

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 July 2018

**Public Authority:** Information Commissioner's Office

**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
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)**

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1. The complainant has requested the amount paid for work in an Appeal case to a named barrister by the Information Commissioner's Office (ICO). The ICO refused to provide this information on the basis of section 43(2) of the FOIA.
2. The Commissioner's decision is that the ICO has correctly engaged the section 43(2) exemption and the balance of the public interest favours maintaining the exemption. She requires no steps to be taken.

## Request and response

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3. On 14 November 2017, the complainant wrote to the ICO and requested information relating to an appeal to the Information Tribunal (EA/2017/1080). The request was in the following terms:

*"Under FOIA I would like to know how much [name redacted] of counsel charge for providing a response (attached). Please provide any invoices."*

4. The ICO responded on 12 December 2017. It stated that no invoices or information on [name redacted]'s charges for this specific response were held. The ICO stated it did hold information on the standard rate it had with [name redacted] for the preparation of a response but considered this would be exempt from disclosure on the basis of section 43 of the FOIA.
5. Following an internal review the ICO wrote to the complainant on 22 December 2017 and upheld its response.

## Scope of the case

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6. The complainant contacted the Commissioner on 8 January 2018 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the ICO has correctly engaged section 43(2) of the FOIA in relation to the amount paid to [name redacted] and, if so, where the balance of the public interest lies.

## Reasons for decision

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### Section 43(2) – prejudice to commercial interests

8. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.

9. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*<sup>1</sup>

10. The withheld information in this case is the amount paid to [name redacted] for her services. This information is commercial in nature as it relates to the "purchase" of services.
11. Having determined that the information is commercial in nature the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.

*The nature and likelihood of the prejudice occurring*

12. The ICO considers disclosing the information would be likely to prejudice both its own commercial interests and those of the barrister. However, the arguments presented by the ICO seem to focus more on the prejudice to its own commercial interests and the Commissioner has therefore focused her attention on this first but notes that the prejudice arguments for both parties are intertwined.
13. The ICO argues that disclosure could impact on its ability to secure favourable rates for barristers in the future. The ICO explained that it had secured favourable rates for the work these barristers undertake for a number of reasons. These include, but are not limited to, the ICO's position as a regulator and its willingness to use junior counsel where appropriate. The ICO is concerned disclosing the rate paid may impact on its ability to continue to negotiate favourable rates in the future both with these barristers and other Chambers. This is also tied in to the idea that disclosing the rate paid would be likely to prejudice the commercial interests of the barristers/Chamber as it would reveal how much they charge the ICO – information which may be of use to competitors. If the barristers/Chambers is a commercially disadvantaged then this in turn will impact on the ICO's ability to negotiate favourable rates with the barristers/Chambers in the future.

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<sup>1</sup> See here:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.aspx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx)

14. The Commissioner accepts that this information would be likely to have a prejudicial impact on both parties commercial interests should it be disclosed. The Commissioner is satisfied the ICO provided its arguments with the full knowledge of the position of the barrister/Chambers as it had previously consulted with them on this issue.
15. In order to accept the exemption is engaged the Commissioner usually requires evidence of a causal link between the information in question and the alleged prejudice argued. This is usually easier to argue where an issue is ongoing, such as retendering or negotiating a new commercial contract or deal. Whilst the ICO has not specifically provided evidence of this the Commissioner considers it is reasonable to assume that, given the work of the ICO, there is a frequent need to engage barristers to represent the ICO. Therefore it can be argued that disclosing the rate paid will have a likely impact on future negotiations as it may make the barristers more reluctant to offer favourable rates due to their competitive advantage being diminished.
16. The Commissioner therefore considers that section 43(2) FOIA was correctly applied and she has gone on to consider the public interest test in this case.

*Public interest arguments in favour of disclosure*

17. The ICO recognises the public interest in promoting accountability and transparency in the spending of public money and the way the ICO conducts its business.

*Public interest arguments in favour of maintaining the exemption*

18. The ICO argues there is a strong public interest in it 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 Counsel's it wishes to engage.
19. The ICO further considers the public interest sits with it being able to compete in a competitive marketplace and in respecting the commercial interests of both Counsel who work with it and itself. The work that the ICO does is to uphold information rights law and is inherently in the public interest and it is essential that it is able to carry on that work in the most effective and efficient way possible.

*Balance of the public interest arguments*

20. The Commissioner recognises there is a public interest in the disclosure of information which provides greater transparency in the spending of public money. In this case disclosing the rate paid would give an insight into the spending of the ICO on external legal work. That being said, the

Commissioner notes that the ICO publishes the total cost spent on legal fees in its annual report and this does go some way to satisfying the need for transparency in connection with legal fees.

21. The Commissioner notes that both parties were given the opportunity to present any arguments with regard to the public interest and whilst the ICO did provide some arguments the complainant did not. The Commissioner, beyond increasing transparency, cannot think of any other compelling public interest argument in favour of disclosing this information.
22. Balanced against this, the Commissioner has accepted there would be a prejudice to the ICO's commercial interests through disclosure of this information and she must therefore accept that there is weight to the argument this would not be in the public interest. Disclosing information which would put the ICO at a disadvantage when negotiating rates for barristers would not be in the public interest.
23. The arguments for disclosure are somewhat diminished by the information that the ICO published but, in any event, the Commissioner has been unable to see any obvious public interest in this information beyond increasing transparency. The arguments for withholding the information are clearer and the Commissioner considers carry greater weight. There is significant public interest in not prejudicing the commercial interests of the ICO, not only in securing best value for public money but also in ensuring the ICO can operate efficiently in its role as regulator by relying on the services of barristers it has a relationship with and at a reasonable cost.
24. Therefore, the Commissioner considers that the public interest in ensuring the ICO is not put in a commercial disadvantage outweighs any public interest in disclosure. Section 43(2) has therefore been properly engaged.

## Right of appeal

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25. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**