



First-tier Tribunal

Information Rights

Appeal Reference: EA/2018/0148

Decided without a hearing

**Before
KAREN BOOTH
JUDGE**

**MIKE JONES and DAVID WILKINSON
TRIBUNAL MEMBERS**

Between

EDWARD WILLIAMS

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

DECISION AND REASONS

DECISION

1. The decision notice issued by the Respondent on 23 July 2018 (Reference: FS50718900) is in accordance with the law and the appeal is dismissed.

(NB in this Decision: The Respondent is referred to as “the Commissioner”; the Freedom of Information Act 200 is referred to as “FOIA”; and references to page numbers are to the numbered pages in the bundle of evidence that was produced for this appeal.)

REASONS

Background to the appeal

2. This appeal relates to a request under FOIA for information about the Commissioner’s spending on legal services for FOIA work.

The request for information and the response

3. On 14/11/17, Mr Williams sent an email in the following terms to the Commissioner (page 111):

“Under FOIA I would [sic] to know how much Elizabeth Kelsey [“EK”] of counsel charge for providing a response (attached). Please provide any invoices.”

The “response” referred to was a response drafted by EK on behalf of the Commissioner to a separate appeal brought by Mr Williams.

Response and review decision

4. The Commissioner responded on 12/12/17 (page 112), saying that EK had not yet submitted an invoice and so the information requested was not held.

She went on to say that:

- (a) They did hold information about EK’s standard rate for the preparation of a response and were expecting her charges for the response in question to be in line with that rate.
- (b) They were withholding that information in reliance on section 43 of FOIA, subsection (2) of which provides that “information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it).”.
- (c) Having applied the public interest test (and citing the factors considered), she had concluded that, in all the circumstances, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

5. On 22/12/17, the Commissioner reviewed the decision but did not change it.

The complaint to the Information Commissioner

6. On 22/12/17 (page 119) Mr Williams submitted a complaint to the Commissioner. This was investigated by a senior case officer. That officer's letter to the Commissioner's Information Access Service Manager is at page 120 and his response is at page 126. He attached a copy of an email dated 18/4/14 (page 129), from Monckton Chambers in response to a consultation about a similar issue. Mr Williams' response is at page 135.
7. The Commissioner issued her decision on 23/7/18 (page 1). She decided that section 43(2) had been correctly applied, the balance of the public interest test favoured maintaining the exemption and no steps were required to be taken.

The appeal to this Tribunal

Appeal grounds

8. On 23/7/18 Mr Williams appealed to this Tribunal against the Commissioner's decision notice. His grounds of appeal (page 11) were as follows.

“1. The exemption was wrongly applied, release of data would not prejudice commercial interest of any party.

2. The public interest test was wrongly applied. It favours disclosure. Releasing rate(s) would allow other service providers to submit lower bids, thus it is in the commercial interest of [the Commissioner] and the taxpayer to release data.

It can only be in the most exceptional circumstances that the public interest test would favour non-disclosure. Disclosure helps maintain confidence in the IC and prevents waste and corruption.

I would like a decision which releases the full “rate card” offered by [the Commissioner]. Other service providers can then bid, accordingly.”.

Commissioner's response to appeal

9. The Commissioner's Response to the appeal is at pages 14-26. The key points are as follows.
 - a) Mr Williams is not contesting the conclusion that the information requested is commercial in nature but is arguing that its disclosure would not prejudice the commercial interest of any party.
 - b) The Commissioner submits that disclosure *would be likely* to have that effect, citing case law establishing that:
 - the test of which is “a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not” and “more than a hypothetical or remote possibility”;
 - although the *chance* of prejudice needs to be significant and weighty, the *extent* of the prejudice need not be (but may be relevant to the public interest test) – it is sufficient that some commercial disadvantage is likely to be suffered.
 - c) Disclosure of the information could affect the Commissioner's ability to negotiate rates with barrister's chambers in the future, on the basis that they are likely to be discouraged from tendering if they believe that confidential information will be revealed. In this case the chance of such

discouragement is more than hypothetical/remote. Disclosure would be likely to prejudice the Commissioner's commercial interests if fewer bids are received – thus inhibiting the Commissioner's ability to obtain best value for money.

