

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2022

Public Authority: UK Health Security Agency
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested the UK Health Security Agency (UKHSA, formerly known as Public Health England or PHE) to disclose the total amount spent on locum consultants in the microbiology department in Birmingham between April 2020 and the date of the request. They also asked for the most spent on one individual consultant during the same time period. UKHSA refused to disclose the requested information citing section 40(2) and 43 of FOIA.
2. UKHSA later withdrew its application of section 40(2) but proceeded on the basis that the requested information was still exempt in accordance with section 43 of FOIA.
3. The Commissioner's decision is that UKHSA is entitled to refuse to disclose the requested information in accordance with section 43 of FOIA. He therefore does not require any further action to be taken.

Request and response

4. On 17 January 2021, the complainant wrote to UKHSA and requested information in the following terms:
 - “1) May I ask for information regarding PHE Birmingham and the locum spend on consultants in the microbiology department.
 - 2) Specifically, the total amount since April 2020 and the most paid to a single individual in this time.”
5. UKHSA responded on 16 February 2021. It refused to disclose the requested information citing section 40(2) and 43 of FOIA.
6. The complainant requested an internal review on 28 February 2021.
7. UKHSA responded on 5 March 2021. It upheld its previous application of section 40(2) and 43 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 21 March 2021 to complain about the way their request for information had been handled. The complainant is of the view that UKHSA has paid a large amount of tax payers' money to support the microbiology department of University Hospitals Birmingham in the form of locum payments. They believe it is in the public interest to better understand how such public money has been utilised. They believe it is possible to provide the requested information without prejudicing the commercial interests of the parties concerned. They stated that they asked for the total amount paid, not rates of pay or the names of any individuals.
9. During the Commissioner's investigation UKHSA withdrew its reliance on section 40(2) of FOIA. It was agreed that it was not possible to determine from the information available whether the withheld information constituted personal data. It was therefore agreed to proceed on the basis that section 43 of FOIA applies.
10. The Commissioner's investigation has therefore determined whether UKHSA is entitled or not to refuse to disclose the withheld information in accordance with section 43 of FOIA.

Reasons for decision

11. Section 43 of FOIA states that a public authority may refuse to disclose information if its disclosure would or would be likely to prejudice the commercial interests of the public authority and/or a third party.
12. It is a qualified exemption. So in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the public authority and/or a third party, the public authority must consider the public interest test. It must weigh up the public interest arguments in favour of disclosure against the public interest arguments in favour of maintaining the exemption. It then needs to demonstrate that the balance of the public interest test rests in maintaining the exemption.
13. UKHSA confirmed that the total spend during the period specified in the request relates to one single locum consultant microbiologist in Birmingham. The consultant microbiologist was supplied by an agency. UKHSA paid the supplier and then the agency paid the consultant microbiologist via its PAYE payroll system. It stated that because there was only one single locum consultant microbiologist the answer to the two elements of question two of the request are the same. The withheld information equates to the total amount spent during the timeframe specified in the request on locums and the most paid to the agency during the same period for a single locum consultant microbiologist.
14. UKHSA confirmed that disclosure would expose the negotiated salary for a single locum consultant within an extremely small pool of expertise. This would be likely to prejudice its own commercial interests, as it would disclose the total paid for the locum consultant's services to the agency over a defined period of time. It would be likely to prejudice UKHSA's ability to negotiate and compete within a competitive environment and to secure such services in the future at a competitive price.
15. UKHSA went on to say that disclosure would be likely to damage procurement, by taking away the ability to negotiate sensitively and competitively. This would in turn put aspects of public health at risk if it was unable to fill vital roles and perform certain services. It argued that commercial interests are entwined with the expertise needed when protecting public health, and disclosure would be likely to damage the service for securing that expertise.
16. UKHSA also argued that disclosure would be likely to prejudice the commercial interests of the agency. It stated that the agency is also

operating in a highly competitive environment, offering consultants with specific areas of expertise for a negotiated price. Disclosure would be likely to hinder the agency's ability to negotiate competitively and secure the best possible prices for the services and staff it offers.

