

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 2013

Public Authority: Department of Health
Address: Rivergate House
Newbury Business Park
London Road
Newbury
Berkshire
RG14 2PZ

Decision (including any steps ordered)

1. The complainant has requested information about NHS South West's contract with a named company. NHS South West provided the complainant with some of the requested information but withheld some information under section 42 and section 43(2) FOIA.
2. NHS South West became defunct on 1 April 2013. The Department of Health Legacy Management Team has taken responsibility for this complaint.
3. The Commissioner's decision is that section 40(1), section 40(2) and section 43(2) apply to the redactions made to the information requested at part 1 of the request. The Commissioner considers that the information requested at part 2 of the request is exempt under section 40(1) FOIA. The Commissioner considers that the information requested at part 3 of the request is exempt under section 43(2) FOIA.
4. The Commissioner requires no steps to be taken.

Request and response

5. On 3 October 2012, the complainant wrote to NHS South West and requested information in the following terms

"1. Please provide me with a copy of your contract with [named

company] containing:

a. your instructions to it regarding the handling of all communications to NHS organisations from me and other members of the South West Whistleblowers Health Action Group, including your instructions on the handling of Freedom of Information Requests and Subject Access Requests under the Data Protection Act.

b. the cost to the SHA of this service provided by [named company]."

6. For the purposes of this Notice part 1 of the above request will be referred to as part 1, 1(a) will be referred to as part 2 and 1(b) will be referred to as part 3.
7. On 26 October 2012 [named company] responded on NHS South West's behalf. It provided the complainant with the standard terms within its contracts but said that specific information about the rates it charged were commercially sensitive. It said that the instructions it had received from NHS South West were subject to legal professional privilege so could not be disclosed. It reiterated that it could not give detailed cost information but it said the costs incurred in relation to the matter were in the region of £3,000.
8. The complainant requested an internal review on 23 January 2013. NHS South West sent the outcome of its internal review on 20 February 2013. It upheld the original response.
9. In this case NHS South West has withheld information relating to the first part of the request because it considers it is commercially sensitive. This is covered by the exemption contained at section 43 FOIA. This exemption should have been cited to the complainant. In relation to the second part of the request it withheld information which was subject to legal professional privilege. This is covered by the exemption contained at section 42 FOIA. Again this exemption should have been cited to the complainant. It reconfirmed that the overall cost of the matter was £3,000 and it therefore considered this part of the request had been responded to in full.

Scope of the case

10. The complainant contacted the Commissioner 13 March 2013 to complain about the way his request for information had been handled.
11. The Commissioner has considered whether NHS South West was correct to withhold information under section 42 and section 43(2) FOIA.
12. During the course of the Commissioner's investigation it became apparent that there was personal data contained within the withheld information and therefore section 40(1) and section 40(2) FOIA have been applied where appropriate.

Reasons for decision

Part 1 of the request

13. In relation to part 1 of the original request for a copy of [named company's] letter of engagement and standard terms and conditions, the DoH confirmed that together these formed the contract between [named company] and South West Strategic Health Authority (now transferred to the Legacy Management Team at the Department of Health by virtue of the Health & Social Care Act 2012). The DoH reiterated that the terms and conditions had already been disclosed to the complainant in the original response to her request. It went on to explain that it was now content to disclose the letter of engagement with the exception of the hourly rates set out as applying to the work and associated costs estimate, the description of the scope of work to be carried out by [named company] and some personal data. The redacted letter was sent to the complainant and a copy provided to the Commissioner. It confirmed that the hourly rates, scope of work and personal data are exempt under sections 43(2), 42 and 40(2) FOIA.
14. Having viewed the withheld information, the Commissioner considers that some of this would be the personal data of the complainant and therefore section 40(1) FOIA would also apply in this case.

Section 40(1) FOIA

15. The Commissioner considers that the third and sixth redactions highlighted by the DoH in relation to the information caught by part 1 of the request are the complainant's own personal data.

