

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2019

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested from the Parliamentary and Health Service Ombudsman (PHSO) the hourly rates of all legal professionals instructed and the total sums paid to each firm (they were employed by) between 2017 and 2018. The PHSO disclosed the total sums paid to each firm but applied section 43(2) of the FOIA (commercial interests) to withhold the hourly rates of each legal professional.
2. The Commissioner's decision is that the PHSO has correctly applied section 43(2) of the FOIA to the withheld information and the public interest in maintaining the exemption outweighs the public interest in disclosure.
3. The Commissioner does not require the PHSO to take any steps as a result of this decision.

Request and response

4. On 27 August 2018, the complainant wrote to PHSO and requested information of the following description.

"1. Please provide the names of all legal professionals you engaged during the year 2017/18 who were paid by the hour.

2. Please state the hourly rate of each. If the hourly rate of any particular individual varied during the year, please provide the lowest and the highest rate.

3. Please provide the total amount paid to each during 2017/18. I would like the figures to show the gross amount (net plus VAT) paid in each case, similar to how the Government Legal Department (GLD) has done it in response to this FOIA request concerning [redacted]:
<https://www.whatdotheyknow.com/request/5...>"

5. On 19 September 2018 the PHSO responded. In regard to point 1 and 3 of the request, it provided the names and total amount paid to each firm the legal professionals were employed by. In regard to point 2, it applied section 43(2) of the FOIA to withhold the hourly rate of each legal professional.
6. On 1 October 2018 the complainant wrote to the PHSO and requested a review of its handling of his request. His request for review focussed on point 2 stating that if the hourly rate paid to each legal professional was anonymised this would not prejudice the commercial interests of the PHSO. He said that it had previously disclosed the hourly rate paid to an unnamed barrister, and given that a (named) QC could be instructed at £230 per hour, there was a genuine public interest in knowing how many barristers have been instructed by the PHSO and what they are charging for their services.
7. On 30 October 2018 the PHSO conducted a review and wrote to the complainant maintaining its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 7 November 2018 to complain about the way his request for information had been handled.
9. The Commissioner notes that, under point 1,2 and 3 of the request the complainant originally requested the names, hourly rates and totals paid to each of the legal professionals, and that in its initial response to the request, the PHSO provided the name of firms the legal professional were employed by and the total paid to each firm. She further notes that in his request for an internal review to the PHSO, the complainant did not raise any issues with its interpretation of and responses to parts 1 and 3 of the request, e.g., not being provided with the names of and

totals paid to each legal professional. He instead only focused his complaint on the PHSO's application of section 43(2) of the FOIA to the information requested under part 2, and added that the names of the legal professionals could be anonymised. The Commissioner has therefore only considered the matter raised to her by the complainant, specifically; whether the PHSO was correct to apply section 43(2) of the FOIA to withhold the hourly rates of legal professionals instructed between 2017 – 2018. The Commissioner wrote to the complainant notifying him of the scope of her investigation, and asked him to respond within 10 working days if he did not agree, the complainant did not respond raising any issues with the scope of the investigation.

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. Section 43(2) of the FOIA states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

11. In order for a prejudice based exemption, such as 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 applicable interests within the relevant exemption;
- 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 which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather 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 public authority to discharge.

The complainant's view

12. The complainant disputed the PHSO's position that disclosing the hourly rates of the legal professionals anonymised would harm its own interests as it would simply reveal what it is paying for legal services.

The PHSO's submission

13. The PHSO said that disclosure of the withheld information would be likely to prejudice its own and the legal professionals' interests. It explained that if the highest and lowest hourly rates of all legal professionals instructed between 2017 and 2018 were released it would enable existing legal professionals and prospective legal professionals bidding for future contracts to see the hourly rates the PHSO has paid and expect the same rate it had previously agreed to (with another firm) and could use this as a starting point in negotiations. This could lead to it paying over the market rate for work based on a previously agreed hourly rate. Consequentially, the PHSO would be unable to enter into future negotiations relating to hourly rates on an equal footing, affecting its ability to negotiate competitively, weakening its position and minimising its ability to obtain maximum value for money. It said that legal professionals currently instructed may also question existing rates. It said that disclosure would similarly be likely to affect the ability of the legal professionals instructed to enter into negotiations over hourly rates on equal footing during negotiations with prospective clients who are likely to resist higher rates for future work. It said that the legal professional's existing clients may also question existing rates.
14. The PHSO provided the Commissioner with submissions from a firm whose legal professionals' hourly rates are within the scope of the request and the withheld information. They said that they specialise in providing legal support to public sector organisations, that there are a relatively small number of legal professionals/firms that specialise in this work and the market is increasingly competitive. They said that it is common for public sector clients to enter into long term agreements with legal professionals/law firms with a fixed hourly rate and that their hourly rate has generally been very static over recent years to support their clients in managing the public sector funding cuts they have faced and continue to face. They said that 70% of their client base is public sector, if their hourly rates, which are common to the PHSO and other clients, are made available to its competitors, they would be able to determine the rates they are/may be charging under existing and future contracts and may elect to lower their rates to make their offering more

attractive diminishing their commercial advantage, particularly as many public sector tenders give a significant weighting to pricing and therefore disclosure of this information would put them at a significant disadvantage. This would be likely to prejudice its ability to bid and win new work.

15. They also said that all work done for clients is billed on an hourly rate basis and the PHSO is billed on the hourly rates agreed and there is no flexibility in regard to this. They said that disclosure of the hourly rates could also lead to other existing clients of the firm questioning the rate agreed where they exceed the rates upon which it works with the PHSO. Prospective future clients of the firm would also be likely to resist higher rates if they were to know the rates agreed with the PHSO a number of years ago. The PHSO said that it is concerned that in this context disclosure of the information could lead to legal professionals being discouraged to take up work because of the effects of disclosure and loss of confidence.
16. In regard to the PHSO previously disclosing the hourly rate of an unnamed barrister, it has explained to the Commissioner that the information was disclosed in error at the time and has confirmed that it has no intention to publish similar information again in the future.

