

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 May 2019

Public Authority: NHS Commissioning Board (NHS England)

Address: Quarry House
Quarry Hill
Leeds LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information associated with public information campaigns from NHS England ('NHSE'). NHSE released some information and has withheld the value of fees paid to particular celebrities under section 43(2) of the FOIA (commercial interests).
2. The Commissioner's decision is that NHSE is entitled to rely on section 43(2) to withhold the disputed information and the public interest favours maintaining the exemption.
3. The Commissioner does not require NHSE to take any remedial steps.

Request and response

4. On 19 August 2018, the complainant wrote to NHSE and requested information in the following terms:
 1. *Since January 2017 has NHS England launched a new publicity or public information campaign. These campaign(s) will include but not be limited to information about the provision and organisation of services both at GP and Hospital level. Alternatively the campaign may be concerned with recruiting new staff including but not limited to new doctors and nurses. The campaign could be about a new threat to public health and or the provision of new treatments. The*

campaign could have also been about the blood donor service. The campaign could have been concerned with diet and or healthy eating and or exercise. Alternatively the campaign may have been concerned with the dangers posed by smoking, excessive alcohol or drugs.

- 2. If the answer to question one is yes can you please identify the campaign(s). In the case of each campaign can you provide its title and provide a brief description of its aims. Can you state the total amount spent by the organisation on the campaign. Please include spending carried out on behalf of the organisation by bodies including advertising agencies. Can you also state when the campaign was launched.*
 - 3. In the case of each campaign can you identify whether a well known personality was hired to front or take part in the campaign. The personality (ies) could be a figure (s) from any of the following areas of public life: Academia, Science, Sport, Popular music, Classical music, Television light entertainment and television news, Actors working in film and or television and or theatre, television documentaries and factual programming, the wider world off showbusiness, literature and publishing, the business world and Youtube bloggers.*
 - 4. In the case of each campaign can you identify the personality (ies) hired to front and or present and or participate in the campaign. In the case of personality can you state the total amount paid for the services of that personality. Please provide the figure irrespective of whether the sum was paid by the organisation directly or whether it was paid by an organisation such as an advertising agency working on the organisation's behalf. In the case of each personality can you state for how many days they worked on the campaign.*
 - 5. Can you specify what form the campaign took. For instance was it solely confined to TV?*
5. NHSE responded on 21 September 2018. With regard to the first part of the complainant's request NHSE confirmed it had launched a number of public information films. Addressing the second, third and fifth parts, NHSE listed: the campaigns, the celebrities who had been involved in four of them and the form the campaigns took.
 6. NHSE withheld the information the complainant requested in part 4 (the amount any celebrity was paid) under section 43(2) of the FOIA and confirmed that the public interest favoured maintaining this exemption.

7. Following an internal review NHSE wrote to the complainant on 5 October 2018. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 2 November 2018 to complain about the way his request for information had been handled. He confirmed that he is dissatisfied with NHSE's response to part 4 of his request, specifically.
9. The Commissioner's investigation has therefore focussed on whether NHSE can rely on section 43(2) to withhold the information requested in part 4, and the balance of the public interest.

Reasons for decision

Section 43 – commercial interests

10. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
11. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that 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.
12. Second, 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 that is alleged must be real, actual or of substance.
13. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg 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. The anticipated prejudice must be more likely than not.
14. Section 43(2) is subject to the public interest test.

