

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2019

Public Authority: Information Commissioner

Address: Wycliffe House
Water Lane
Wilmslow
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)

1. The complainant has requested information associated with a First Tier Tribunal (Information Rights) appeal decision that resulted from a decision the Commissioner had made regarding Barnet, Enfield and Haringey Mental Health NHS Trust's handling of a request the complainant had submitted to it. The ICO released some information, said it did not hold other information and withheld some information under section 42(1) of the FOIA (legal professional privilege). The complainant is dissatisfied with the ICO's application of section 42(1) to some information and the length of time it took to provide a response to his request.

2. The Commissioner's decision is as follows:
 - At the time of the request the information that the ICO withheld under section 42(1) of the FOIA engaged this exemption and the public interest favoured maintaining the exemption.
 - The ICO breached section 10(1) as it did not provide a response to the complainant's request within 20 working days.
3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 29 May 2018 the complainant wrote to the ICO and requested information in the following terms:

"This is a request to the Information Commissioner's Office (the ICO) for information held in its role as a public authority within the meaning of the Freedom of Information Act, Schedule 1. The Request arises out of the conduct of two information tribunal cases EA/2015/0120 and 2017/0232. You have just provided some information ordered by the latter tribunal on 2 May 2018. The scope of each discrete part of this request is as follows, and I ask that each be given individual attention, as is my entitlement under section 1.

1. Information amounting to the text of correspondence between the ICO and Barnet Enfield and Haringey Mental Health NHS Trust (MHT) [or vice versa; and including legal or other representatives of either] leading on 31 July 2015 to the signing by the MHT chief executive Maria Kane of 2 ICO Qualified Person Opinion forms whose receipt was first pleaded on behalf of the ICO on 29.09.15 in information tribunal case EA/2015/0120; and correspondence submitting such forms to the ICO; and any ICO response to MHT.

2. Information evidencing any internal ICO deliberations or any discussion or decision leading up to contact made by the ICO with MHT (believed to have occurred on 24.07.15) and/or to any ICO assessment of said 31 July 2015 opinion forms or opinions stated therein; and information evidencing any internal ICO deliberations or any discussion or decision leading up to the pleading by the ICO on 29.09.15 that such opinions of the MHT chief executive were reasonable.

3. Information amounting to the text of correspondence between the ICO and MHT [or vice versa; and including legal or other representatives of either] leading on 19 and then on 27 August 2014 to the signing by

MHT's self-described acting chief executive Mary Sexton of 2 ICO Qualified Person Opinion forms; and correspondence submitting same to the ICO; and any ICO response to MHT.

4. Information evidencing any internal ICO deliberations or any discussion or decision leading up to contact made by the ICO with MHT and/or to any ICO assessment of said 19 or 27 August 2014 opinion forms or opinions stated therein; and information evidencing any internal ICO deliberations or any discussion or decision leading up to (a) a statutory finding under section 50 that either of such opinions was reasonable; or (b) the pleading by the ICO on 09.07.15 that such opinions of Mary Sexton were reasonable.

5. Information concerning any monitoring or enforcement by the ICO of MHT's compliance with the FOI Act since 31.10.13.

6. Information relating to the ICO's procedures for and/or method of raising, drafting, producing, consulting, approving, revising or amending its guidance to public authorities, including that provided for by section 47 FOIA; to include the granting to any ICO personnel of delegated authority to do such under the Data Protection Act Schedule 5, whether individually or within a team or group structure.

7. Information as to any decision made within the ICO and/or by its representatives in the period 30.11.15 to 09.12.15 to concede that the guidance would be revised; and/or to present such a concession by pleading on 09.12.15 that the Commissioner intends to revise. [The words in italics above are from [Redacted] e-mail of 16.05.16 to Information Tribunal Decisions at 18:05 just provided by you by order of the Tribunal on 29 May 2018 at 12:10.]"

5. The ICO responded on 20 July 2018. It said it does not hold information with the scope of parts 2, 3, 4 and 5 of the request. The ICO confirmed it holds information within the scope of parts 1, 6 and 7 and released the information it holds that falls within the scope of part 6.
6. The ICO said the information it holds that is relevant to parts 1 and 7 of the request is exempt from release under section 42(1) of the FOIA as it attracted legal professional privilege, and that the public interest favoured maintaining the exemption.
7. The ICO provided a review on 10 August 2018 in which it maintained its original position.
8. In correspondence to the Commissioner on 22 August 2018 the complainant advised that, separately, he had just received redacted information from Barnet, Enfield and Haringey Mental Health NHS Trust

('the Trust'), the majority of which comprised redacted emails between the Trust and the ICO covering the period 14 July 2015 to 6 August 2015. The complainant said this was information that the ICO had withheld from him [in response to the current request].

