



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0312P**

**Determined, by consent, on written evidence and submissions.  
Considered on the papers on 17 March 2020**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**  
Ms Marion Saunders  
Dr Malcolm Clarke

**Between**

**Des Moore**

Appellant

And

**The Information Commissioner**

Respondent

**DECISION AND REASONS**

## DECISION

1. The appeal is dismissed.

## MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 100.

## BACKGROUND AND CONTEXT

4. On 27 August 2018, the Appellant wrote to the Parliamentary and Health Service Ombudsman (PHSO) and requested information of the following description.

"1. Please provide the names of all legal professionals you engaged during the year 2017/18 who were paid by the hour.

2. Please state the hourly rate of each. If the hourly rate of any particular individual varied during the year, please provide the lowest and the highest rate.

3. Please provide the total amount paid to each during 2017/18. I would like the figures to show the gross amount (net plus VAT) paid in each case, similar to how the Government Legal

Department (GLD) has done it in response to this FOIA request concerning [redacted]: <https://www.whatdotheyknow.com/request/5...>”

5. On 19 September 2018 the PHSO, in relation to points 1 and 3 of the request, provided the names and total amount paid to each firm the legal professionals were employed by. In regard to point 2, it applied section 43(2) FOIA to withhold the hourly rate of each legal professional.
6. On 1 October 2018 the Appellant wrote to the PHSO and requested a review of its handling of his request. As the Commissioner records in the decision notice of 30 August 2019: -

His request for review focussed on point 2 stating that if the hourly rate paid to each legal professional was anonymised this would not prejudice the commercial interests of the PHSO. He said that it had previously disclosed the hourly rate paid to an unnamed barrister, and given that a (named) QC could be instructed at £230 per hour, there was a genuine public interest in knowing how many barristers have been instructed by the PHSO and what they are charging for their services.

7. On 30 October 2018, the PHSO conducted a review and wrote to the Appellant, maintaining its original decision. The Appellant contacted the Commissioner on 7 November 2018 to complain about the way his request for information had been handled. The Commissioner stated that she has only considered the matter raised to her by the Appellant, which is whether the PHSO was correct to apply section 43(2) FOIA to withhold the hourly rates of legal professionals instructed between 2017 - 2018.

#### LEGAL FRAMEWORK

8. As stated above, the relevant exemption relied on by PHSO is in section 43(2) FOIA which, materially, reads as follows: -

**43.— Commercial interests.**

(1) ...

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

9. In relation to the test for prejudice in s43(2) FOIA, in *Hogan v Information Commissioner* (EA/2005/0026, 17 October 2006) it was stated as follows: -

28. The application of the 'prejudice' test should be considered as involving a number of steps.

29 First, there is a need to identify the applicable interest(s) within the relevant exemption...

30 Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a *de minimis* threshold which must be met.

31 When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use.

32...

33 ...

34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), where a comparable approach was taken to

the construction of similar words in Data Protection Act 1998. Mr Justice Munby stated that 'likely': *"connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."*

35 On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests (considered later in this decision). In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.

10. S43(2) FOIA is a qualified exemption and, even if it is applicable, the public interest in disclosure or withholding the information must also be considered.

#### THE DECISION NOTICE

11. The Commissioner set out the PHSO's position as to prejudice as follows:

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13. The PHSO said that disclosure of the withheld information would be likely to prejudice its own and the legal professionals' interests. It explained that if the highest and lowest hourly rates of all legal professionals instructed between 2017 and 2018 were released it would enable existing legal professionals and prospective legal professionals bidding for future contracts to see the hourly rates the PHSO has paid and expect the same rate it had previously agreed to (with another firm) and could use this as a starting point in negotiations. This could lead to it paying over the market rate for work based on a previously agreed hourly rate. Consequentially, the PHSO would be unable to enter into future negotiations relating to hourly rates on an equal footing, affecting its ability to negotiate competitively, weakening its position and

minimising its ability to obtain maximum value for money. It said that legal professionals currently instructed may also question existing rates.