16. Under section 40(1) FOIA, the personal data of the requester is absolutely exempt from disclosure.
17. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - a. from that data, or
 - b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
18. The complainant is clearly identified in the third redaction and the sixth redaction is specific to the complainant and if linked with the third redaction would identify this link with the complainant.
19. The Commissioner has therefore concluded that the third and sixth redactions are the complainant's own personal data and are therefore absolutely exempt under section 40(1) FOIA.

Section 40(2) FOIA

20. The Commissioner considers that section 40(2) FOIA would apply to the first, second and fourth redactions.
21. Section 40(2) of the FOIA provides an exemption for information that constitutes the personal data of third parties:

"Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied."

21. Section 40(3)(a)(i) of the FOIA states that:

"The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),”

22. In this case the redactions were made to the name of members of staff of NHS South West and a member of staff of [named company]. This constitutes the personal data of those individuals as it is information which they would be identifiable from it. The DoH has argued that it is exempt under section 40(2) of the FOIA by virtue of section 40(3)(a)(i). It said that this was because to release this information would breach the data protection principles.
23. Under section 40(3)(a)(i) FOIA, where disclosure of third party personal data would breach any of the data protection principles, it is exempt under FOIA. The DoH has argued that disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed fairly and lawfully”. Furthermore at least one of the conditions in Schedule 2 should be met.
24. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following:-

Likely Expectation of the Data Subject

25. The DoH has explained that the name of the member of staff from NHS South West has been redacted as the public authority is now defunct and therefore the individual is no longer an employee of that public authority. The DoH has also explained that for this reason, it is unable to contact this individual to obtain his consent to disclosure. On this basis the DoH does not consider this individual would expect his name to be disclosed within the context of this letter.
26. Whilst the Commissioner must consider the position at the time the request was made, under the circumstances it would be inappropriate not to consider the fact that NHS South West no longer exists and therefore the individual no longer works for the public authority. As the DoH cannot therefore contact this individual to obtain their view on disclosure, under the circumstances it is likely that this individual would not expect his name to be disclosed in this context.
27. In relation to the name of the member of staff of [named company], as this is a private company the Commissioner considers the member of staff is unlikely to have considered their name would be disclosed in this context.

The Legitimate Public Interest

28. The Commissioner does not consider that disclosure of the names of the members of staff of NHS South West and the named company would add to the quality or the depth of the information provided to the complainant. The Commissioner does not consider that there is a legitimate public interest in the disclosure of these names.
29. The Commissioner therefore considers that section 40(2) was correctly engaged in this case.

Section 43(2)

30. The Commissioner considers that section 43(2) would be applicable to the fifth exemption in the letter.
31. Section 43(2) 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.
32. The fifth redaction relates to the details of the standard hourly rates or prices charged by [named company] and scope of work. It has argued that [named company's] commercial interests would be prejudiced if this information were disclosed.
33. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to [named company's] commercial interests.
34. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his 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.
35. The Commissioner considers that the rates charged for the service provided by the [named company] does relate to the [named company's] commercial interests.
36. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.

37. The Commissioner has gone on to first consider how any prejudice to the commercial interests of the [named company] would be likely to be caused by the disclosure of the requested information.
38. The DoH has explained that the great majority of the work of law firms such as [named company] is obtained under frameworks or contracts which are awarded following bidding processes. In the case of work for NHS organisations such as South West Strategic Health Authority and its successor body, and other public sector organisations (a significant portion of [named company's] business), a full tender process will be followed. Pricing, in particular the hourly rates to be charged for the work, is always a factor which carries significant weighting in these tender/bidding processes. The hourly rates charged by solicitors' firms are therefore a key differentiating factor between different firms in terms of their commercial offering. They are therefore of significant interest and use to competitors to [named company], who would be able to pitch their rates at a particular level in order to undercut [named company] and gain points in any bidding process. Disclosure would therefore benefit competitors and adversely affect [named company] in relation to tenders for future work. In addition, clients of the firm are likely to be unhappy about any publicity concerning the hourly rates being charged, and this could also affect the firm's commercial interests by affecting the willingness of clients to instruct the firm.
39. The DoH explained that these rates were specified in a contract which was agreed only last year, and they continue to apply to ongoing work by [named company] for the Department of Health Legacy Management Team as the holder of the contractual liabilities of South West Strategic Health Authority. There are continuing commercial pressures on rates for legal work for the NHS and public sector which means that rates are continually being reviewed both by providers and by clients. Tenders for legal work (either full tenders of frameworks/contracts or mini-tenders for smaller pieces of work) take place continually. Therefore [named company] and its competitors are continuously engaged in tenders and preparation of hourly rate packages for clients and potential clients. Therefore the disputed information is very much of current interest to competitors of [named company] and there is a direct and ongoing prospect of commercial damage if the information is disclosed.
40. The DoH confirmed that this view on third party prejudice has been established through discussions with [named company]. It said that these discussions took place orally with colleagues in South West Strategic Health Authority at the time that the original response was sent to the complainant. It said that [named company] have now