9. In later correspondence to the Commissioner on 17 December 2018 the complainant again referred to the above correspondence that the Trust had released to him and said that he considered that the ICO would not be able to rely on section 21 (information accessible to the applicant by other means) with regard to the information he had received from the Trust.

Scope of the case

10. The complainant first contacted the Commissioner on 13 August 2018 to complain about the way his request for information had been handled.
11. The Commissioner's investigation has focussed on the ICO's application of section 42(1) to information it withheld that relates to parts 1 and 7 of the request. She has not considered whether the ICO can rely on section 21 with regards to certain information as the ICO has not referred to this exemption in any of its correspondence to the complainant or to her.
12. The Commissioner has also considered whether the ICO complied with its duty under section 10(1) with regard to the timeliness of its response.

Reasons for decision

Section 42 – legal professional privilege

13. Section 42(1) of the FOIA says that information that attracts legal professional privilege (LPP) is exempt from disclosure. This exemption is subject to the public interest test.
14. The purpose of LPP is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and his or her client remain confidential.

15. The information the complainant has requested in part 1 can be summarised as: any correspondence between the ICO and the Trust (including legal or other representatives) that led to the Trust's Chief Executive signing two of the ICO's 'Qualified Person' forms; correspondence from the Trust to the ICO in which the forms were submitted and any response from the ICO to the Trust.
16. The ICO has provided the Commissioner with copies of the information it is withholding. With regard to part 1, the information the ICO holds is correspondence exchanged between lawyers representing the ICO and the Trust. The ICO says this was correspondence exchanged between the two parties in advance of litigation: specifically, the First Tier Tribunal (Information Rights) ('the FTT') appeal case EA/2015/0120. The correspondence was, according to the ICO, produced by lawyers for the exclusive purpose of conducting litigation ie for the above appeal.
17. The ICO has referred to *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) in which the Information Tribunal described LPP as: *"...a set of rules or principles which are designed to protect...exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing form litigation."*
18. The ICO has confirmed the following:
 - The withheld information was created in anticipation of litigation. Specifically it was created in anticipation of Tribunal case referred to above which the ICO opposed and which was heard on 9 March 2016. The first email exchange begins on 14 July 2015. This follows confirmation the ICO received from the Tribunal on 27 May 2015 that it had received an appeal to its decision notice.
 - The sole purpose of the communication was to obtain advice to assist in the litigation.
 - The communications were between two professional legal advisers solely for the purpose of preparation in the appeal case.
 - The correspondence was confidential and the ICO has not made it available to the public or third party without restriction.
19. The Commissioner has reviewed this information and she has found that it is as the ICO has described.
20. In her initial correspondence to it, the Commissioner had advised the ICO that the complainant had told her that he had received certain information separately, from the Trust, as discussed at paragraphs 8 and 9.

21. In its submission the ICO told the Commissioner that in August 2018 the Trust had provided the ICO with unredacted copies of two emails: an email dated 6 August 2015 from the Trust to the ICO and an email dated 6 August 2015 from the ICO to the Trust. It said that the Trust had explained that it had released these to the complainant in response to an information request it had received from him but that it had redacted what it described as personal data from this information. The Commissioner advised the ICO that the complainant had advised her that he had received from the Trust further correspondence between the ICO and the Trust, in addition to the two emails above, and which, again is described at paragraph 8 and 9.
22. The Commissioner asked the complainant if he was able to provide her with copies of the redacted information that the Trust had sent to him so that she could make a judgement on whether the remaining information would attract the section 42(1) exemption. In correspondence to her dated 27 February 2019 the complainant detailed all the information that had been redacted from these particular emails, so far as he could identify what this was likely to be. In the Commissioner's view, all the information that the Trust redacted was personal data, which is exempt under section 40(2) of the FOIA; the Trust had released the remaining content to him.
23. The possibility therefore existed that this particular information might no longer attract LPP as it had now been made available to the general public. However, the Commissioner must consider the circumstances as they were at the time of the request. The Trust released this information to the complainant on 21 August 2018. At the point of the complainant's request on 29 May 2018 and the ICO's response in July 2018 (and at the point of the request for an internal review in July and internal review response on 10 August 2018), the Trust had not released any related information to the complainant and this information had not been made available to the general public.
24. The Commissioner has considered all the circumstances and is satisfied that, at the time of the request, all the information that the ICO holds that falls within the scope of part 1 of the request attracted litigation privilege; that the privilege had not been waived at that point, and consequently that this information engaged the section 42(1) exemption. The Commissioner has gone on to consider the information that the ICO has withheld that falls within the scope of part 7.
25. The information the complainant has requested in part 7 can be summarised as information associated with any decision to revise particular guidance, made by the ICO between specific dates.

26. The relevant information that the ICO holds is correspondence exchanged between its in-house lawyer, her internal client and the external counsel instructed in relation to the above referenced appeal, between 30 November 2015 and 9 December 2015.
27. The ICO has confirmed that it has considered the criteria for litigation privilege to apply and has found the following:
 - This information was also created in anticipation of the litigation referred to above. It is correspondence exchanged between ICO's staff, an in-house lawyer and its external counsel regarding its response to the Appeal.
 - The sole purpose of the communication was to obtain advice to assist in the litigation.
 - It is apparent the communications were between legal advisers and their client, and solely for the purpose of preparation in this case.
 - The correspondence was confidential and has not been made available to the public or third party without restriction.
28. The Commissioner has also reviewed this information and she has found that it is again as the ICO has described. She is satisfied that this information also attracts litigation privilege; that at the time of the request this privilege had not, and has not, been waived, and consequently this information also engages the section 42(1) exemption.
29. Despite the information within the scope of part 1 and part 7 being exempt from disclosure under section 42(1) at the time of the request, it might still be disclosed if the public interest in disclosing the information is greater than the public interest in maintaining the exemption. The Commissioner has therefore gone on to consider the public interest arguments with respect to both requests.

Public interest test

Public interest in disclosing the information

30. The ICO has referred to the general public interest inherent in freedom of information legislation ie the assumption of disclosure that is associated with the 'right to know' provisions of section 1 of the FOIA.
31. The ICO has also referred to the need for the ICO to be open and transparent in the work that that it does, and the processes that it applies when carrying out its statutory functions.

Public interest in maintaining the exemption

32. The ICO has referred to the general public interest underpinning the principle of legal privilege, which is that communications pertaining to litigation are protected.
33. The ICO says there is also a need to safeguard openness in all communications between the ICO's in-house legal advisers and any external legal representatives that it was considered necessary to contact as part of the appeals process. This helps to ensure access to full and frank legal advice which is fundamental to the administration of justice.

Balance of the public interest

34. The FTT appeal case about which the requested information was generated (namely, EA/2015/0120) was ongoing in 2015, up to three years before the date on which the complainant submitted his request. It might be possible to argue, therefore, that, given the passage of time, the matter – ie the appeal – was no longer a 'live' issue. This in turn might lessen the weight of the public interest argument for maintaining the exemption.
35. Except that the matter has remained 'live'. This is because the complainant submitted a further request to the ICO associated with the same matter, and again appealed the Commissioner's decision in that case to the FTT and, ultimately, to the Upper Tribunal. The Upper Tribunal made a decision in respect of the complainant's appeal to it in January 2019. In addition, the Commissioner is aware that the complainant has recently submitted another complaint to her about the ICO's handling of another request for information that he submitted to it (on the same matter). The possibility of further litigation in the future is therefore real. The Commissioner considers that any public interest that there may be in the subject that is the focus of the complainant's request (in this case and in separate cases) is substantially weaker than the very strong public interest in lawyers and clients being able to talk frankly and openly with each other. For these reasons the Commissioner is satisfied that the balance of the public interest falls in favour of maintaining the section 42(1) exemption in this case.

Section 10 – time for compliance with request

36. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to be told whether the authority holds the information and (b) to have the information communicated to him or her if it is held and is not subject to an exemption.

37. Section 10(1) says that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
38. The complainant submitted his request to the ICO on 29 May 2018 and did not received a response until 20 July 218. The ICO therefore breached section 10(1) with regards to this request.

Right of appeal

39. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF