

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2024

Public Authority: North East Ambulance Service NHS Trust
Address: Bernicia House
Goldcrest Way
Newcastle upon Tyne
NE15 8NY

Decision (including any steps ordered)

1. The complainant has requested a copy of a report. The above public authority ("the public authority") variously relied on sections 36 (prejudice to the effective conduct of public affairs), 40 (personal information), 41 (breach of confidence) and 42 of FOIA (legal professional privilege) to withhold the information.
2. The Commissioner's decision is that sections 36 and 42 of FOIA are not engaged. Sections 40(2) and 41 of FOIA are engaged, but only to a limited extent.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of the interim report. The public authority may make the redactions specified in the confidential annex.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In 2022, it was reported in the media that the public authority had failed to provide timely information to the coroner. These reports were based on evidence from a whistleblower and a leaked copy of an audit report carried out by AuditOne.
6. Shortly after the allegations were reported, the then Secretary of State for Health ordered an independent investigation into the public authority.

Request and response

7. On 2 April 2024, the complainant wrote to the public authority and requested information in the following terms:

“Request One: Please provide a copy of the Interim Report produced by AuditOne in March 2020 during their review of the NEAS.

Request Two: Please provide the minutes from the meeting held on 16 March 2020 where the initial findings of AuditOne were presented to NEAS.”
8. The public authority responded on 26 April 2024. It denied holding any information within the scope of request two. In respect of request one, it relied on sections 36, 40(2), 41 and 42 to withhold the information. It upheld this stance following an internal review.

Scope of the case

9. The complainant has not challenged the public authority’s denial that it holds information within the scope of request two. The Commissioner has therefore focused on whether the public authority was entitled to rely on the exemptions outlined above to withhold the interim report.

Preliminary matters

10. At the outset of his investigation, the Commissioner asked the public authority for submissions in support of each of the exemptions cited. He noted that he was required to publish the reasoning for his decision, but accepted there may be matters that the public authority needed to explain to him, but which were too sensitive to be published. He asked

the public authority to highlight any such matters clearly in its response. If it failed to highlight specific matters, or explain why those matters it had highlighted were sensitive, the Commissioner warned that he reserved the right to exercise his own discretion as to which matters he would include in a published decision – without seeking further input from the public authority.

11. In its submission, the public authority highlighted large swathes of its submission as being too sensitive for publication. These matters include:
 - The qualified person's opinion.
 - The entirety of the public authority's justification for relying on section 42 of FOIA.
 - The majority of the public authority's reasoning in respect of section 41 of FOIA.
12. The public authority did not explain why any of these matters were sensitive, but it did direct the Commissioner's attention to section 132 of the Data Protection Act which prevents him, his predecessors, his current staff and his former staff from disclosing information provided to him for the purposes of exercising his regulatory functions – unless a lawful gateway has been satisfied.
13. The Commissioner recognises that within the highlighted material are some matters which are self-evidently sensitive and likely to cause harm if published.
14. However, some of this highlighted material is material that the public authority should have no reasonable expectation will be withheld. It has not explained why this material is sensitive and it is not self-evident why this would be the case.
15. The Commissioner considers that it would be fundamentally unfair to the complainant to provide a decision notice that did not properly explain why each exemption was or was not engaged, or where the public interest balance should lie and why.
16. Such is the extent of the public authority's highlighting, had he been willing to respect it, the Commissioner would have been reduced to simply asserting that sections 36 and 42 were or were not engaged, without explanation. That would clearly be unacceptable.
17. Both parties to the complaint – and the public more widely – should be able to understand why the Commissioner has made the decision that he has.

18. The Commissioner has therefore exercised his discretion and included some of the highlighted material in his decision – but only to the extent necessary to explain his decision.
19. The Commissioner would draw the public authority's attention to section 132(2)(c) of the Data Protection Act 2018 which allows the Commissioner to disclose information obtained in the course of his regulatory functions, where that is done for the purposes of and is necessary for, the discharge of any of his functions. The functions in this case being the providing of a decision under section 50 of FOIA and the explaining of that decision.