17. UKSHA commented further that agencies will expect their pricing models to be kept confidential. If UKHSA was required to disclose such information it would be likely to deter potential recruitment agencies from engaging with UKHSA and sharing this type of information. This would in turn be likely to negatively impact upon the quality and quantity of recruitment agencies within UKSHA's and the government's supplier network. It stated that stakeholders would be unwilling to work with UKHSA in the future if it was to compromise their private commercial interests in this way.
18. The Commissioner asked UKHSA to confirm whether it had contacted the agency concerned about the request and whether the arguments it has presented in terms of the likely commercial damage to the agency originated from the agency itself. UKHSA advised that it is unsure whether contact was made initially, at the time the request was being handled, but it has contacted the agency now and the agency is of the view that disclosure would be likely to damage its commercial interests for the reasons stated above.
19. The Commissioner has reviewed the withheld information and he is satisfied that disclosure would be likely to prejudice the commercial interests of both UKHSA and the agency and therefore section 43 of FOIA is engaged. He will now explain why.
20. He notes that disclosure would reveal the total spent for locum consultants over the period specified in the request. It would also reveal the most UKHSA paid for one single consultant over the same time period, as only one consultant was contracted to supply services at Birmingham. It would reveal exactly what UKHSA and the agency concerned negotiated and secured for a set period, for one consultant and the types of services required. If this information was disclosed it would be likely to hinder both UKHSA's and the agency's ability to negotiate in future procurement exercises for similar services, as it would reveal what each was willing to pay/accept. Other agencies wishing to compete for similar work would know upfront what UKHSA was willing to pay for this time period and the types of services that this would have included. It would enable them to tailor their bids accordingly. Similarly, it would enable competing agencies to potentially outbid the agency concerned.
21. The Commissioner accepts that given the commercial sensitivity of the information in question here, disclosure would be likely to deter

stakeholders, the agency concerned and other agencies within the marketplace from engaging so freely with UKHSA in the future. This would limit the pool of expertise available to UKHSA when future locum support is required.

Public interest test

22. UKHSA advised that it recognised the public interest in transparency and its commitment to be open and transparent. It accepts that disclosure of the withheld information would present a full picture of the public expenditure concerned and enable wider public scrutiny of its decision making and use of public resources.
23. However, it considers the public interest rests in maintaining the exemption. It stated that disclosure would reveal the negotiated salary for a single locum consultant over a specified timeframe; a locum within an extremely small pool of expertise. Disclosure would be likely to prejudice the commercial interests of UKHSA and the agency concerned for the reasons explained above and this is not in the interests of the wider public.
24. It argued that it is not in the public interest to damage UKHSA's ability to compete competitively for such services or similar, as this would result in a less effective use of public money. It could result in UKHSA having to pay more for similar services which is not in the interests of the wider public. UKHSA stated that disclosure would be likely to deter the agency and others from engaging with it for fear that commercially sensitive information could be disclosed. This would reduce the pool of available expertise and negatively affect the quality and quantity of suppliers available. This is not in the public interest.
25. The Commissioner recognises the public interest in openness, transparency and accountability. He notes in this case that disclosure would reveal how much UKHSA has spent on locums for the timeframe specified and enable members of the public to scrutinise this spend more closely and assess for themselves whether value for money has been achieved.
26. However, in this case the Commissioner agrees with UKHSA that the public interest rests in maintaining the exemption. He accepts that it is not in the interests of the wider public to prejudice the ability of UKHSA and the agency concerned from competing fairly in a highly competitive and expert market place. If it was revealed how much UKHSA was willing to pay for the locum consultant over the timeframe specified, it would prevent UKHSA from securing similar or better terms in future procurement exercises. This could be at an additional cost to the public purse.

27. Given the information in question, the Commissioner has accepted that disclosure could deter the agency and others from engaging so freely with UKHSA and other government departments in the future. This would reduce the pool of expertise available to UKSHA, possibly result in it having to pay more for the services it required and put aspects of public health potentially at risk. Again this is not in the public interest.
28. For these reasons the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

29. 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

30. 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.
31. 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

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