confirmed again in writing that they consider that disclosure would still prejudice their commercial interests. A copy of this email was provided to the Commissioner.

41. The Commissioner must determine whether the prejudice claimed is “more probable than not” as the DoH has said that it would occur if the information were disclosed. In this case the redacted information is the standard breakdown of pricing and hourly charges. The DoH has confirmed that the current contract is ongoing and that such tenders are continually being put out within the health service for [named company] and its competitors to bid for. The Commissioner considers that as the contract is ongoing and because [named company] is continually submitting similar bids to health organisations on this basis in competition with its competitors, the prejudice claimed is more probable than not.
42. The Commissioner therefore considers that section 43(2) was correctly engaged in this case.
43. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

Public interest arguments in favour of disclosing the requested information

44. The DoH has explained that it recognises that the following public interest arguments favour disclosure of the requested information:
 - It recognised that there is a strong public interest in transparency and accountability with regard to expenditure of public money. However, it said that as the overall figure for the value of the work carried out by [named company] has been disclosed, some transparency has been provided in this case.

Public interest arguments in favour of maintaining the exemption

45. The DoH has explained that it believes the following public interest arguments favour maintaining the exemption:
 - It is important for NHS organisations and other public authorities to maintain a strong procurement position and avoid unwarranted prejudice to the commercial interests of their advisers. It is also important for them to be able to make appropriate arrangements to manage legal risks and issues without concern on either side that the financial minutiae of their relationship will be disclosed to the public other than for valid audit and accountability reasons.

Balance of the public interest arguments

46. The Commissioner considers that there is a public interest in openness and transparency, and in accountability for the efficient use of public funds. However he accepts that in this case some high level information of this nature has been disclosed to the complainant which goes some way to meeting this public interest argument.
47. The Commissioner does however consider that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies enter successful bids and enter into contracts with public authorities such as in this case.
48. On balance, the Commissioner considers in this case that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption.
49. As the Commissioner considers that the redactions were made appropriately under section 40(1), section 40(2) and section 43(2) FOIA he has not gone on to consider the application of section 42 FOIA any further in relation to part 1 of the request.

Part 2 of the request

50. The DoH has argued that records and emails of advice from [named company] which represent or refer to [named company's] instructions from South West Strategic Health Authority with respect to the handling of correspondence with the complainant are exempt under section 42.
51. The Commissioner considers that because the records and emails of advice relate to the handling of the complainant's correspondence it would be her own personal data.
52. As stated above, under section 40(1) FOIA the requester's own personal data is absolutely exempt under section 40(1) FOIA.
53. Upon viewing a sample of the withheld information the Commissioner considers that the complainant is clearly identifiable from it, certainly in conjunction with other information in the public domain and it would therefore be categorised as her personal data. The confidential annex provides further supporting evidence of this position. It is therefore absolutely exempt from disclosure under FOIA.

Part 3 of the request

54. The DoH has explained that a breakdown of [named company's] actual charges up to the date of the original FOIA request is exempt under section 42 and section 43(2) FOIA.
55. For the same reasons as set out at paragraphs 30-48 above, the Commissioner considers this information to be exempt under section 43(2) FOIA as disclosure would provide even more detailed pricing information relating to [named company].

Right of appeal

56. 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

57. 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.

58. 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

Pamela Clements
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