15. NHSE has provided the Commissioner with a detailed and thorough submission. It has first confirmed that disclosing the fees paid to particular individuals it named at part 3 of the request *would be likely to* (as opposed to *would*) prejudice NHSE's commercial interests and those of the individual celebrities with whom NHSE engaged on particular public information campaigns.
16. NHSE has then explained that the individuals in question were hired through its advertising agencies to record voice-overs for the 'GP Access' and 'We are the NHS' campaigns. They were selected for their abilities in delivering engaging voice-overs for these specific campaigns. Each of the individuals perform voice-overs as part of their wider work as actors/performers. NHSE says that this was therefore a commercial arrangement between it and the individuals, comparable to any other work they complete in their professional capacity.
17. The individuals agreed to undertake the work at a significant discount to the usual fees they would charge a commercial organisation for the same work. NHE argues that disclosing the fees that were agreed for its campaigns would be likely to put them at a disadvantage when negotiating fees with other potential clients in future. The discounts were, it says, generously offered by the individuals specifically because these were NHS campaigns. The fees paid do not represent the 'true cost' of engaging these individuals for voice-over services. NHSE says that to reveal the fees would therefore be likely to undervalue the individuals, and give the impression that they could be engaged by commercial organisations for a similar fee level.
18. In NHSE's view disclosing this information would therefore be likely to significantly jeopardise the individuals when negotiating for future contracts with commercial organisations.
19. NHSE has further argued that the fees do not represent the 'true cost' to the NHS in engaging an individual to provide a voice-over. The discounts were not expected on either side of the arrangement, and it says it can therefore not be assumed that the fees paid in these specific cases could be achieved again. NHSE considers that disclosure would therefore be likely to prevent (or at least, make it more difficult) for NHSE to secure voice-over artists at a lower fee (which may be appropriate depending on the nature of the contract, or in cases where individuals similarly wish to provide NHSE with a discount, resulting in a lower overall cost). This is because disclosure would reveal how much it has previously paid for such services in the past.
20. NHSE also considers it to be relevant that there would be no question of similar information being released for other work the individuals have conducted for organisations which are not subject to the FOIA. It argues

that disclosure would be likely, therefore, to have the impact of making the NHS a less attractive organisation for celebrities to work with. If there is a risk that information will be released which jeopardises their future earning potential, NHSE says it stands to reason that both these specific individuals and/or other professional actors will either be dissuaded from providing similar discounts to the NHS, or may be dissuaded from working with the NHS altogether.

21. In either case, NHE says its commercial interests are likely to be negatively affected. As outlined above, the individuals were engaged in this work for their skill as voice-over artists, rather than due to their celebrity status. A voice-over artist is chosen for their ability to deliver information in a manner and tone which is compelling, sensitive to the subject matter, and resonates with the audience. For this reason, it is natural that many voice-over artists are actors/celebrities, who are likely to possess these skills and qualities. NHSE argues that it is therefore contrary to its commercial interests to disclose information which dissuades such individuals from looking to work with it on such campaigns. If celebrities are disinclined to provide discounted (or at least, comparable) rates to NHSE, in order to avoid 'undervaluing' themselves in the commercial marketplace more generally, it is unlikely that NHSE would be able to secure voice-over services for a similar cost in future, thus increasing the cost of campaigns going forward. Alternatively, NHSE argues that if individuals are discouraged from working with it altogether, its ability to produce high-quality, value for money campaigns is threatened, by reducing its ability to secure the services of the 'best' voice-over artists available.
22. In addition NHSE has told the Commissioner that it intends to use the 'We are the NHS' campaign advertisements again in future. The fees paid in these campaigns entitle it to the use of the voice-overs for a single year. When the current period ends, an additional fee will be required in order to extend NHSE's right-of-use. NHSE says it is therefore not in its commercial interests to take any action which may influence the individuals to increase the fee it pays.
23. The Commissioner asked NHSE to provide evidence that demonstrates a clear link between the information's disclosure and any prejudice to commercial interests which may occur. NHSE has said that both individuals relevant to part 4 of the request earn a proportion of their income from voice-over work. Disclosing the discount agreed by these individuals is highly likely to negatively impact their ability to negotiate fees in the future, as NHSE has outlined above. NHSE has confirmed that it has not previously released information of this nature and, as such, it has acknowledged that it does not have any specific experience of disclosure resulting in the prejudice outlined above. However, it

considers it to be relevant that no other fees paid to these individuals (or indeed, any other voice-over artists) are publicly available.