Reasons for decision

Section 40(2) – third party personal information

20. Section 40(2) of FOIA allows a public authority to withhold information, that would be the personal information of someone other than the requester, unless there would be a specific lawful basis in data protection legislation for publishing that information.
21. Information will be personal information if it relates to a living individual and the individual can be identified either directly from that information or by combining that information with other information.
22. The report discusses the cases of several patients who have died. As they are no longer alive, information about them is no longer covered by data protection legislation, so section 40(2) does not apply. However, such information may still be covered by a duty of confidence. This issue is addressed under section 41 of FOIA below.
23. The report also refers to a number of individuals who are still alive. These include public authority staff members, external solicitors and those who had some form of relationship with the deceased patient.
24. These individuals are referred to either by their name, initials, pronouns, job titles or relationship to the deceased patients.
25. In the Commissioner's view, redacting the names of these individuals would be sufficient that the remaining information would not be personal information.
26. The public authority has drawn attention to an [independent report](#) written by Dame Marianne Griffiths. That report covers some (though not all) of the matters covered in the interim report.

27. The Commissioner is not persuaded that, if the types of information referenced above were removed from the interim report, the individuals concerned are any more identifiable than they already are from Dame Marianne's report. If a person can already identify the individuals in Dame Marianne's report, they will learn nothing new about those individuals from the interim report. If they cannot identify the individuals from Dame Marianne's report, they are no more likely to do so from a redacted version of the interim report.
28. The Commissioner therefore only needs to consider whether there would be a lawful basis for publishing the identities of the individuals concerned – not any other information about them.
29. As far as the Commissioner is aware, none of the individuals concerned has given their consent for their own personal information to be published. Therefore there will only be a lawful basis for publication if that is necessary to satisfy a legitimate interest.
30. The Commissioner considers that there is a legitimate interest in understanding the public authority's decision-making processes – both at a senior level and at ground level. Some very serious questions have been raised about decisions that have been made and it is very much in the public interest to understand what has gone on.
31. There is a particularly strong public interest in understanding what involvement senior leaders had in those decisions and the actions that they did, or did not, take.
32. In order to satisfy those legitimate interests, it is necessary, in the Commissioner's view, to leave the names of senior leaders unredacted. There is no less-intrusive way of achieving the interest.
33. The report also discusses the actions of a particular paramedic during a particular incident. The Commissioner notes that it is in the public domain that this particular paramedic has since been struck off the health and care professions register for his actions during this incident. The Commissioner is not satisfied that the information in the interim report goes beyond what is already in the public domain about this paramedic. He is therefore satisfied that disclosing this individual's name is necessary.
34. For the remaining individuals, the Commissioner is not satisfied that revealing their names is necessary to achieve any legitimate interests. Revealing the names of junior staff members does not explain what senior staff did or did not do. Revealing the names of individuals with a connection to each deceased patient or of external solicitors would not assist in understanding the public authority's decision making processes.

35. As publication is not necessary, there would be no lawful basis for publication and so section 40(2) of FOIA would be engaged.
36. However, for the staff described in paragraphs 32 and 33, publication **is** necessary and the Commissioner has gone on to balance their rights against the legitimate interests in publication.
37. In relation to the paramedic, the Commissioner is satisfied that the legitimate interests outweigh this individual's rights. The information relates to their conduct at work and it is conduct that has been found to be so unsatisfactory that they have been struck off their own professional register.
38. The information goes no further than what is already in the public domain about this individual. The Commissioner does not consider that the individual concerned should have a reasonable expectation that their name would be withheld in these circumstances. Therefore publication should not cause them unwarranted distress.
39. In relation to the senior staff, the Commissioner considers that those staff members with job titles including "head of", "chief" or "director of" should have no reasonable expectation that their names would not be disclosed. These are people who make decisions at the highest level of the public authority and who should therefore expect to be subject to scrutiny. The Commissioner also notes that the job titles indicate that all these individuals had key roles in ensuring that the public authority discharged its duty of care towards its patients.
40. The information in question relates only to the individuals' professional lives, therefore the intrusion on their private lives caused by publication would be minimal. Publication would therefore be a proportionate means of achieving a legitimate aim.
41. The public authority has noted that certain individuals named within the interim report have been subject to "significant levels of abuse" due to their involvement in the cases covered by the interim report. It noted that the public may wish to pursue these individuals, but this would not be a legitimate interest.
42. The Commissioner agrees that abusing a member of the public authority's staff, in any manner, is not a legitimate interest. It is unacceptable in any context.
43. However, as the public authority has pointed out, staff members are already subject to abuse. It is not clear why publishing their names would have more than a marginal effect on something that was already ongoing. In respect of senior leaders, publishing their names would at least give the public an authoritative account of their actions.