12. The PHSO also made submissions to the Commissioner about the position of legal professionals as follows: -

It said that disclosure would similarly be likely to affect the ability of the legal professionals instructed to enter into negotiations over hourly rates on equal footing during negotiations with prospective clients who are likely to resist higher rates for future work. It said that the legal professional's existing clients may also question existing rates.

13. The PHSO provided the Commissioner with submissions from a firm whose legal professionals' hourly rates are within the scope of the request and the withheld information. The Commissioner recorded that: -

They said that they specialise in providing legal support to public sector organisations, that there are a relatively small number of legal professionals/firms that specialise in this work and the market is increasingly competitive. ....They said that 70% of their client base is public sector, if their hourly rates, which are common to the PHSO and other clients, are made available to its competitors, they would be able to determine the rates they are/may be charging under existing and future contracts and may elect to lower their rates to make their offering more attractive diminishing their commercial advantage, particularly as many public sector tenders give a significant weighting to pricing and therefore disclosure of this information would put them at a significant disadvantage. This would be likely to prejudice its ability to bid and win new work.

14. It was also recorded in relation to legal professionals that:

15. They also said that all work done for clients is billed on an hourly rate basis and the PHSO is billed on the hourly rates agreed and there is no flexibility in regard to this. They said that disclosure of the hourly rates could also lead to other existing clients of the firm questioning the rate agreed where they exceed the rates upon which it works with the PHSO. Prospective future clients of the firm would also be likely to resist higher rates if they were to know the rates agreed with the PHSO a number of years ago. The PHSO

said that it is concerned that in this context disclosure of the information could lead to legal professionals being discouraged to take up work because of the effects of disclosure and loss of confidence.

15. The Appellant disputed the PHSO's position that disclosing the hourly rates of the legal professionals anonymised would harm its own interests as it would simply reveal what it is paying for legal services.

16. In relation to the necessary tests to be met in relation to s43(2) FOIA the Commissioner's conclusions can be summarised as follows: -

- (a) The negotiation of hourly rates of pay during the procurement of legal services is a commercial activity, and therefore the requested information relates to the interests covered by the s43(2) FOIA exemption, which the exemption contained at section 43(2) of the of the FOIA is designed to protect.
- (b) Disclosure of the withheld information would be likely to harm both the PHSO's and the legal professionals' commercial interests.
- (c) Whether the rates are anonymised or not, the information could be used in current or future negotiations by legal professionals bidding for work to infer what the PHSO is willing to pay for similar services.
- (d) Legal professionals could also use the information to determine a starting point for negotiations, ultimately impacting the PHSO's ability to enter negotiations on an equal footing and obtain the best value for money.
- (e) Legal professionals could also use the information to question their existing rates. The PHSO is a publicly funded body and should not be

disadvantaged when entering negotiations with external services providers.

- (f) From the point of view of the legal professionals, the information could be used by competitors to determine the rates the legal professionals are likely to charge for their services, and bids could then be tailored accordingly.
- (g) Existing clients could also question legal professionals' rates and affect their ability to continue with and/or renew their contracts.
- (h) Disclosure has the potential to harm the PHSO's and legal professionals' commercial interests given the insight such information would provide to existing and future legal professionals bidding for work with the PHSO and the legal professionals competitors in the legal advice services market.
- (i) On the basis of submissions received, disclosure would give rise to a real and significant risk of this prejudice occurring.
- (j) 'Legal professionals are highly skilled researchers and negotiators, that both skill sets form part of their formal and ongoing training and it is therefore likely that in preparing for negotiations prospective bidders would be likely to obtain and use the withheld information to gain an advantage during negotiations and consequentially affect the PHSO's ability to obtain maximum value for money' (paragraph 21).

