

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2014

Public Authority: University of Sussex

Address: Sussex House

Brighton

BN1 9RH

Decision (including any steps ordered)

1. The complainant has requested the university to disclose the legal costs it incurred in relation to an internal review response it produced on 12 March 2014.
2. The Commissioner's decision is that the university has acted appropriately by refusing to disclose this information under section 43 of the FOIA.
3. As the Commissioner is satisfied that section 43 of the FOIA applies and that the public interest in maintain the exemption outweighs the public interest in disclosure of the information, he requires no further action to be taken.

Request and response

4. On 13 March 2014, the complainant wrote to university and requested information in the following terms:

"Did the University see legal advice in conducting this internal review?"

The name and job title of the University employee who suggested obtaining legal advice.

The name and job title of the University employee(s) who approved this.

The name and job title of the University employee(s) who actually sought the legal advice.

The name and firm/chambers of the practitioners from whom legal advice was sought.

The cost, broken down by firm/chambers if the practitioners came from more than one."

The internal review being referred to in this request is the internal review completed by the university on 12 March 2014 in respect of an earlier information request that the complainant made on 18 January 2014. This request has been addressed separately under case reference FS50534401 and the Commissioner issued a decision notice on this case on 11 September 2014.

5. The university responded on 10 April 2014. It provided the requested information for the first four questions but refused to disclose the name of firm which provided the legal advice and the cost incurred under sections 41 and 43 of the FOIA.
6. The complainant requested an internal review on 10 April 2014.
7. The university carried out an internal review and informed the complainant on its findings on 13 May 2014. It confirmed that it remained of the opinion that sections 41 and 43 of the FOIA apply to fifth and sixth question.

Scope of the case

8. The complainant contacted the Commissioner on 13 May 2014 to complain about the way his request for information had been handled. Specifically, the complainant does not agree that sections 41 and 43 apply to the remaining withheld information. He referred to previous requests made and the university's previous decision to release the name of legal firms used and the costs incurred.
9. During the Commissioner's investigation, the university decided to disclose the name of the legal firm involved (question five), Pinsent Masons LLP. As this information was subsequently disclosed, the Commissioner has focussed on question six only and whether the legal costs incurred for the completion of the university's internal review response of 12 March 2014 is exempt from disclosure under the FOIA.
10. During the Commissioner's investigation the university also confirmed that it had decided to withdraw its application of section 41 of the FOIA.

This notice will therefore only address question six and the university's application of section 43 of the FOIA.

Reasons for decision

11. Section 43 of FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of the university, Pinsent Masons LLP or both.
12. Section 43 of the FOIA is a qualified exemption. Therefore, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the university, Pinsent Masons LLP or both, the university also needs to apply the public interest test. For this, the university needs to consider the public interest arguments for and against disclosure and establish whether the public interest is best served by maintaining the exemption or by disclosure.
13. The university has stated that it considers disclosure of the legal costs it incurred for the internal review response of 12 March 2014 would be likely to prejudice the commercial interests of Pinsent Masons LLP. It provided a copy of a letter it received from Pinsent Masons LLP to the Commissioner which outlines Pinsent Masons LLP's objections to the disclosure of this information.
14. Pinsent Masons LLP stated that the withheld information in this case is the cost it charged the university for a discrete piece of work (the internal review response of 12 March 2014) which is now in the public domain. It believes legal professionals could reasonably estimate the length of time taken to produce this response and rival firms, with relative ease, could reverse engineer its fee for the response to arrive at a close estimate of the hourly rate it charges the university for information law work. Pinsent Masons LLP confirmed that this is distinct from a public authority disclosing its aggregate legal expenditure or expenditure per firm (which, in any event, would not usually be accompanied by the attendant work which those firms have produced) in which no reverse engineering exercise would be possible.
15. Pinsent Masons LLP advised that it understood different responses under the FOIA will require differing levels of effort and cost on the part of the law firm appointed. However, it is its hourly rate model on which the majority of commercial law firms operate which it regards as commercially sensitive rather than a flat rate for producing documents of differing lengths. Pinsent Masons LLP believes its hourly rate could be determined with some accuracy from the withheld information and the piece of work it completed, which is in the public domain. Once the

hourly rate has been extrapolated this can then be applied to a range of requests of varying complexity.

