

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 April 2012

**Public Authority:** Legal Services Commission

**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant asked the Legal Services Commission (LSC) to provide him with the names of the individuals who acted as Independent Cost Assessors and the fees paid to each named individual. The LSC provided him with the names of each assessor and an anonymised list of fees to each assessor, but withheld the amounts paid to each named individual on the basis of the personal data exemption of the Freedom of Information Act. The Commissioner has decided that the LSC is entitled to withhold this information on the basis of this exemption.

#### Request and response

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2. On 7 September 2011 the complainant wrote to the Legal Services Commission (LSC) and requested information in the following terms:

*'Could you provide me with (1) the names of the LSC's Independent Cost Assessors (2) the fees paid to each Assessor over the last 12 months.'*

3. The LSC responded on 5 October 2011 and explained that it believed that provision of the information in the format requested would constitute personal data and breach the Data Protection Act (DPA). It therefore considered this information to be exempt from disclosure on the basis of section 40(2) of FOIA. However, it did provide the complainant with an anonymised list of fees paid to the LSC's various

Independent Cost Assessors (ICAs).<sup>1</sup> (The LSC explained that given the way the relevant information was held in its systems by financial year, it provided the information for the period April 2010 to March 2011 rather than for the last 12 calendar months.)

4. The complainant contacted the LSC on 24 October 2011 and asked for an internal review of its decision to rely on section 40(2). He also noted that, from the data provided, it was clear that some of the ICAs had been used with far greater frequency than others. He therefore sought clarification on the basis upon which the LSC decided how to select particular ICAs for individual appeals.
5. The LSC informed him of the outcome of the review on 16 November 2011. The review upheld the application of section 40(2). The LSC also provided the complainant with a description of how it allocated individual appeals.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 23 November 2011 to complain about the way his request for information had been handled, specifically the withholding of information under section 40(2).
7. The Commissioner has confirmed with the complainant that in submitting this request he was, in fact, seeking two separate pieces of information; firstly, the names of all of the ICAs and, secondly, the amounts paid to each named ICA. (The Commissioner notes that fulfilment of the second part of this request would, by default, fulfil the first part of the request. However, fulfilment of the first part would obviously not provide the complainant with the information sought by the second part.)
8. During the course of the Commissioner's investigation the LSC has disclosed to the complainant the names of the ICAs to which payments were made in the financial year 2010/11. Therefore, at the point this notice is being issued, the only information falling within the scope of the complainant's request that continues to be withheld is the actual amount paid to each of the named ICAs. The Commissioner therefore

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<sup>1</sup> ICAs sit on the LSC's Independent Review Panel and consider appeals by providers of legal aid against LSC cost assessments for the provision of that legal aid.

simply needs to make a determination as to whether this information is exempt from disclosure on the basis of section 40(2).

## Reasons for decision

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9. Section 40(2) of FOIA states that personal data is exempt if its disclosure would breach any of the data protection principles contained within the DPA. The LSC has argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

‘Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

at least one of the conditions in Schedule 2 is met, and

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.’

10. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - particular circumstances of the case, e.g. established custom or practice within the public authority; and
  - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
  - whether information of the nature requested is already in the public domain;

- o if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
11. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
  12. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

*The complainant's position*

13. The complainant's submissions to the Commissioner focused on why he believes that disclosure of the withheld information is necessary. The complainant noted that at the internal review stage the LSC had explained that the process of selecting ICAs for a particular appeal was as follows:
14. Each regional LSC office retained a list of active ICAs and appeals are allocated to them on a rota basis. Some offices will try and send appeals to ICAs who have been waiting for an appeal the longest. Additionally, ICAs may not be sent appeals because they are unavailable due to work commitments, the appeal is from their firm or the ICA works from home and the appeal involves large bundles of information. In such scenarios, the regional office uses the next ICA on the list. The LSC explained that the process varies slightly from region to region but the appeals are generally allocated in this manner; it is the availability of ICAs to accept appeals with underpins the process.
15. The complainant noted that the anonymised list of payments revealed significant variations in the frequency with which particular ICAs had been selected. (In his submissions to the Commissioner, the complainant explained that it was his understanding that each appeal attracted a fixed fee so it was easy to determine how many appeals each ICA had determined in the financial year 2010/11.) The complainant accepted that there may be an innocent explanation for this, but the contrast was so stark that he was concerned that, in some circumstances, the LSC may be selecting particular assessors based

upon their tendency to find in favour of the LSC. The complainant explained that if he knew the names of the particular ICAs he could ask the LSC why it had selected a particular named ICA so many times when, in comparison, it had selected another named ICA so few times. The complainant argued that without this additional transparency it was difficult for those affected by decisions of the ICAs to have confidence in the independent appeals process.

16. The complainant also explained to the Commissioner that he understood that the LSC had received a very similar request from another individual and it was in the process of complying with this request. This request sought amongst other information, the names of all ICAs alongside the number of cases they have been referred over the last two years. The complainant explained that, given his understanding the ICAs are paid a fixed fee for each assessment and that fee was in the public domain, knowing the number of cases referred to each ICA would enable someone to work out the amount they had in fact been paid. In the complainant's view, this was a further reason why the withheld information in his case should be disclosed.

*The LSC's position*

17. The LSC suggested that the ICAs would have a reasonable expectation that details regarding the fees they received would not be disclosed. This is on the basis that ICAs do not have a contract with the LSC but instead are subject to the procedures set out in the Appeals Manual.<sup>2</sup> (In its initial correspondence with the complainant the LSC incorrectly referred him to another document entitled the 'Review Panel Arrangements'.) The LSC noted that these procedures explained that the LSC would not pass on the personal data of ICAs without their permission.
18. The LSC also argued that the ICAs could not be considered to be acting in a public facing or high profile role.
19. Furthermore, the LSC argued that the disclosure of the amount of fees paid to each ICA would represent an invasion into the privacy of the individuals concerned because it would reveal something about their financial income.
20. Finally, the LSC argued that disclosure of the withheld information was not necessary in light of the information it had already provided in

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<sup>2</sup> <http://www.legalservices.gov.uk/docs/main/AppealsManualFinalVersion11October.pdf>

respect of this topic, i.e. the number of ICAs it used, total expenditure on ICAs and the anonymised breakdown of the fees paid to each individual.

21. With regard to the disclosure of information in response to a similar request – and the complainant's line of argument that this meant that his request should be complied with – the LSC explained to the Commissioner that it was not, strictly speaking, the case that ICAs are paid fixed fees. Rather there was a guide as to what should be paid per case, based on a daily rate, but local LSC offices are allowed to exercise their discretion in relation to what they pay. This is because some of the appeals may be more complex or very straightforward. Therefore, the LSC argued that by disclosing the number of cases dealt with by an individual ICA it was not, by default, disclosing the amount they were paid. Whilst it may be possible for the recipient of the case volume data to calculate an approximate payment figure for an individual based on the data disclosed alongside their knowledge of the Appeals Manual, this is not a direct disclosure by the LSC of the amount each individual ICA had earned and it saw this as an important distinction.
22. The LSC also explained that in relation to this similar request it had consulted with all of the named ICAs and received no objections to the disclosure of the number of cases each person had been allocated. In this way, it had obtained consent for disclosure of each individual's personal data. With regard to the information which is the focus of this complaint, the LSC explained that it had contacted each of the ICAs in order to inform them that their names would be disclosed but advised that the payment amounts would remain anonymous pending the outcome of the ICO's decision. With regard to the potential disclosure of the payment information, the LSC received one specific objection from an ICA who clearly objected to any potential disclosure of individual earnings.

