



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0019 (P)

Decided without a hearing on: 11 January 2021

Before

**JUDGE SOPHIE BUCKLEY
ANNE CHAFER
ANDREW WHETNALL**

Between

EDWARD WILLIAMS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules. The mode of hearing is 'P'.

DECISION

1. For the reasons set out below the appeal is allowed in part.

SUBSTITUTE DECISION NOTICE

2. The public authority was not entitled to withhold the information on page A2 (redacted as set out in the closed annex) and page A3 of the closed bundle.
3. The public authority was entitled to withhold the information on part of page A1 (identified in the closed annex), part of page A2 (identified in the closed annex) and on pages A3 and A6 under s 43 of the Freedom of Information Act 2000 (FOIA).
4. The public authority was entitled to withhold the information on part of page A1 (identified in the closed annex) and on pages A4 and A5 under s 40(2) FOIA.
5. The public authority must disclose the information on page A2 (redacted) and page A3 within 42 days of the date of promulgation this decision.

REASONS

Introduction

1. There is a short closed annex to this decision. It is necessary in order not to defeat the purpose of these proceedings. A redacted version of the closed annex can be published once the time limit for any appeal has expired, or any appeal has been finally determined.
2. The public authority in this appeal is the Information Commissioner. To avoid confusion we adopt the approach in the Decision Notice of referring to the Information Commissioner in her role as public authority as 'the ICO' and in her role in determining the complaint as 'the Commissioner'.
3. This is an appeal against the Commissioner's decision notice FS50856917 of 10 January 2020 which held that the ICO was entitled to rely on section 43 of the Freedom of Information Act 2000 (FOIA) to withhold the information and that the ICO had breached s 17(1).
4. The Commissioner did not require the ICO to take any steps.

Request and Decision Notice

The Request

5. Mr. Williams made the request which is the subject of this appeal on 19 February 2019:

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.

The Response

6. The ICO replied to the request on 7 June 2019, refusing to provide the requested information under s 43(2) (Commercial interests) and s 40(2) (Personal data). After an internal review, the ICO upheld its position.
7. Mr. Williams complained to the Commissioner by email dated 5 July 2019.

The Decision Notice

8. The Commissioner recorded that it appeared Mr. Williams did not dispute that the information requested engaged the s 43 or s 40(2) exemption.

Commercial interests – s 43

9. The Commissioner was satisfied that the harm alleged by the ICO concerned commercial matters and commercial interests which are protected by s 43. She was satisfied that a causal relationship existed between releasing the withheld information and prejudice to commercial interests and that such commercial prejudice would be of substance. The Commissioner was satisfied that that the chance of prejudice occurring is more than a hypothetical possibility and there is a real and significant risk. She therefore concluded that the exemption was engaged.
10. In relation to the public interest, the Commissioner considered that the argument that the public should know how the ICO is spending public money is not a particularly strong argument, because broad financial information is published in the ICO's annual reports every year. She agreed that disclosing how much the ICO pays for legal services would be likely to dissuade some providers from engaging with the ICO which would result in fewer bids being received with the risk that the ICO would not achieve the best value for money. The Commissioner also agreed that disclosure would be likely to encourage other providers to offer and provide services to the ICO at less favourable rates.
11. Under s 17 the Commissioner concluded that the ICO did not issue a refusal notice within the required period and therefore breached s 17(1).

Grounds of Appeal

12. The Grounds of Appeal in essence are that the public interest favours disclosure, in particular:

- a) The request was for 'broader information'. EA/2018/0148 stated that the public interest lies more obviously in the disclosure of broader information about expenditure by the Commissioner on legal services.
- b) The release of contracts, rates etc. will allow for true open competitive tendering and ensure no favouritism or other corruption.
- c) The Crown Commercial Services guidance note 'The Transparency of Suppliers and Government to the Public' states that the presumption in favour of disclosure should apply to the vast majority of commercial information about government contracts with commercial confidentiality being the exception rather than the rule.

The Commissioner's response

Commercial interest

13. The request in the present case is not for 'broader information' in the sense used by the FTT in its decision in EA/2018/0148. The request is, in effect a request for the same information but in relation to more than one barrister. It is similarly hard to see what public interest lies in knowing what a number of individual barristers have agreed with the ICO as regards the standard rates agreed with those barristers.
14. The guidance note 'Transparency of Suppliers and Government to the Public' does not assist Mr. Williams. It simply notes that there should be a presumption in favour of disclosing information but notes that there are exemptions in the FOIA. The Commissioner did not dispute that there is a public interest in disclosure but for the reasons given in the decision notice it was outweighed by the public interest in maintaining the exemption. Paragraph 10 of the guidance note states: 'Pricing. The way the supplier has arrived at the price they are charging government in a contract could normally be withheld..'
15. Each case must be determined on its own facts. It cannot only be in exceptional cases that commercially sensitive information should be withheld.

Reply of Mr. Williams

16. The ICO has not provided any reason why all the requested information is being withheld. The ICO could have provide the contracts with sensitive information redacted and explained the redaction.
17. There is no indication that any of the contracts will be re-tendered (see Cranfield v the Information Commissioner EA/2011/0146).
18. If the information is released this might increase competition. The public interest lies in the public getting best value for money.

Final submissions of Mr. Williams

19. The tribunal can order release of the information with redactions. There is no reason why the ICO could possibly object to releasing the information with prices redacted.

Evidence

20. We have read an open bundle, an additional open bundle and a closed bundle of documents, which we have taken account of where relevant.

Legal framework

S 43 – Commercial interests

21. Section 43(2) provides

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)

22. ‘Commercial interests’ should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person’s ability to participate competitively in a commercial activity.
23. The exemption is prejudice based. ‘Would or would be likely to’ means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.
24. S 43 is a qualified exemption, so that the public interest test has to be applied.

Personal information

25. The relevant parts of s 40 of FOIA provide:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
 - (a) It constitutes personal data which does not fall within subsection (1), and
 - (b) either the first, second or the third condition below is satisfied.

- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
(a) would contravene any of the data protection principles, or..,

26. Personal data is defined in s 3(2) of the Data Protection Act 2018 (DPA) as:

Any information relating to an identified or identifiable living individual

27. Personal data must be processed 'lawfully and fairly' and one of the lawful bases of processing in article 6(1) of the General Data Protection Regulation ('GDPR') must apply. The only potentially relevant basis here is article 6(1)(f):

Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

28. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows:

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

A contents based approach

29. We have looked at the contents of each document, taken in the context of the withheld information as a whole, when assessing whether or not the ICO is entitled to withhold the information (see para 16 of the Upper Tribunal decision in **Foreign and Commonwealth Office v Information Commissioner and Plowden** [2013] UKUT 275 (AAC)).

The Task of the Tribunal

30. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

31. The issues we have to determine are as follows:

Commercial interests

1. Is the prejudice to commercial interests claimed by the ICO real, actual or of substance?
2. Has the ICO shown that there is some causative link between disclosure and the claimed prejudice?
3. Has the ICO shown that the occurrence of prejudice is more probable than not or, if not, that there is a real and significant risk of the occurrence of that prejudice?
4. If so, does the public interest favour maintaining the exemption?

Personal information

1. Is the information personal data?
2. Would disclosure breach any of the data protection principles?

Discussion and conclusions

Scope of the request

32. The request is for 'all current agreements for provision of legal services by outside bodies such as barristers chambers, law firms etc.'. The information in the closed bundle relates to two barristers' chambers. It primarily consists of lists of standard rates for particular tasks for barristers of particular seniority or for named individuals. There is also one page containing standard terms in relation to one particular chambers.
33. Given the Commissioner's role and therefore understanding of the requirements of FOIA, and given the clarity of the request, we have proceeded on the basis that the Commissioner holds no further information within the scope of the request i.e. that the Commissioner holds no other information on current agreements for the provision of legal services by outside bodies.
34. We infer that the paucity of information held on, for example, ongoing arrangements or contracts stems from the nature of barristers as individual self-employed practitioners. Barristers operate on a self-employed basis. Contracts are entered into with individual barristers rather than with chambers and in relation to individual cases rather than on an ongoing basis.
35. For the reasons that follow, in relation to page A1, a small section of page A2 (identified in the closed annex) and pages A4-A6 we have concluded that the ICO was entitled to withhold the information under s 43 or s 40(2). We have concluded that it was not entitled to withhold the remainder of the information on page A2 and the whole of page A3.

Commercial interests

36. We deal first with part of page A1, a small part of page A2 and page A6. These pages consist of the rates of particular barristers or barristers of a particular seniority for particular tasks. In our view all this information is commercial information.
37. The prejudice relied on by the ICO is (i) prejudice to individual barristers' ability to negotiate with other clients about fees; (ii) prejudice to the ICO's freedom to negotiate in confidence to secure an overall arrangement that provides best value for money; (iii) a risk that other barristers/chambers may be more reluctant to offer favourable rates if they know that such information may be made public; (iv) prejudice to the ICO's ability to negotiate with barrister's chambers in the future on the basis that they are likely to be discouraged from tendering if they believe that confidential personal and pricing information will be revealed. If fewer bids are received this would be likely to prejudice the ICO's commercial interests inhibiting the ICO'S ability to obtain best value for money. We find that the prejudice relied on by the ICO, i.e. harm to its own and to barristers' commercial interests is real, actual and of substance.
38. When considering whether the ICO has established a causative link or that the occurrence of prejudice is more probable than not, we have to take account of the fact that disclosure has not yet happened. It is a hypothetical, future event. There is therefore unlikely to be concrete or direct evidence of the specific effect of this particular disclosure.
39. Taking this into account, we accept the ICO's assertion that there is a causal relationship between disclosure and the prejudice set out above. As a matter of common sense, we accept that the disclosure of particular rates agreed with a specific client has a causal relationship with prejudice to their ability to negotiate with other clients. Further, and again as a matter of common sense, we accept that there is a causal relationship between the disclosure of the rates agreed by the ICO and the prejudice to its negotiating positions set out above.
40. Turning to the question of likelihood, we must decide if disclosure would be likely to result in the prejudice relied on. We must decide if there is a real and significant risk of the prejudice occurring.
41. We accept that there is a real and significant risk of that prejudice being caused by disclosure. We find there is a real and significant risk that the knowledge that agreed rates would not be confidential would impact on the likelihood of a barrister or chambers offering the ICO more favourable rates, because the publication of those rates would impact on their negotiating position with other clients. This would be likely to prejudice the ICO's freedom to negotiate

in confidence to secure an overall arrangement that provides the best value for money.

42. We accept that the prejudice relied on by the ICO arises to some extent because barristers' rates agreed with particular clients are, in general, kept confidential. If there was a universal practice of publishing the agreed rates of Counsel's fees the prejudice would be less likely to arise. That is not the case and therefore we accept that the claimed prejudice would be likely to occur.
43. As stated above, barristers operate on a self-employed basis. Contracts are entered into with individual barristers rather than with chambers and in relation to individual cases rather than on an ongoing basis. This situation is not therefore comparable to a situation where there is an agreed ongoing contract which is unlikely to come up for re-tender, such as that in the first-tier tribunal case referred to by Mr. Williams (**Cranfield v IC** EA/2011/0146), where the contract had another 18 years to run.
44. For the above reasons we accept that the exemption is engaged in relation to part of page A1, a small part of page A2 and page A6.
45. In relation to the rest of page A1, the rest of page A2 and pages A3, A4 and A5 we do not accept that there is a real and significant risk of the claimed prejudice being caused by disclosure. We conclude below that part of page A1 and all of pages A4 and A5 should be withheld on the basis that the information on those pages is personal information and the exemption in s 40(2) is engaged.
46. In relation to the rest of page A2 and A3, we have concluded that this information should be disclosed for the reasons set out in the closed annex. We cannot see how the disclosure of this information could lead to any of the prejudice relied on by the ICO.

Public interest

47. We do not accept that the Procurement Policy Note relied on by Mr. Williams means that s 43(2) can only be relied on by the ICO in exceptional circumstances, or that we must apply a presumption in favour of disclosure. We must apply the provisions of FOIA, not the terms of the policy note. In any event the note does envisage that pricing information could reasonably be withheld on the grounds of commercial confidentiality. We do accept that the policy note reflects the clear public interest in transparency in relation to the expenditure of public money of which we take account below.
48. We accept that there is a public interest in transparency in relation to the expenditure of public funds, which leads to greater accountability and an increased opportunity for scrutiny. We take account of the fact that the ICO publishes the total amount that it spends on legal services per year which

already contributes to this public interest. We accept that the information held by the ICO within the scope of the request, i.e. details of the individual hourly rates, or rates for particular tasks charged by particular barristers or barristers of particular seniority does add something to the public's ability to scrutinise or challenge the ICO's expenditure on legal services. We accept that there is also some public interest in the fact that other barristers might be encouraged to bid for work, and could improve their bids, potentially reducing the ICO's expenditure or widening the pool of barristers used.

49. As identified above, we think that there is a clear risk that the ICO's negotiating position would be adversely affected, and that they would be less likely to be offered favourable rates if the information were disclosed. In our view, there is a strong public interest in the ICO being able to secure the best value when spending public money, and we accept that disclosure would be likely to prejudice their ability to do so.
50. Taking into account of all of the above, we conclude that the strong public interest in maintaining the exemption outweighs the public interest in disclosure.

Personal information

51. During the course of the investigation Mr Williams has not challenged the ICO's assertion that some of the information should be withheld because it is personal information, nor is this raised in the notice of appeal. It is our understanding that the scope of his challenge is limited to s 43.
52. However, because we have upheld the appeal in relation to part of the information, and the ICO relied on s 40(2) in the alternative, we have gone on to consider whether the ICO was right that the remaining information should be withheld under s 40(2). We have limited our consideration to any information which we have concluded is not covered by s 43 i.e. part of page 1 and pages A4 and A5.
53. We conclude that the information is personal information because it relates to identified living individuals. We conclude that disclosure of the personal information is not necessary for the purposes of any legitimate interest in transparency or holding the ICO to account for its expenditure of public money. The personal information is not relevant to this particular public interest, and simply gives details of, for example, an individual barristers' name, seniority, and area of expertise. Accordingly we find that none of the lawful bases in article 6(1) apply, and therefore disclosure would not be lawful and fair and in breach of one of the data protection principles. The ICO is accordingly entitled to withhold the information on part of page 1 and on pages A4 and A5 under s 40(2).

Conclusion

54. For the reasons set out above the appeal is allowed in part.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date of Decision: 26 January 2021

Promulgated: 28 January 2021

Appeal reference amended from 2019 to 2020 under under Sect 40, Slip Rule Corrections on 02 February 2020