16. Pinsent Masons LLP therefore believes disclosure of the withheld information in this case would be likely to prejudice its commercial interests. It provided the following examples:
 - (a) Rival firms could use this information to undercut Pinsent Masons LLP during bids for future information law work. This would result in a loss of competitive advantage for Pinsent Masons LLP.
 - (b) Reverse engineering of Pinsent Masons LLP's hourly rate will provide a good indication of the charges the university paid for this piece of work. Given access to the complexity and length of the piece of work completed and the exact fee charged, a third party could potentially reverse engineer the fee to approximate the hourly rate at which Pinsent Masons LLP was prepared to undertake this work. Pinsent Masons LLP believes such information would be likely to affect its ability to compete in the marketplace and therefore prejudice its commercial interests. Knowledge of Pinsent Masons LLP's rates is not public knowledge. Rival firms could take an unfair advantage of this information.
 - (c) Disclosure may also lead to competitors trying to establish how it structures its information law practice to offer the rates it does. Pinsent Masons LLP explained briefly how it currently structures its information law practice in order to provide competitive rates to its clients (more detail on this particular argument cannot be quoted here, as to do so, may release commercially sensitive information).
 - (d) Knowledge of its rates in a particular case could also lead to other clients questioning the costs it has incurred for what it believes is similar work.
17. The complainant also submitted some arguments to the Commissioner for him to consider. The complainant referred to similar requests he has made to the university and previous decisions it has made to disclose legal costs on a particular issue. The complainant does not believe this case should be treated any differently and the same approach should be taken. The complainant also referred to issues he had with the application of section 41 of the FOIA. However, as this exemption is no longer being applied, these arguments are no longer relevant.
18. The Commissioner has reviewed the withheld information and considered at length the arguments present by the university on behalf of Pinsent Masons LLP and the complainant. He is satisfied in this case

that disclosure of the requested information would be likely to prejudice the commercial interests of Pinsent Masons LLP and he will now explain why.

19. The Commissioner notes that the university has in the past responded to the complainant's information requests for legal expenditure. However, it is the Commissioner's view that each request should be judged on its own merits and he agrees with the university and Pinsent Masons LLP that the circumstances of this particular case are different.
20. The request itself was phrased in a particular way to request the fee charged by Pinsent Masons LLP for a specific piece of work i.e. the cost to produce or assist with the university's internal review response of 12 March 2014 in relation to an earlier information request the complainant had made. This response was issued under the FOIA and so can be classed as in the public domain. The earlier information requests the complainant refers to in his submissions to the university and the Commissioner relate to aggregate legal expenditure and the total legal costs the university has incurred to a particular date on a specific issue.
21. The Commissioner agrees that it would be possible for rival law firms to estimate the length of time it took Pinsent Masons LLP to produce the piece of work in question and from the costs charged (assuming this was released into the public domain) work out the hourly rate Pinsent Masons LLP charged in this case with some accuracy. If the hourly rate charged in this case was disclosed it would be likely to prejudice the commercial interests of Pinsent Masons LLP.
22. The Commissioner agrees that rival firms could use this information to potentially undercut Pinsent Masons LLP in future bids for similar work. Legal services required by the public sector is a highly competitive environment and information law practice is a specialist area. The Commissioner notes that Pinsent Masons LLP is one of the legal firms which specialises in this sort of work and it should be permitted to protect its current competitive edge and reputation.
23. He also accepts that more generally disclosure of the requested information could negatively impact upon Pinsent Masons LLP's existing relationships with its clients. If the hourly rate was reviewed by other clients it may lead to those clients questioning the work Pinsent Masons LLP has provided for that particular charge. If existing clients feel, rightly or wrongly, that the university has received preferential rates (and the Commissioner is not aware that this is actually the case here) this may lead to a breakdown in future working relationships. This could be the same for the university if another public authority was forced to release the hourly rate it was charged by Pinsent Masons LLP for a piece

of work. The university could review this and potentially question the fees it was charged in a particular case.