17. Having found that the s43(2) FOIA exemption was engaged, the Commissioner turned to consider the public interest test. She noted that the Appellant argued that as a (named) QC could be instructed for £230 per hour therefore there was a genuine public interest in knowing how many barristers have been instructed by the PHSO and what they are



charging for their services. She agreed that there is a public interest in public authorities being transparent and open with regard to the activities they undertake, in particular ensuring that public funds are apportioned appropriately when incurring expenditure on procuring external legal services.

18. However, the Commissioner also agreed that the balance of public interest lay in (i) maintaining the exemption to ensure the PHSO can maintain a competitive advantage when negotiating hourly rates for legal services in the future, (ii) maintaining its existing relationships with legal service providers, and (iii) preventing any adverse effect disclosure could have as a result of legal professionals becoming discouraged by loss of confidence to take on work because of effects of disclosure.

19. She noted that the PHSO has already disclosed the total sums paid to each firm the legal professionals were instructed from between 2017-2018 in response to the request. She noted the submissions made by the legal professionals, and the specific concerns that had been made by legal professionals about the effect on future negotiations, which was a matter also raised by the PHSO.

#### THE APPEAL

20. The Appellant filed an appeal dated 31 August 2019. The grounds of appeal essentially disputed the Commissioner's conclusion that s43(2) FOIA was engaged, on the basis that previous disclosures had revealed what one QC charged for PHSO work (£275 per hour), and what another charged for doing important work for the government (£230 per hour), and therefore further disclosures would not be likely to be prejudicial to commercial interests. In relation to the public interest the Appellant is concerned that the PHSO is not getting value for money if a QC engaged to litigate cases of national importance charges the government £230 per

hour, and the PHSO is paying more than that when it instructs a QC. He is of the view that knowing the hourly rate paid is important to the aim of finding out if the PHSO is getting value for money. Being provided with the total amounts paid to legal firms and practitioners does not show how much is being paid per hour.

21. The Commissioner prepared a response which re-iterates the points made in the decision notice. The Appellant also prepared a reply to this in which he argues (a) that the information he seeks is 'financial' and not 'commercial' (citing the Court of Appeal case of *DWP v Information Commissioner* [2016] EWCA Civ 758); and (b) referring to the FTT case of *Williams v IC* (EA/2018/0148), that disclosure of an amount paid to a barrister for a piece of work could not encourage others to submit lower bids. Further submissions dated 11 February 2020 from the Appellant addressed particular points made in emails by legal professionals about preferring not to disclose the information, essentially supporting the Appellant's argument that it is in the public interest (from a value for money point of view) to disclose the information.

## DISCUSSION AND DECISION

### **Is the exemption in s43(2) FOIA engaged?**

22. The Appellant contested that the information sought is commercial in nature, and relied on the case of *DWP v IC and Zola* (see above).
23. *DWP v IC and Zola* was a case on a number of issues, where it seemed to be accepted that additional expenditure by the DWP from its welfare budget on benefits was a 'financial interest' rather than a 'commercial interest' (see paragraph 21 of the judgment). However, that does not translate to the factual situation in this case where clearly, in our view, the

PHSO's 'commercial interests' are engaged when negotiating fees with lawyers in private practice.

24. It also seems clear (and is not contested) that there is a causal relationship between the potential disclosure (of hourly rates paid to lawyers) and the prejudice claimed (disadvantages in future commissioning exercises).
25. Thus, for the purposes of the tests in *Hogan*, in essence what we have to decide is whether the disclosure of the information requested gives rise to a real and significant risk (as defined in *Hogan* and other cases) of prejudice to the commercial interests of PHSO and the legal professionals concerned.
26. The Appellant's main point is that the information which is available about what two QCs are paid means that commercial interests are not likely to be prejudiced. It is known that the PHSO has paid a QC £275 per hour, and that the government pays another top QC £230 per hour. Thus, he says, the rates which the PHSO is prepared to pay, and the rates at which QC services could be secured are already known.
27. In our view, this is too simplistic approach. There are many reasons why barristers are paid the hourly rate they receive for the work they do. It may depend on the amount and nature of the work (including legal difficulty, values involved and specialisation) for example. As the submissions in this case indicate, legal professionals may charge very different amounts to different clients and different kinds of clients. The figures of two barristers do not tell us, as the Appellant seems to infer, for example, that the PHSO is able to commission work from a QC at less than £275 per hour, or that £275 per hour will secure the expertise and the availability needed in a particular case. Indeed, these are issues raised by the PHSO in its letter of 11 July 2019 to the Commissioner when it explained that there is flexibility in its approach to commissioning services depending on the factors indicated earlier in this paragraph.

28. Further, the figures the Appellant has, only relate to QCs. It is likely that the majority of work commissioned by the PHSO will be from more junior barristers and solicitors. From the disclosures we know nothing as to the rates charged by these legal professionals. Therefore, we do not find that the disclosures that have been made mean that likely prejudice cannot be established in this case.
29. We have set out the submissions made to the Commissioner by the PHSO and the legal professionals above. Essentially, both are concerned that disclosure of the information sought will be prejudicial to their respective commercial interests. The PHSO does not want legal professionals necessarily bidding at higher rates because they can see that the PHSO has been prepared to pay such rates in the past (even if those rates have been justified given the nature of the work). The legal professionals fear being further squeezed in a competitive legal market if details of lower fees are revealed. They are also concerned that other clients (where they may have negotiated higher rates) will seek to lower the rates paid.
30. It seems to us that these are real concerns on both sides. Even if legal practices and barristers chambers have a general idea as to the 'going rates' in most kinds of cases, it is inevitable that disclosure will be closely scrutinised to see if future bids can be tailored. We cannot tell whether this would have the affect of bids being at higher amounts or lower amounts, or whether existing lawyers who work with the PHSO would be discouraged from bidding again, or whether potential new bidders would not enter the market. But we can conclude on the evidence and submissions we have seen that there is a real and significant risk of prejudice (as defined in the *Hogan* case) to the commercial interests of the PHSO and the legal professionals with which it works, or could work.

31. In relation to the case of *Williams*, this does not, in our view advance the Appellant's case. *Williams* was a case where an appellant sought information about the fee paid by the Commissioner to one barrister in a particular case. He sought to argue that disclosure might encourage lower fees in future, and so was in the public interest. The FTT commented that information about one fee, with no context, would not encourage lower bids in future. That comment is not relevant to this case where the Appellant is, indeed, seeking a range of information about fees in the context of the PHSO's overall framework of commissioning, and which may have an effect, as we have found, on future bids.

32. On that basis it is our view that the exemption s43(2) FOIA applies.

### **Public interest**

33. In the light of this findings we do need to go on to consider the application of the public interest test.

34. There is the general public interest in transparency and knowing how a public body is spending taxpayers' money, especially when it is a question as to whether value for money is being obtained.

35. However, the Appellant has already had disclosed to him a lot of information as to how much the PHSO spends on outside legal services and also where the money goes. He says that is not enough for his purposes as he cannot tell how much the PHSO is paying lawyers per hour: he is concerned that the PHSO might become a cash cow for lawyers.

36. Disclosure of the information sought will not actually tell him whether the PHSO has got value for money (which seems to be the main concern),

because the information will not disclose why a particular rate has been paid to a particular lawyer for a particular piece of work.

37. Thus, in our view the public interest in further disclosure (above the responses received to the other parts of the request) is limited and would not achieve the Appellant's purpose. Against this, there appears to be a finely tuned system of commissioning and procuring work by the PHSO which it is feared will be upset by further disclosure. We have already found that there is a real and significant risk of prejudice to the PHSO's commercial interests (which include, as a public authority, achieving value for money) and in our view, there is a greater public interest in protecting that system from the risks identified by the PHSO, than there is in disclosing the information sought by the Appellant.

## CONCLUSION

38. For all these reasons, this appeal is dismissed.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 17 April 2020.