- d) As regards the Appellant's assertion that disclosure would benefit the Commissioner by leading to other service providers submitting lower bids, the information requested is a charge for drafting a particular type of document from a particular barrister and is not necessarily reflective of rates agreed by the Commissioner for other work from the same barrister or with other barristers. Others may not submit lower bids if more lucrative work was not available as part of the agreement.
- e) The Appellant has not raised any specific points in relation to his assertion that disclosure would not prejudice the commercial interests of the barrister concerned or her Chambers. The Commissioner maintains that it would (citing the email at page 129 in support). Disclosure would reveal how much they charge the ICO, which could be of use to competitors, and this in turn will impact on the Commissioner's ability to negotiate favourable rates with the barristers/Chambers in the future.
- f) Public interest test points –
 - The Commissioner has already acknowledged the public interest in promoting accountability and transparency in the spending of public money.
 - There is a public interest in potential tenderers being encouraged to bid for public contracts and being able to improve the quality of their bids. There is a real risk in this case that other barristers/chambers may be more reluctant to offer favourable rates due to their competitive advantage being diminished if they know that such information may be disclosed to the public.
 - Mr Williams has not addressed the Commissioner's public interest arguments in favour of maintaining the exemption.
 - There is a recognised need to protect commercially confidential information and a clear public interest in a fair market and competition.
 - The Commissioner disagrees with the Appellant's assertion that it can only be in the most exceptional circumstances that the PIT would favour non- disclosure. Each case must be determined on its own facts.
 - The public interest test arguments advanced by Mr Williams are insufficient to outweigh the strong public interest in maintaining the exemption.
- g) Mr Williams is not in any event entitled to information which releases EK's "full "rate card". That is not what he requested, and it thus falls outside the Tribunal's jurisdiction.

Mr Williams' further responses

10. Submission dated 9/8/18 (page 27) - To which he attached a copy of a document entitled "The Transparency of Suppliers and Government to the Public" (page 30), asserting the relevance of specified extracts and concluding as follows: "I ask that the ICO reconsiders its approach having read the Govt. requirements. I do not accept that the commercial interests of any barrister would be prejudiced by knowing how much the contract is for. On the contrary, if Counsel is providing good value this will encourage others to engage her. Open pricing is what ensure a competitive market place. The ICO claims it has favourable rates, but what comparison is the ICO using? More information is needed."
11. Undated submission (page 36) - His main points were as follows.
- a) He agrees that disclosing the invoice would reveal how much EK (but not her Chambers) charged for one job and that this may be of use to her competitors, but it does not follow that this will impact on the Commissioner's ability to negotiate favourable rates with barristers/Chambers in the future. That claim is a naked assertion bereft of detail/principle.
 - b) It is not clear how EK would be commercially harmed if her invoice was released. If her charge was fair she might attract new clients. If it was high, then the Commissioner would not have obtained favourable rates.
 - c) The Commissioner has failed to give reasons as to why she believes she has achieved favourable rates in the past or what that phrase means. She cannot know if she has negotiated favourable rates as she is the only FOIA regulator.
 - d) The Tribunal decisions cited on her behalf are not binding/relevant. The Commissioner decision FS50607111 supports his case (in that decision the Commissioner decided that that there was a public interest in creating an environment in which publicly maintained schools can secure contracted services at a lower rate due to a competitive market).
 - e) Government policy should be respected in the same manner as statutory regulations and statutory guidance (citing 2005 judgement of Lord Bingham in case of Munza).
 - f) In support of his submissions he attached copies of -
 - A Crown Commercial Service document entitled "Publication of Central Government Tenders and Contacts" as updated in 2017;
 - Information pack relating to a 2017 recruitment exercise for an in-house General Counsel for the ICO (asserting that this demonstrates that the Commissioner is confident that releasing the range of the amount she is prepared to pay for legal services will not stop her getting best value and undermines her argument in this appeal in its entirety).

Commissioner's application to rely on additional exemption (section 40(2))

12. On 28/8/18 the Commissioner applied to the Tribunal for permission to rely on an additional exemption (that is, section 40(2) of FOIA) (personal information) in the alternative. Mr Williams consented to this and the Tribunal agreed that it was fair and just to allow this.

13. The Commissioner's arguments in support of the application of section 40(2) are set out in the Commissioner's further written submission dated 28/8/18.

The key points are as follows.

- a) The information requested is the personal data of EK.
- b) Its disclosure would breach the first data protection principle ("personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless- (a) at least one of the conditions in Schedule 2 [of the Data Protection Act 1998 ("the DPA")] is met").
- c) As to fairness, there is no presumption that the openness and transparency of the activities of public authorities should take priority over personal privacy. It is necessary to consider the possible consequences of disclosure for individuals, their reasonable expectations and any legitimate interests in the public having access to the information.
- d) For the reasons set out in paragraphs 22 of the submission, EK would have a reasonable expectation that the information held would not be disclosed to the public. And there is little legitimate interest in a member of the public being made aware of a fee charged by an individual barrister for a particular piece of work.
- e) Having concluded that disclosure would be unfair, it was unnecessary to consider whether any condition in Schedule 2 was met. However, the Commissioner was satisfied that the only potentially relevant condition (condition 6¹) was *not* met. Even if Mr Williams is pursuing a legitimate interest, disclosure of the information would not be necessary to meet such an interest as it would be unwarranted in this particular case by reason of prejudice to the legitimate interests of EK.

Mr Williams' final reply

14. Mr Williams provided the following further information in support of his appeal.

- Response dated 28/8/18 from the Government Legal Department ("GLD") to Mr Williams FOIA request for information concerning two named barristers' fees relating to his FOIA appeal EA/2017/0180 (figure for total fees billed provided) as well as agreed pay and expenses etc. rates for individual barristers /their Chambers for FOIA work in 2018 (link to published information provided).
- Response dated 24/8/18 from the GLD to Mr Williams in response to his FOIA request requesting a breakdown of how much had been paid to

¹ "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the 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."

another named barrister over the last 10 years (information provided) and his agreed hourly rate (provided).

15. He made the following further points.

- a) If the GLD is happy releasing this information then how can the Commissioner justify not doing the same?
- b) The last-named barrister has not had his career harmed since his earnings were made public by the Guardian in 2013.
- c) This goes to the public interest test in this appeal. The Government is spending freely when it comes to barristers it favours, despite the plight of some members of the criminal bar (due to “relentless cuts”).
- d) As a member of the public he has a legitimate interest in understanding how the GLD has spent £2,934 on two barristers acting for the DVLA in his FOIA appeal about parking tickets when a person facing a murder trial has no legal representation.
- e) He rejects the contention that EK has a legitimate expectation that her fee or standard rate will never be revealed. She is a qualified lawyer and a FOIA expert who advertises her background and achievements on her Chamber’s website. When she signed up for government work she should have known that there is a clear interest in how public money is spent. The data is not sensitive. It is professional data. It has no potential impact on EK in a professional capacity.
- f) He has not seen any evidence that EK asked for or was offered a confidentiality agreement.

Our task and the issues we had to decide

16. Our task is set out in section 58 of FOIA:

58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

17. The issues we had to decide were as follows.

- a) **Issue (a)** - Had the Commissioner correctly concluded that disclosure under FOIA of the information held (being EK's standard fee for drafting a FOIA appeal response) would, or would be likely to, prejudice the commercial interests of any person (including the Commissioner)?
- b) **Issue (b)** - If the answer to issue (a) is "yes", in all the circumstances of the case did the public interest in maintaining the section 43(2) exemption outweigh the public interest in disclosing it?
- c) **Issue (c)** - If section 43(2) did not apply, was the closed material exempt information by virtue of section 40(2)?