24. Although he cannot go into any detail here (because to do so may release information of a commercially sensitive nature), the Commissioner also agrees that disclosure may lead to rival firms investigating further exactly how it is able to offer the hourly rates that it does for this type of work. Pinsent Masons LLP's structure and methods for offering such rates for information law work is in itself commercially sensitive and could be detrimental to Pinsent Masons LLP's interests if it could be established from this information and other information available.
25. As the Commissioner is satisfied that disclosure would be likely to prejudice the commercial interests of Pinsent Masons LLP and that section 43 of the FOIA applies, he now needs to go on to consider the public interest test.
26. The university confirmed that it understands that there is a public interest in public authorities being transparent and open with regards to the activities they undertake, in particular public expenditure. However, it considered the public interest in disclosure was marginal and rested in maintaining the exemption and ensuring the university can maintain a competitive advantage when negotiating similar terms in the future.
27. Pinsent Masons LLP also argued in its submissions to the university that the public interest rested in maintaining the exemption. It stated that while it accepts there is a public interest in openness and transparency in the activities of public authorities, in particular the expenditure of public funds. And, there is a public interest in allowing members of the public to understand decisions made by public bodies and potentially enable them to challenge these if they wish. It does not believe that the disclosure of the fee paid by the university for the piece of work in question would further this public interest.
28. Pinsent Masons LLP stated that disclosure of the fees charged in this case could act as a disincentive to offer competitive prices if other firms do not consider that they can compete with such rates. This lack of genuine competition could lead to the misspending of public funds or at the very least the university not getting value for money for the services it requires. Such consequences are not in the public interest.
29. It confirmed that there is a stronger public interest in ensuring the university can seek quality legal advice for a competitive price. By disclosing the fee charged for the piece of work in question other firms offering legal services would have knowledge of how much the university is willing to pay for legal advice of this nature. Such firms

could reverse engineer Pinsent Masons LLP's fee based on their own experience of this sector and from the internal review response of 12 March 2014 to approximate its hourly rate for this type of work. This could lead to other firms offering flat rate services to the university in an attempt to undercut Pinsent Masons LLP's rates, which would not take into account the complexity of the relevant requests (if a flat rate) or Pinsent Masons LLP's working relationship with the university which allows it to produce the piece of work in question at particular rates. This could in turn lead rival firms to offer poor quality services in order to complete the work within a strict fee limit and without the benefit of Pinsent Masons LLP's working relationship with the university. Again such implications would not be in the public interest.

30. In addition, Pinsent Masons LLP does not consider the public interest is served by the disclosure of its fee for one single transaction. It states that the university could disclose its legal spending for any given period, in a manner which would not allow firms to reverse engineer a rival's hourly rates, but which would allow public oversight of the university's spending on legal matters. Therefore disclosure of the cost of the piece of work in question here does not specifically assist in allowing accountability of public expenditure when it represents a small fraction of the university's total yearly legal spend for a discrete piece of legal advice that represents a small instruction relative to the entirety of advice provided by Pinsent Masons LLP to the university.
31. The Commissioner has given the arguments for and against disclosure detailed consideration. He is of the view that there is a public interest in transparency and accountability and in particular where the expenditure of public funds is concerned. In the current climate of continuing cuts to public funding and the need to make resources stretch further and further, there is a strong public interest in enabling members of the public to understand more clearly and challenge if necessary how these funds are managed and spent by making information of this nature available.
32. He disagrees with the university that the public interest in favour of disclosure is marginal in this case. In fact the Commissioner considers there is a strong public interest in knowing how much public authorities may or may not be spending on legal firms carrying out their FOIA functions. Given the length of time the FOIA has been in place and the experience public authorities should have gained to date dealing with information requests, the Commissioner considers there is a public interest in knowing how much a public authority has spent on legal firms producing FOIA responses on its behalf.
33. However, in this particular case, given the very specific nature of the costs in question and the piece of work to which it relates, which is in

the public domain, the Commissioner considers the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

34. The Commissioner has agreed that it is likely that rival firms could determine from the withheld information Pinsent Masons LLP's hourly rate to a degree of accuracy. He has accepted that disclosure of Pinsent Masons LLP's hourly rate would be likely to be prejudicial to its commercial interests. He considers this information could be used by rival firms to undercut Pinsent Masons LLP and stifle true competition in future bids for similar work. The Commissioner considers there is a stronger public interest in protecting the commercial interests of legal firms such as Pinsent Masons LLP and in ensuring that a fully competitive environment for the future bidding of all legal advice for the university is maintained.
35. Disclosure could hinder the university's ability to secure such favourable terms in the future with Pinsent Masons LLP and other legal firms it uses or with those that wish to compete and such consequences are not in the public interest. The Commissioner considers there is a stronger public interest in this case in ensuring the university can obtain quality legal advice on any issue at a competitive price. If less competitive prices or less favourable terms are available, this will impact negatively on the expenditure of already strained public funds.
36. For the above reasons, the Commissioner is satisfied that the public interest in favour of maintaining the exemption at section 43 of the FOIA outweighs the public interest in disclosure of the information in this case.

Right of appeal

37. 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

38. 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.
39. 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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