and how they had been approved by the public authority. The Commissioner does not find such an argument persuasive.
15. Even if the Commissioner were to be persuaded that the public authority had acted inappropriately (and he expresses no view on the matter either way), it is not clear how disclosing this particular information (the agreed rates) would add to public understanding. The £1.2m figure is already in the public domain and the public authority has now disclosed a copy of its business case, along with assorted chains of correspondence approving it. Therefore its reasoning is now in the public

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259518/fs50718900.pdf>

domain – meeting any public interest in transparency without revealing information that would be likely to have the effects set out in paragraph 13 above.

16. The Commissioner is therefore satisfied that, in respect of the agreed rates, the balance of the public interest favours maintaining the exemption.
17. In respect of the name of the firm or chambers that has been instructed, the Commissioner is not persuaded that the exemption is engaged.
18. An article in the Law Gazette (albeit one published after the request was responded to) names the lead counsel for the public authority during the Cost Capping Order proceedings.² A quick search identifies the chambers this particular barrister is a member of. It would be unusual for a public authority to instruct different lead counsel for different parts of the litigation and therefore the Commissioner considers it likely that the lead counsel's chambers is the firm referred to (although he has not seen the withheld information so cannot confirm whether this is or is not the case).
19. However, even if the Commissioner is wrong on this point, once a decision has been promulgated by the court, the public authority's lead counsel will be named and that name can easily be traced back to a particular firm. Furthermore, the name of the firm will be released at some point anyway when the public authority publishes its spending data – as it is required to do by law.
20. Therefore, whilst the Commissioner accepts that the name of this firm or chambers was not definitively in the public domain at the point of the request, he considers it highly likely that it soon will be. The public authority has not put forward any argument that would explain why a premature disclosure of the name would be harmful.
21. The Commissioner therefore considers that this information does not engage the exemption and should be disclosed.

² <https://www.lawgazette.co.uk/news/good-law-project-wins-costs-cap-in-ppe-case/5113029.article>

Personal data – section 40

22. As he has done in many cases, the Commissioner accepts that the public authority was entitled to withhold contact details and the names of junior officials.
23. There is a legitimate interest in knowing which senior civil servants or ministers were kept in the loop. This is already met by disclosing the information with the names of senior civil servants unredacted. The Commissioner can see no legitimate interest in disclosing contact details or the names of junior officials. Such disclosure would therefore be unlawful and thus section 40(2) of FOIA is engaged.

Procedural matters

24. The Commissioner notes that in this case the public authority disclosed information outside of the 20 working day timeframe. He is therefore obliged to record a breach of section 10 of FOIA.

Other matters

25. The Commissioner notes that the public authority's original arguments as to why section 43 were engaged centred around harming its ability to defend itself successfully in litigation. Whilst the Commissioner accepts that there may be in the public interest for public authorities to be able to defend themselves, when appropriate, he would note that the ability to defend against litigation is not a **commercial** interest.

Right of appeal

26. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

27. 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.
28. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF