

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 October 2012

Public Authority: Legal Services Commission
Address: 8th Floor
102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant asked the Legal Services Commission (LSC) for the amounts that have been paid in legal aid to Abu Qatada since 2008 and for details of any legal aid claim currently being considered.
2. The Commissioner's decision is that by first maintaining that it did not hold the information and then by exempting it under s40(2), s31(1)(c) and s43(2) the LSC did not deal with the request in accordance with the FOIA.
3. The Commissioner requires the LSC to disclose the information within 35 calendar days of the date of this decision notice.
4. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 February 2012 the complainant requested the following information:

"Please provide the cost of legal aid for Abu Qatada (real name Omar Othman) with a breakdown of all sums paid since 2008 to date. In the breakdown can the date of payment, amount and reason (which court hearing etc) be included? Please provide details of any claim for legal aid currently being considered by the commission in relation to the above named individual. By details I mean which legal proceedings they may refer or legal work on behalf of Abu Qatada."

6. On 20 February 2012 the LSC confirmed to the complainant that Abu Qatada received legal aid for his case before the Special Immigration Appeals Committee (SIAC). The LSC advised that the requested information could be considered exempt under s40(2) and that the first data protection principle of fair and lawful processing could have been breached by its disclosure. It concluded however, that in this instance there was an overriding public interest to disclose that Abu Qatada was in receipt of legal aid. This was on the basis that the case had been subject to significant press and public interest and had been the subject of a parliamentary question. The LSC was satisfied that disclosure was fair and lawful, that it would not cause unwarranted harm to the data subject concerned and that disclosure was necessary to meet the public interest.
7. Whilst the LSC confirmed that Abu Qatada has received legal aid for his SIAC case the actual detail of the sums that have been paid since 2008 were not provided. The LSC submitted that it did not hold this information. This was on the basis that the case had not concluded and that payments that had already been made needed to be reconciled against final bills received.
8. The LSC further submitted that it did not wish to compromise litigation by disclosing the costs of a case. In this regard the LSC referred to the Funding Code Procedures C16. These regulations limit disclosure of legal aid certificates to opponents. Whilst there is no equivalent regulation in respect of criminal cases the LSC maintained that the same underlying principle applied in this instance.
9. On 21 February 2012 the complainant appealed against the LSC's decision to withhold the information. The LSC's internal review of 20 March 2012 acknowledged that with SIAC proceedings there was no danger of a jury being prejudiced by release of the information. The LSC therefore ceased its reliance on the Funding Code Procedures to withhold the information. It confirmed that payments had been made to the firm of solicitors acting for Abu Qatada so that they did not have to wait until the case was concluded and their final bill was received. However, the LSC upheld its submission that information concerning the amounts that had been paid to the firm since 2008 was not held. This was on the basis that these were payments on account and might be subject to change on receipt of the final bill.
10. When the Commissioner indicated during his investigation that he considered the information to be held the LSC introduced exemptions at s40(2), s31(1)(c) and s43(2) to withhold the amounts of legal aid paid.

Scope of the case

11. On 21 March 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. The scope of the Commissioner's investigation has been to determine whether the requested information is held by the LSC and to consider the appropriateness of the exemptions it has applied in order to withhold the information.

Background information

13. Abu Qatada has lived in the United Kingdom since claiming asylum in 1993. He was arrested after the 9/11 terror attacks in 2001 and accused of giving religious legitimacy to terrorists. Tapes of his sermons were discovered in the Hamburg flat used by the 9/11 hijackers. Abu Qatada has been in custody in the UK or under surveillance since 2002. In February 2012 he was released on bail from a maximum security prison. He had been held there for six and a half years whilst fighting deportation to Jordan where he is wanted on terrorism charges. He has since been re-arrested and imprisoned pending conclusion of the deportation case.
14. SIAC cases involve the deportation or exclusion of an individual from the United Kingdom on national security or other public interest grounds.
15. The LSC runs the legal aid scheme in England and Wales. It has officially confirmed that Abu Qatada has been in receipt of legal aid to fund his appeal against deportation.

Reasons for decision

Whether the requested information is held by the LSC

16. The LSC accepts that legal aid payments have been made since 2008 to the firm of solicitors acting for Abu Qatada. However, it has also submitted that it does not hold the requested information. On the basis that the case against deportation is ongoing, the LSC have maintained that until payments are reconciled against the final bill it would not be possible to confirm costs for the earlier stages of the case which have already been concluded.
17. The Commissioner informed the LSC that he recognised that the legal aid sums paid to date were in effect payments on account and that the final bill may differ once the case has concluded. He requested a copy of

the payments made to date and the LSC supplied him with this information on 8 May 2012.

18. The Commissioner has carefully considered the terminology of the request. It refers to "the cost of legal aid" as well as "a breakdown of all sums paid since 2008 to date". The LSC's response has been to interpret the request as being for the "exact" costs of legal aid which will be worked out after final reconciliation. The LSC's more narrow interpretation stems from its in-house procedure for assessment and costing of legal aid bills. The Commissioner considers that the terminology of the request from a member of the public should have been considered in its common parlance terms rather than viewed through the LSC's "technical" interpretation of the meaning of "cost". The applicant has not asked for the adjusted post-reconciliation cost. He has simply asked for the sums paid out to date. The possibility that the final bill may contain adjustments in relation to sums already received is not a valid reason to withhold information about the actual amounts paid to date. In the Commissioner's view it would be a simple matter for the LSC to add a qualifying rider to the information stating that on conclusion of the case the final breakdown of the sums payable may be subject to change.
19. It is clear that payments have been made to the legal firm acting for Abu Qatada. It is also clear that there are records to this effect in the LSC's possession. Therefore the Commissioner does not accept that information concerning these payments is not held.

Section 40(2)

20. Section 40(2) of the FOIA provides that third party personal data is exempt from disclosure if its release would contravene any of the Data Protection Principles set out in Schedule 2 of the Data Protection Act 1998 (DPA).
21. In relation to payments made concerning the SIAC case, the LSC maintained in a letter of 31 July 2012 to the Commissioner, that the information was exempt under s40(2). It submitted that it was important to recognise that the SIAC case had received significant media and public attention leading to parliamentary questions and a debate at the House of Commons Select Committee. Because of this the LSC argued that disclosure of the amounts paid would be unfair to Abu Qatada and would therefore breach the first data protection principle.
22. Whether or not an individual is in receipt of legal aid implies something about that person's financial position and in the Commissioner's view is therefore personal data.

23. The Commissioner has considered whether disclosure of the information would contravene the first data protection principle of fair and lawful processing. In doing so he notes that Abu Qatada's receipt of legal aid was publicly confirmed by the LSC on the basis that the SIAC case had received significant media and public attention leading to a parliamentary question. Because of this the LSC had concluded that disclosure was necessary to meet the public's legitimate interest in the case. However, in relation to the actual amounts involved the LSC employed the same argument of significant media and public attention leading to parliamentary questions as a reason to withhold the information.
24. The Commissioner considers that the information regarding the amounts paid in legal aid to Abu Qatada constitutes his personal data. The Commissioner has therefore considered whether its disclosure would contravene the first data protection principle.
24. The first principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met.
25. In considering whether disclosure would be fair the Commissioner has taken the following factors into account:
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned
 - the individual's reasonable expectations of what would happen to the information
 - whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subject.
27. The LSC did not provide any specific arguments as to how or why disclosure of the information would cause any unnecessary unjustified damage or distress to the data subject. The Commissioner considers that the actual amounts involved might result in the individual receiving further public criticism but he doubts whether any specific reputational damage would arise, given the notoriety of his case.
28. In relation to the individual's reasonable expectations, the Commissioner considers that given the high profile nature of the case it would not be unreasonable or unexpected that the public interest would require transparency in all aspects of the matter.
29. With regard to the legitimate interests of the public the Commissioner considers that:

there is a legitimate public interest in the openness and accountability of the LSC as a public authority responsible for the expenditure of substantial public funds

- the amounts of legal aid involved have been subject to significant press speculation which reflects the powerful public interest in this case and terrorism cases in general

- disclosure of the information would augment and assist the public's understanding of the legal aid system and how it operates in such cases

- an orderly disclosure of the information will set the record straight

30. Taking the above factors into account, the Commissioner is satisfied that the legitimate interests of the public are sufficient to justify any negative impact to the rights, freedoms and interests of the individual concerned. He therefore considers that disclosure of the information would be fair.

31. Having decided that disclosure of the amounts paid in legal aid would be fair the Commissioner has gone on to consider whether disclosure would be lawful. The information is not protected by any duty of confidence or statutory bar and he therefore considers that its disclosure would be lawful.

32. The Commissioner has considered whether any of the schedule 2 conditions of the DPA are met for disclosure of the information.

33. Schedule 2 condition 6 permits disclosure where it is:

"necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

34. In order for the condition to be met, the Commissioner considers that disclosure must satisfy a three part test:

(i) there must be a legitimate interest in disclosing the information

(ii) the disclosure must be necessary for that legitimate interest

(iii) even where the disclosure is necessary it must not cause unwarranted interference or harm to the rights, freedoms and legitimate interests of the data subject.

35. The Commissioner has detailed the legitimate interests in disclosure of the information at paragraph 29 of this notice. He considers that disclosure of the information is necessary for these legitimate interests.
36. Having already established that the processing is fair, the Commissioner is also satisfied that release of the information would not cause any unnecessary interference with the rights, freedoms and legitimate interest of the data subject. He is therefore satisfied that the schedule 2 condition is met.
37. As disclosure of the amounts paid in legal aid would not contravene the first principle of the DPA the Commissioner does not consider the information to be exempt under s40(2).
38. The LSC's letter to the Commissioner of 31 July 2012 added that some of the barristers involved might believe the information to be their personal data if they were sole practitioners. However, the Commissioner does not consider the names or details of the lawyers receiving payment to be within the scope of the request.
39. As the exemption at s40(2) is not engaged the Commissioner has not proceeded to consider whether any of the schedule 2 conditions are met in this instance.

Section 31(1)(c)

40. Section 31(1)(c) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the administration of justice.
41. The LSC submitted that given the high profile nature of the deportation case and the press attention it has received, disclosure of the costs associated with it to date would be likely to compromise the litigation. The LSC maintained that this could potentially prejudice the outcome for Abu Qatada.
42. The LSC did not explain how or why knowledge of the amount paid in legal aid to date would be likely to compromise the litigation or influence the decision of the SIAC. Nor did it provide any argument or evidence to support the view that disclosure of the amount paid would be likely to prejudice the outcome for Abu Qatada.
43. The Information Tribunal has determined that any reliance on 'prejudice' should be rejected if the causal relationship between

disclosure and the likelihood of prejudice required is not demonstrated.¹

44. In the absence of any evidence from the LSC or the provision of any argument to support or explain why disclosure would be likely to prejudice the administration of justice the Commissioner considers that the LSC has failed to establish engagement of the exemption. In any event, there is nothing apparent to the Commissioner from the facts of this case to support such an argument.
45. As the exemption at s31(1)(c) is not engaged the Commissioner has not proceeded to consider the public interest test in respect of the exemption.

Section 43(2)

46. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person holding it.
47. The LSC submitted that Abu Qatada's lawyers may well argue that disclosure of the information would prejudice their commercial interests as the media could and would be likely to publish unfavourable articles highlighting the amount earned from legal aid. In this regard the LSC said it had experienced mis-representation of solicitors' costs in recent media coverage of other high profile cases.
48. The fear of an unfavourable press is not a valid reason for withholding information under FOIA. Any concern that the media may mis-represent the amounts paid would in the Commissioner's view be pre-empted by a clear and transparent disclosure of the information.
49. The LSC did not explain how the likelihood of unfavourable media articles concerning the legal aid amounts paid in this case would prejudice the commercial interests of the lawyers involved. Nor did it provide any argument or evidence to support that view.
50. As referenced by footnote 1, any reliance on 'prejudice' should be rejected if the causal relationship between disclosure and the likelihood of prejudice required is not demonstrated.
51. The LSC did not provide the Commissioner with any submission from the lawyers themselves to support the suggestion that commercial prejudice would arise from disclosure. In line with the Information Tribunal's decision in *Derry Council v Information Commissioner*

¹ [Hogan v Information Commissioner and Oxford City Council \(EA/2005/0030\)](#)

(EA/2006/0014) he does not consider it appropriate to take into account speculative arguments advanced by public authorities about how prejudice may occur to third parties. Without confirmation or evidence of commercial prejudice from the third parties themselves the LSC's submission in this respect can only be considered to be supposition.

52. In the absence of any evidence from the LSC or the provision of any argument to support or explain how disclosure would prejudice the commercial interests of the lawyers concerned, the Commissioner considers that the LSC has failed to establish engagement of the exemption.
53. As the exemption at s43(2) is not engaged the Commissioner has not proceeded to consider the public interest test in respect of the exemption.

Right of appeal

54. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

55. 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.
56. 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

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**