(NB In the event that we were satisfied that the closed material *could* be withheld in reliance on section 43(2), we were not obliged to consider section 40(2). However, it was open to us to do so, either by giving our decision in the alternative or by way of observation².)

In deciding these issues, our focus was on the information held at the relevant time; that is, the information about EK's standard rate for drafting appeal responses to FOIA requests. The Commissioner had correctly pointed out that we could not consider release of what Mr Williams referred to as "the full "rate card" offered by IC". That was not the information that he had requested.

The evidence

18. The evidence before us consisted of: the paper evidence in the open bundle of documents (135 pages); the additional documents (Case Management Directions dated 29/8/18, further Commissioner submission dated 28/8/18, Mr Williams' email dated 28/8/18 and his further Reply; and the "closed material" (consisting of EK's standard rate for producing a FOIA appeal response for the Commissioner).

19. Both parties requested a paper determination. After considering the bundle of evidence (which included the very thorough and detailed submissions from both parties referred to above) we were satisfied that we were able to determine the appeal without an oral hearing and that it was fair and just to do so.

What we decided and why

Issue (a)

20. We were satisfied, on the balance of probabilities, that disclosure of the closed material to the general public would pose a real and significant risk of prejudice to the commercial interests of the Commissioner (and possibly EK).

21. In order to perform her statutory duties, the Commissioner needs the services of both in house and external lawyers. EK is one of the external legal professionals who provides legal services to the Commissioner. She is

² Paragraph 109 of the Judgement of the Upper Tribunal in *IC v 1. Malnick*; 2. *ACOPA* [2018] UKUT 72 (AAC).

presumably retained as such because she has the necessary expertise and experience and because the Commission has been able to negotiate appropriate rates with her. Her standard rate for particular legal tasks (including her standard rate for producing a FOIA appeal response) will have been negotiated, in confidence, as part of a wider contract between them, that is satisfactory to both parties.

22. In isolation, the closed material is unlikely to be of any real value to others. Its disclosure would provide a restricted and possibly distorted/misleading picture of the wider business relationship. There is no evidence before us to suggest that EK has consented to this information being put into the public domain. It is unlikely, in our view, that she would have so consented or that she would have an expectation that this would happen in the absence of such consent (as supported by the email from Monckton Chambers at page 129). She will clearly be very aware of the potential for a FOIA request relating to her fees, but we considered it likely that she would expect the Commissioner to resist disclosure of the information available in this case (i.e. her standard rate for a particular legal task).
23. In support of his case for disclosure, Mr Williams has provided a copy of the guidance at page 84. He appears to assert that this guidance is directly applicable to the contractual arrangements between the Commissioner and EK. We were not in a position to validate that assertion. However, it was not at all clear from his submissions or from our perusal of the guidance that it discourages/precludes reliance on section 43(2) of FOIA in relation to the type of information being withheld in this case.
24. Mr Williams has also provided information about disclosures made by the Government Legal Department in relation to legal fees paid to barristers on behalf of central government departments. We do not know the basis for their practices in that respect and the Commissioner is not a central government department. We have not in any event seen any evidence about disclosures of information equivalent to the closed material.

As regards the information pack relating to the public recruitment exercise for the salaried position of General Counsel to the Commissioner, that information was clearly not relevant to the issues we needed to determine in relation to this appeal. We rejected Mr Williams' assertions that the cases cited by the Commissioner were not relevant (although it is correct to say that First-tier Tribunal decisions are not binding on another First-tier Tribunal).

25. We were satisfied that EK's standard rate for specific legal tasks is commercially confidential information and that its disclosure (in the absence of EK's express consent) would be likely to be damaging to the wider business relationship between the Commissioner and EK (and possibly between other lawyers who have similar contracts with the Commissioner). More generally, we considered the importance of preserving the Commissioner's freedom to negotiate, in confidence, the constituent parts of a business arrangement in order to secure an overall agreement that offers best value for money. It was more probable than not, in our judgement, that disclosure would be likely to

prejudice the commercial interests of the Commissioner in these and possibly other respects.

Issue (b)

26. We were satisfied that, in all the circumstances of the case the public interest in maintaining the section 43(2) exemption outweighed the public interest in disclosing it?

27. It is clearly the case that there is a significant public interest in promoting accountability and transparency in the spending of public money.

28. Mr Williams appears to be asserting that it is in the public interest for the Commissioner to be fully transparent about the fees it pays to barristers for FOIA work given the lack of government money available for important criminal defence work. We accepted that there is a general public interest in the public having access to information about expenditure on public services, particularly if there is a groundswell of opinion that a crucial public service is being under funded.

However, the public interest lies more obviously in having access to *broader* information about such expenditure and we noted that the Commissioner publishes the total expenditure on legal fees in her annual report (page 4). Whilst we accepted that a greater level of transparency might well be in the public interest, it is hard to see what public interest lies in knowing what one individual barrister has agreed with the Commissioner as regards her standard rate for a particular legal task on FOIA cases, in the absence of any other information about the contractual arrangement as a whole. We were unpersuaded by Mr Williams' assertion as it applies to this case.

29. Mr Williams also asserts (citing in support the Commissioner's decision notice at page 77) that "releasing rate(s) would allow other service providers to submit lower bids, thus it is in the commercial interest of [the Commissioner] and taxpayer to release data.". Again, we could not see how the disclosure of the standard rate of a specific barrister for a specific legal task, in the absence of additional information relating to the contract as a whole, would cause or encourage other service providers to submit meaningful lower bids.

30. There is clearly a strong public interest in the Commissioner being able to negotiate and secure necessary and appropriate legal services in a competitive market place, on terms that achieve the best value for the public purse. It is not in the public interest to require the disclosure of confidential information that would undermine her ability to do this effectively, particularly where (as in this case) the information relates solely to one narrow aspect of a wider agreement. In our judgement, these factors outweigh the more generic public interest test factors referred to above, and the exemption should be maintained.

Issue (c)

31. If our decision on section 43(2) is wrong, we have in any event decided that the information could be withheld in reliance on section 40(2).

32. The information concerned is clearly EK's personal data even though it consists of information relating to her professional life.
33. As mentioned above, the first data protection principle requires, amongst other things, that personal data shall not be processed unless at least one of the conditions in Schedule 2 of the DPA is met. We took a slightly different approach to the Commissioner by considering Schedule 2 first (and before the question of whether disclosure would be fair and lawful in a more general sense).

The Commissioner correctly pointed out that the only potentially relevant Schedule 2 condition was condition 6 (the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the 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. We accepted that, in requesting this information, Mr Williams was pursuing legitimate interests (which included transparency in the spending of public money on legal costs relating to FOIA appeals, against the background of his concerns about the underfunding of criminal defence work). We did not accept, however, that the processing (i.e. in this case the disclosure of the closed material into the public domain) was *necessary* (which case law has established means "*reasonably necessary*") for the purposes of *those* interests.

As mentioned on numerous occasions above, the closed material in this case is information consisting of EK's standard rate for producing responses to FOIA requests for the Commissioner. We did not see how, in isolation, that information could possibly further the legitimate interests that Mr Williams is pursuing. Condition 6 was not, therefore, met.

35. As condition 6 did not apply, we did not need to further consider whether the disclosure of the closed material would be fair and lawful more generally. However, for the reasons given in paragraph 22 above, we considered that EK would have a legitimate expectation that the closed material would not be put into the public domain. It followed that its disclosure would be unfair for the purposes of the first data protection principle.

Conclusion

36. As we had concluded that the Commissioner had correctly relied on section 43(2), her decision was in accordance with the law. The appeal was therefore dismissed. Our decision was unanimous.

Judge of the First-tier Tribunal

Date: 18 February 2019