24. In relation to NHSE's own commercial interests, NHSE considers it to be self-evident that any action which is likely to result in an increase in cost to NHSE will have a negative impact on its commercial interests.
25. Finally, NHSE has explained that, given the status of the individuals in question, it has not been practicable for it to liaise with them in order to seek their views on the potential disclosure of this information. NHSE has argued, however, that it is outside of the normal expectations of individuals to have information such as this put into the public domain. Furthermore as the fee paid between a service provider and client is generally assumed to be confidential, it is satisfied that it is fair to assume that the individuals would not consent to the information being disclosed.
26. The Commissioner considers that NHSE has provided a robust case for applying section 43(2) to the information it is withholding. She has considered the submission against the three criteria at paragraphs 11 – 13 and has decided that the withheld information engages the section 43(2) exemption. The actual harm that the authority alleges would or would be likely to occur through disclosure of the information would relate to commercial interests; of both NHSE and the individuals concerned. The necessary causal link exists as releasing into the public domain the fees particular individuals received would make it possible for other organisations or other individuals to see what the individuals in this case were paid for particular pieces of work they did for NHSE. This might affect what the individuals in this case could charge other organisations for similar work and/or what other individuals could charge NHSE likewise. In the Commissioner's view such harm is of substance. Finally, NHSE has confirmed that the specified prejudice *would be likely to occur* and the Commissioner is satisfied that it is more than a hypothetical possibility and is a real risk.

Public interest test

Public interest in disclosing the information

27. The complainant has argued that the public has a right to know if NHSE is making appropriate use of its public funding. He says that many of the salaries in the NHS are either public knowledge already or are subject to disclosure via the FOIA. The complainant does not consider that celebrities and personalities who take part in NHSE public information campaigns should be exempt because of their celebrity status. He has noted, in particular, individuals who he considers have been keen to

portray themselves as champions of the health service and who charge the NHS for their services.

Public interest in maintaining the exemption

28. NHSE has discussed what it considers to be the underlying **issue**, namely how NHS money is spent, particularly as it relates to marketing campaigns.
29. NHSE considers, as has been outlined above, that there is very limited public interest in the specific individual fees paid being released. Notwithstanding this, it says it is keen to ensure that the public can access and understand NHSE's budget and spend. In NHSE's view this (very limited) public interest has already been met in this case. It says it provided the complainant with the budget of each campaign; addressing the public interest in understanding where NHSE has spent money on campaigns. It says that, furthermore, it advised the complainant that the fees paid represented a discount compared to the normal rate. NHSE is therefore satisfied that it has, as far as it is able to without jeopardising the commercial interests as set out above, provided the complainant with assurance that the fees represented value for money, and has addressed any concerns on that front.
30. NHSE argues that, conversely, there is a strong public interest in protecting its ability to run effective, value-for-money campaigns. It has confirmed that it therefore considers that the balance of public interest in relation to the above issue is in favour of maintaining the exemption.
31. NHSE has also considered the **information** in question. It says that while the specific fees paid to organisations for their role in securing the services of the celebrities may be 'of interest', it does not consider there to be any genuine 'public interest' in this information. NHSE has noted that in her published guidance, the Commissioner advises that; "*what may serve those private interests does not necessarily serve a wider public interest*". In NHSE's view, revealing the individual fees will not contribute to any public debate, nor will it materially aid public understanding of the campaigns in question.
32. On the other hand, NHSE considers there to be a significant and weighty public interest in withholding the specific fees, in order to avoid damaging working relationships with agencies and thereby risking its ability to negotiate similarly-discounted fees in future. NHSE therefore concludes that the balance of public interest in relation to the specific information is in favour of maintaining the exemption.

33. By way of a summary of its position, NHSE says that it considers, both at the time of the complainant's original request and now, that the arguments in favour of withholding the requested information outweigh the (limited) public interests in disclosure. It also considers that where there is public interest (eg in relation to understanding how much money NHSE spends on marketing campaigns), that this has been met through the release of the overall budget information.

Balance of the public interest

34. The Commissioner has not been convinced by the complainant's arguments. She considers that most people would assume that celebrities – as with any other service provider – would be remunerated appropriately for services they provide to NHSE, and the fact that they are would not come as any surprise. In contrast, the Commissioner has found NHSE's arguments to have been well thought through and compelling. She has nothing to usefully add and has decided that the public interest in maintaining the exemption in this case outweighs any interest in disclosing the disputed information, for the reasons NHSE has provided.

Right of appeal

35. 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@justice.gov.uk

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

36. 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.
37. 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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