

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2020

Public Authority: Information Commissioner's Office (ICO)

Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested information on the costs to the ICO of provision of legal services by outside bodies. The ICO has withheld the information it holds, citing sections 40(2) (personal data) and 43 of the FOIA (commercial interests) as a basis for non-disclosure. The ICO considers that the balance of the public interest favours maintaining the section 43 exemption. Regarding section 43, the complainant considers that there is greater public interest in releasing the information he has requested, than in withholding it.

2. The Commissioner's decision is as follows:
 - The withheld information engages the exemption under section 43(2) of the FOIA and, in line with section 2(2)(b), the public interest favours withholding the requested information under this exemption.
 - The ICO breached section 17(1) as it did not refuse the request within the required timescale of 20 working days.
3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 19 February 2019 the complainant wrote to the ICO and requested information in the following terms:

"Please disclose all current agreements for provision of legal services by outside bodies such as barristers chambers, law firms etc. This should include the rates of pay agreed. This should include the rates of pay agreed."
5. The ICO responded on 7 June 2019. It withheld the requested information under section 43 of the FOIA and section 40(2), and said the public interest favoured maintaining the section 43 exemption.
6. The complainant requested an internal review on 7 June 2019 regarding the public interest test associated with section 43.
7. The ICO provided a review on 5 July 2019. It maintained its position that the public interest favours maintaining the section 43 exemption and provided further public interest arguments for non-disclosure.

Scope of the case

8. The complainant contacted the Commissioner on 5 September 2019 to complain about the way his request for information had been handled. In his request for an internal review and his initial complaint to the Commissioner, the complainant expressed dissatisfaction with the ICO's position that the public interest favoured maintaining the section 43 exemption. He did not refer to the section 40(2) exemption in either communication.
9. It appears that the complainant does not dispute that the information he has requested engages the section 43 exemption (or the section 40(2)

exemption). The Commissioner's investigation has considered the balance of the public interest associated with section 43 but she has also considered whether this exemption is engaged. Finally, the Commissioner has considered the timeliness of the ICO's refusal.

Reasons for decision

Section 2 – Effect of the exemptions in Part II

Section 43 – Commercial interests

10. Under section 2(2)(b) in Part I of the FOIA, information that is exempt information by virtue of any provision under Part II does not have to be communicated to an applicant if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
11. Section 43(2) in Part II 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). Section 43(2) is subject to the public interest test. In cases where information is exempt from disclosure the information may still be disclosed if the public interest in releasing the information is greater than in maintaining the exemption.
12. In his request for an internal review, the complainant advised the ICO that it had *"...got the pibt wrong"*. By 'pibt' the Commissioner understands the complainant to mean public interest test (PIT). In his complaint to the Commissioner the complainant told the Commissioner that *"I do not agree that the PIBT was correctly applied. There is a legitimate interest in knowing how public money is being spent."*
13. It appears to the Commissioner that the complainant does not dispute that the information he has requested is exempt information under section 43(2) and that the focus of his complaint is the ICO's conclusion regarding the associated PIT. For the sake of completeness the Commissioner has, however, first considered whether the withheld information engages the exemption under section 43(2).
14. 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 must relate to the applicable interests within the relevant exemption. The ICO has described the withheld information as relating to the purchasing of services which is therefore commercial in nature. It has provided the Commissioner with a copy of the information it is withholding and she is satisfied that the envisioned prejudice does

concern commercial matters and commercial interests, which are protected by section 43.

15. 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. The ICO has said in its submission to the Commissioner that releasing the information in question – the agreed amounts paid for legal counsel (ie barristers) - would be likely to harm its own commercial interests by increasing the likelihood that it would achieve less favourable rates in future procurement exercises. It would also be likely to harm the commercial interests of the legal counsel providers as it would reveal how much they charge the ICO. This could affect their ability to negotiate rates of pay and would also be of use to competitors. The Commissioner is satisfied a causal relationship exists between releasing the withheld information and prejudice to commercial interests and that such commercial prejudice would be of substance
16. 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. The ICO's position is that the envisioned prejudice would be likely to happen. The Commissioner is satisfied that the chance of prejudice occurring is more than a hypothetical possibility and there is a real and significant risk.
17. Since the three criteria have been met, the Commissioner is satisfied that the information the complainant has requested engages the exemption under section 43(2) of the FOIA. She has gone on to consider the public interest test associated with section 43.

Public interest test

Public interest in disclosing the information

18. As above, the complainant considers that there is public interest in knowing how the ICO is spending public money (on legal services from external bodies).
19. In its refusal of the request, the ICO said that disclosing the information would promote accountability and transparency in how the ICO spends public money and conducts its business. In its submission to the Commissioner the ICO has acknowledged that disclosing the rate paid would give an insight into ICO's spending on external legal work.

20. At internal review, the ICO also acknowledged that there is a public interest in potential tenderers being encouraged to bid for public contracts and being able to improve the quality of their bids.

Public interest in maintaining the exemption

21. In its refusal, the ICO said that there was public interest in the ICO being able to negotiate and secure counsel engagement on terms which secure the best value for the public purse, without prejudicing its commercial interests or the commercial interests of legal advisors it wishes to engage.
22. The ICO considered that disclosing the fee paid to counsel in respect of cases would be likely to prejudice their ability, and the ability of other counsels engaged by the ICO, to negotiate with other clients about fees. As such this would be likely to harm their commercial interests.
23. In its internal review response, the ICO confirmed that it considers it is essential to the ICO that it can engage legal representation without the parties being concerned their fees will be in the public domain. This would necessarily mean the ICO would be unable to negotiate regarding fees as effectively in the future. It may also mean that certain counsel would not want to engage if there was a propensity that their financial payments were made public.
24. The ICO also said that it is important to preserve the ICO's freedom to negotiate, in confidence, the constituent parts of a business arrangement in order to secure an overall agreement that offers best value for money. Disclosure would be likely to prejudice the ICO's commercial interests in these.
25. It considered there is a real risk in this case that other barristers/chambers may be more reluctant to offer favourable rates due to their competitive advantage being diminished if they know that such information may be disclosed to the public.
26. Finally, the ICO said that disclosing the information could affect the ICO's ability to negotiate rates with barristers' chambers in the future, on the basis that they are likely to be discouraged from tendering if they believe that confidential information will be revealed. Disclosure would be likely to prejudice the ICO's commercial interests if fewer bids are received. This would inhibit the ICO's ability to obtain best value for money.

Balance of the public interest

27. The Commissioner does not consider that the complainant's general argument that the public should know how the ICO is spending public

money is a particularly strong argument. Broad financial information is published in the ICO's annual reports each year. In her view the ICO's arguments are stronger. The Commissioner agrees that disclosing how much the ICO pays for legal services would be likely to dissuade some providers from engaging with the ICO; this would result in fewer bids being received, with the risk that the ICO would not achieve the best value for money. The Commissioner also agrees that disclosure would be likely to encourage other providers to offer and provide services to the ICO at less favourable rates.

28. There is greater public interest in the ICO achieving the most favourable rates possible for the legal services it procures and this would be jeopardized if the requested information was to be released. The Commissioner has therefore decided that the public interest favours withholding the requested information on this occasion.

Section 17 – refusing a request

29. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (i) to be told if the authority holds the information and, under subsection (ii) to have the information communicated to him or her if it is held and is not exempt information.
30. Under section 10(1) an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
31. In cases where a public authority is relying on a Part II exemption to refuse to disclose information (as in this case), under section 17(1) the authority must issue a refusal notice within the time for complying with section 1(1).
32. In this case the complainant submitted his request on 19 February 2019 but the ICO did not refuse the request until 7 June 2019. The ICO therefore breached section 17(1) of the FOIA.

Right of appeal

33. 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

34. 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.
35. 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

Pamela Clements
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