NHS
Resolution

8th Floor,
10 South Colonnade
Canary Wharf
London
E14 4PU
Telephone: 020 7811 2700

November 2024
FOI_6760

The following information was requested on 29 September and clarified on 20 October 2024:

[On 29 September 2024 you requested]:

I am writing to request information under the Freedom of Information Act regarding the guidelines provided to NHS Resolution's panel solicitor firms relating to expert witness fee guidelines. Specifically, I would appreciate details on the following:

Fee Caps and Structures:
1. The current fee caps for different types of expert reports, including but not limited to shortform, advisory, and CPR35 reports.
2. Any other categories of reports that have specific fee caps, along with their definitions.
3. Clear guidance on when fee caps do not apply, and the circumstances under which an hourly rate or an alternative fee structure may be implemented.

Categorization Guidelines:
4. The criteria and rules that define each report type (e.g., shortform, advisory, CPR35) and any other categories used by the panel.
5. The decision-making process that panel solicitors must follow to categorize a claim into the appropriate fee structure.

Exceptions to Fee Guidelines:
6. The procedures and evidence required by panel solicitors to obtain approval for expert witness fees above the set guideline rates, in cases where they are unable to source expert witness evidence at the guideline rate.

7.Additionally, please provide all documentation and/or policies that detail these guidelines, including any recent updates or changes over the past 5 years.

[On 18 October 2024 we sought clarification]:

At present, we think it is likely that we will hold some of the information requested, however, we would like to seek further clarity with regards to question 2. In accordance with our 'advise and assist' duty under section 16 of FOIA, we would encourage you to clarify your request so that we may undertake the necessary searches. Please could you either rephrase your question, or provide/list an 'example' of what it is you are seeking in order that we can understand what you are referring to.

Furthermore, we can confirm that we do not hold the information requested in response to questions 5 and 6.

We will await to hear from you with a revised request.

[On 20 October 2024 you responded]:
Thank you for your response and for seeking clarification on my request.

For question 2, I am seeking information on any additional types of expert reports (beyond shortform, advisory, and CPR35 reports) that have their own distinct fee caps. For example, are there specific fee guidelines for joint expert reports or supplementary reports? Any other report categories recognized by NHSR with unique fee caps would also be relevant.

Additionally, I'd like to rephrase questions 5 and 6 as follows:

Question 5 (Revised):
What criteria and process does NHSR use to determine the appropriate fee structure for expert reports (e.g., shortform, advisory, CPR35)? Please provide any guidelines or internal policies that NHSR follows in making these decisions.

Question 6 (Revised):
In cases where expert witnesses cannot be sourced at the guideline rates, what is NHSR's policy or process for approving fees above the set guideline rates? Please provide any relevant procedures or documentation that outlines how such exceptions are managed by NHSR.

I hope this provides the clarity needed, and I appreciate your assistance in processing my request.

Our Response

NHS Resolution is unable to provide the information that you are requesting, which is being withheld on the following bases:

a) Disclosure would prejudice the effective conduct of public affairs (sections 36(b)(i), 36(b)(ii) and 36(c) FOIA); and

b) The information is commercially sensitive (section 43(2) FOIA).

We set out further detail in relation to the exemptions we have applied below.

Effective conduct of public affairs (sections 36(b)(i), 36(b)(ii) and 36(c) of FOIA)

Disclosure of certain information would, be likely to prejudice:

- The free and frank provision of advice; and/or
- The free and frank exchange of views for the purposes of deliberation; and/or
- The effective conduct of public affairs.

It is the view of the 'qualified person' under FOIA that the above effects would be likely to occur because:

(a) NHS Resolution staff need a ‘safe space’ to conduct and deliberate on its procurement (and wider claims) processes, and explore a range of solutions and make decisions, without fear of scrutiny. If staff involved within our procurement processes fear that their views will be placed into the public domain, it is very likely that this will lead to a culture of fear, where staff will not feel ‘safe’ to openly discuss matters. This would lead to a lack of oversight of NHS Resolution’s procurement processes, and significantly inhibit both the awarding of a ‘fair tender’, and also continuous improvement in our procurement processes which naturally flows from that.

(b) If staff who participate in the procurement process fear that their views and advice will be publicly disclosed, again this will lead to a lack of transparency internally within NHS Resolution, and in turn this will ultimately lead to less informed and poor quality decision making, as issues will not be fully reasoned and tested.

(c) Disclosing NHSR internal guidance, procurement methodology/eligibility/scoring criteria, and deliberations on how it undertakes its procurement processes to the ‘public realm’ could cause disproportionate damage to the way wider NHS procurement processes operate, and in this instance, how NHSR undertakes its procurement processes/obligations in relation to the legal service panel firms used by NHS Resolution.

(d) Disclosing fee structures and discussions surrounding fee structures would cause an imbalance in the equality of arms of case management. It would also prejudice how we could procure in the future and may restrict the willingness of suppliers to engage with NHSR.

(e) With the re-procurement of the Legal Panel drawing closer we must be cautious to not supply any single interested party or any member of the public with information or insight ahead of any other interested party. We must be able to uphold the principles of equitable treatment for all potential bidders.

Accordingly, this information is exempt under ss. 36(b)(i) and (ii) and (c) FOIA.

Commercially sensitive information (section 43(2) of FOIA)

Disclosure of certain information would likely harm:

- The commercial interests of NHS Resolution, in that it would inhibit NHS Resolutions’ ability to seek an appropriately competitive rate for services it puts out for tender; and/or

- It would also prejudice our ability to undertake our statutory functions.

- It could have a wider reaching effect, in that it could hamper how the wider NHS procurement processes are undertaken, preventing NHS organisations from being able to sufficiently undertake its procurement processes fairly, in line with relevant procurement legislation.

Public interest test

Sections 36 and 43(2) FOIA are 'qualified exemptions' which means that as part of their application, NHS Resolution has considered whether the public interest in disclosure of the information covered by the exemption outweighs the public interest in maintaining it.

The public interest factors in favour of disclosure include:

- The inherent public interest in favour of transparency in how public organisations like NHS Resolution operate, and in informed public debate about NHS services, reflected in the general right to information in FOIA.

- Openness leads to greater accountability, demonstrates that NHS Resolution has a grip and introspection on the issues in play, and therefore potentially leads to improved trust and confidence in public bodies.

- The possibility that 'shining a light' on the contracts entered into the way in which NHSR operates, both its relationships with contractors and its FOIA requests will lead to improved trust and confidence in public bodies.

The public interest factors against disclosure include:

- The strong public interest in maintaining effective routes to offer views and advice internally without fear of scrutiny.

- Disclosure could potentially damage the relationship between NHS Resolution and its employees, if it makes it harder for those individuals to be open with NHS Resolution in a 'safe space'. This is likely to lead to staff feeling they cannot raise concerns, ultimately leading to a lack of informed oversight and poor-quality decision making.

- The strong public interest in public authorities being able to maintain discretion in how it conducts its tender and procurement processes, in an effort to seek the best possible services, at a competitive rate. Having this information in the public domain will only reduce NHSR's ability to carry out the same, which would only come at a cost to NHS resolution, and therefore to the tax payer.

In light of all the factors, NHS Resolution has concluded the balance of the public interest favours non-disclosure of the withheld information at this time.

This concludes our response to your request.

If you are not satisfied with the service that you have received in response to your information request, it is open to you to make a complaint and request a formal review of our decisions. If you choose to do this, you should write to Tinku Mitra, Deputy Director of Corporate and Information Governance, Data Protection Officer for NHS Resolution, within 28 days of your receipt of this reply. Reviews of decisions made in relation to information requests are carried out by a person who was not involved in the original decision-making about the request.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a review of the decision. Generally, the Information Commissioner will not make a decision unless you have exhausted the local complaints procedure. The address of the Information Commissioner's Office is:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

https://ico.org.uk/