#### *The Commissioner's position*

23. With regard to the reasonable expectations created by the Appeals Manual, the Commissioner has reviewed the relevant sections of this document (pages 13 and 14). He notes that it does not contain any specific comment about the disclosure of the amount of fees paid to individual IPAs but does include the following:

*'It is also normal practice for the Commission to confirm to an appellant the name of the Assessor or Adjudicator considering their appeal. We will not give them address or contact details nor will we confirm your name if it is evident that there may be some risk to you in our doing so.'*

24. The Commissioner therefore accepts that some expectation of confidentiality of information regarding the ICAs' work for the LSC is created by this comment. Given the financial nature of the fees paid to each ICA the Commissioner accepts that it is reasonable to assume that such an expectation would be likely to encompass the level of the fees they received.
25. The Commissioner also agrees with the LSC that, in the context of undertaking this appeal work, the individuals in question should not be considered to be high profile or public facing individuals. In the Commissioner's opinion this reduces the expectations of these individuals having their personal data disclosed.
26. In relation to the consequences of disclosure, in the Commissioner's opinion, disclosure of the withheld information would represent a notable intrusion into the private lives of the individuals concerned because it would reveal something about their sources of income. Obviously, for some individuals who had undertaken a limited number of appeals, the intrusion would be relatively minor – e.g. for two individuals it would reveal that they only received £18.09 in payments. However, for other individuals, disclosure would reveal that they earned hundreds, and in some cases, thousands of pounds from the appeals work.
27. On the basis of the LSC's submissions the Commissioner is therefore persuaded that disclosure of the amounts paid to each of the ICAs would be unfair. In reaching this conclusion, the Commissioner has considered very carefully the LSC's disclosure of information in response to the similar request identified by the complainant. The Commissioner is satisfied that the LSC's disclosure of information in that case does not undermine his conclusion that disclosure would be unfair in this case.
28. In his opinion there are a number of key distinctions between the two cases: firstly, the fact that fixed fees are not paid for all of the appeals that are undertaken and thus disclosure in this case would give an accurate insight into the amount each individual had actually earned (whereas the LSC's disclosure in relation to the previous case only allows for an approximate indication of the fees paid). Secondly, the two requests cover different time periods; disclosure of the information in this case would reveal how much an individual had been paid for appeals work over a 12 month period whereas complying with the other request revealed information over a two year period. In the Commissioner's view, disclosure of the information in relation to this longer period arguably represents a less intrusive disclosure about the appeals work undertaken by an individual. This because such a disclosure only provides an indication of the level of income of over a broader period of time. Thirdly, and most importantly, the Commissioner considers it to be

very significant that the LSC had sought consent from the individuals before disclosing the number of appeals determined by each ICA. In the Commissioner's view, where a data subject consents to the disclosure of their personal data within the time for statutory compliance with a FOI request, then this disclosure is generally likely to be fair and can be used to satisfy the first condition in schedule 2 of the DPA.

29. Finally, the Commissioner is not convinced that the arguments in favour of disclosure identified by the complainant mean that there is a compelling public interest in disclosure of this information which would outweigh the adverse consequences of disclosure. Although the Commissioner agrees with the complainant that there is public interest in the LSC being open and transparent about how it administers the appeals process, he believes that the disclosures by the LSC made in response to the request substantially address this need.
30. With regard to the complainant's concerns that the list of anonymised payments clearly reveals significant variations in the frequency with which particular ICAs had been selected, the Commissioner does not understand why it is necessary for the complainant to know the names of the individuals concerned in order to query this distribution with the LSC. As noted above, the complainant explained that if he knew the names of the particular ICAs he could ask the LSC why it has selected a particular named ICA so many times when, in comparison, it had selected another named ICA so few times. However, in the Commissioner's opinion the anonymised breakdown of the fees paid to each individual was provided in a format which would already allow the complainant to raise such a query with the LSC. That is to say, each ICA was allocated a number and the amount that numbered individual had been paid. Therefore, the complainant or indeed any other interested individual, could contact the LSC and use the list to identify a particular ICA by number (rather than by name) and then ask the LSC to explain why this individual had been allocated so few, or so many, appeals. Consequently, disclosure of the remaining withheld information is not, in the Commissioner's opinion, necessary to address this particular public interest argument.



## Right of appeal

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31. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

32. 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.
33. 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** .....

**Alexander Ganotis**  
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