The Commissioner's position

17. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the negotiation of hourly rates of pay during the procurement of legal services is a commercial activity, and therefore the requested information (negotiated hourly rates) clearly relates to the interests which the exemption contained at section 43(2) of the of the FOIA is designed to protect.
18. With regard to the second criterion the Commissioner is satisfied that disclosure of the withheld information would be likely to harm both the PHSO's and the legal professionals' commercial interests. The Commissioner has reached this conclusion given that the withheld information contains all hourly rates of legal professionals instructed between 2017 and 2018. The Commissioner has viewed the withheld information and notes that it shows the highest and lowest hourly rate paid to all legal professionals instructed. Whether the rates are anonymised or not, the information could be used in current or future negotiations by legal professionals bidding for work to infer what the PHSO is willing to pay for similar services and could use the information to determine a starting point for negotiations, ultimately impacting the PHSO's ability to enter negotiations on an equal footing and obtain the best value for money. She notes that the information could also be used by existing legal professionals to question their existing rates. The

Commissioner is mindful that the PHSO is a publicly funded body and should not be disadvantaged when entering negotiations with external services providers.

19. The Commissioner has also considered the submission of the legal professionals in this case. She accepts that as public sector organisations give significant weighting to pricing during the procurement of services, the information could be used by competitors to determine the rates the legal professionals are likely to charge for their services, bids could then be tailored accordingly enabling competitors to outbid the legal professionals concerned. She also notes that disclosure could result in the legal professionals' existing clients questioning their rates and affect their ability to continue with and/or re-new their contracts. In the Commissioner's view it is therefore clearly plausible to argue that disclosure of this information has the potential to harm the PHSO's and legal professionals' commercial interests given the insight such information would provide to existing and future legal professionals bidding for work with the PHSO and the legal professionals competitors in the legal advice services market.
20. With regard to the third criterion, the Commissioner accepts that this is met and if the withheld information were to be disclosed there is clearly more than a hypothetical risk; rather there is a real and significant risk of this prejudice occurring. The Commissioner has reached this view based on the arguments made by the PHSO and submissions of the legal professionals on the insight the withheld information would provide. The Commissioner notes the fact that the hourly rates have been agreed during negotiations and have therefore been agreed on the strength of each party's effective negotiating ability at the time.
21. She is also mindful that legal professionals are highly skilled researchers and negotiators, that both skill sets form part of their formal and ongoing training and it is therefore likely that in preparing for negotiations prospective bidders would be likely to obtain and use the withheld information to gain an advantage during negotiations and consequentially affect the PHSO's ability to obtain maximum value for money. This is exemplified by the submission made by the legal professionals, and their view and concern that the information could, in a similar way, be obtained and used by their competitors (legal professionals - also skilled in research and negotiation) to undercut them in the market and during negotiations with future clients and cause existing clients to question their rates. The Commissioner therefore accepts that there is a real and significant chance that the information could be used by individuals bidding for work in the future (with the PHSO) and prospective new clients of the legal professionals during negotiations and of the alleged prejudice occurring.

Public interest test

22. As the Commissioner is satisfied that disclosure would be likely to prejudice the commercial interests of the PHSO and that section 43 of the FOIA applies, she will now go on to consider the public interest test.
23. The complainant said that a QC could be instructed for £230 per hour and therefore there was a genuine public interest in knowing how many barristers have been instructed by the PHSO and what they are charging for their services.
24. The PHSO acknowledges that there is a public interest in public authorities being transparent and open with regard to the activities they undertake, in particular ensuring that public funds are apportioned appropriately when incurring expenditure on procuring external legal services. It however considered the public interest in disclosure rests in maintaining the exemption to ensure the PHSO can maintain a competitive advantage when negotiating hourly rates for legal services in the future, maintain its existing relationships with legal service providers and prevent any adverse effect disclosure could have as a result of them becoming discouraged by loss of confidence to take on work because of effects of disclosure.
25. The Commissioner has given the arguments for and against disclosure detailed consideration. She agrees that there is a public interest in transparency and accountability and in particular where the expenditure of public funds is concerned. In the current climate of continuing cuts to public funding and the need to make resources stretch further and further, there is a strong public interest in enabling members of the public to understand more clearly and challenge if necessary how these funds are managed and spent by making information of this nature available.
26. The Commissioner however notes that the PHSO has already disclosed the total sums paid to each firm the legal professionals were instructed from between 2017-2018 in response to the request. She also notes that in the submission provided, the legal professionals have confirmed their hourly rates are fixed and have been static over recent years to specifically support the PHSO in managing public sector funding cuts. She is also mindful that the rates were negotiated on the strength of each party's ability at the time and that disclosure could allow future bidders a competitive advantage (using the information as a starting point in negotiations / the expectation of similar rates to be paid) and result in a higher rate being paid based on a previous hourly rate

agreed, affecting the PHSO's ability to obtain and (in the case of current legal professionals instructed) retain maximum value for money.

27. The Commissioner also notes that one of the firms instructed have made a submission detailing their concerns about the effects of disclosure in response to the request in this case. She accepts that they have a legitimate concern about the information being used by their competitors to undercut them with existing and future clients and disclosure leading to existing clients questioning their rates. She therefore accepts the PHSO's concern that disclosure could consequentially affect its ability to maintain existing relationships with legal professionals and enter into future negotiations with them, affecting its ability to retain value for money. The Commissioner therefore considers the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Right of appeal

28. 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

29. 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.
30. 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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