44. In the Commissioner's view publishing the names of senior staff should not be contrary to their reasonable expectations and therefore should not cause them unwarranted distress. The legitimate interest in publication outweighs the rights of the data subjects.
45. Given that publication would be lawful, the Commissioner sees no reason why it would not also be fair. Publication would also be transparent as staff members at a public authority should be aware that their employer is subject to FOIA.
46. Therefore section 40(2) is not engaged in relation to these names. The Commissioner has listed, in the confidential annex, the individuals whose identifying information should and should not be disclosed.

Section 41 – breach of confidence

47. Section 41 allows a public authority to withhold information that has been provided to it by another person and whose publication would be an actionable breach of confidence.
48. The public authority appears to be relying on this exemption to withhold the report in its entirety because it "contains patient data."
49. The complainant (a firm of solicitors) argued that this exemption did not apply because any breach of confidence would not be actionable. They argued that they represented the families of three people who (they believed) were mentioned in the report – all of whom were apparently willing to waive their right to bring an action in the event that the public authority disclosed the information.
50. The Commissioner is not satisfied that this is sufficient to preclude the public authority from relying on section 41. This is because:
 - at best, the right to bring an action could only have been waived in respect of three of the people mentioned in the report – and that is assuming that all three were, in fact, mentioned; and
 - no evidence had (or has) been provided to the public authority confirming who exactly would be entitled to waive the rights of the patients in question; and
 - it is not apparent from the evidence exactly what rights the families had agreed to waive or whether they understood that the information would be made available to the world at large; and
 - no formal signed confirmation of a waiver had been received at the point the public authority responded to the request (or since).

51. Given the findings set out below, the Commissioner has not pressed this point further. He has proceeded on the basis that none of the families, of any deceased patient referred to, has either given their formal consent to the information being published or formally waived their rights to bring an action.
52. The Commissioner accepts that patient data is not trivial, that it has been provided to the public authority by another person and that it is provided in circumstances in which there is an implicit duty of confidence on the medical staff who receive it.
53. However, the majority of the interim report is not patient data at all. The report is 30 pages long, of which 16.5 pages are devoted to case studies of how the public authority dealt with six particular patients.
54. However, for each of those case studies, only a paragraph is devoted to the circumstances which necessitated an ambulance being called. The remainder of each case study focuses mostly on either the actions of the paramedics who attended the scene, or the actions that staff at the public authority took to report matters to the coroner. The Commissioner does not consider this to be "patient data" and, although clearly not trivial, the public authority has not explained why this information was provided in circumstances implying a duty of confidence.
55. Consequently, the Commissioner considers that any information which does not relate to the medical condition or treatment of the patients concerned has not been provided in circumstances implying a duty of confidence. As such, there could be no basis for anyone to bring a breach of confidence action and so section 41 does not apply.
56. The next question for the Commissioner to consider is whether any of the remaining information (the identities of the patients concerned and any medical information about them) is in the public domain. If information is already widely available it cannot be regarded as confidential.
57. The Commissioner will refer to the six patients as patients A-F, as the circumstances differ slightly for each one. Patients A, B, C and D are referred to in the interim report by their initials. Patients E and F are only identified by their age and gender.
58. Patients A, B, C, D and F have been named in media reports (albeit that one patient's name has misspelt in at least one article). The families of patients A, C and D have also been quoted in some of the media articles.

59. Dame Marianne's report considers the cases of patients A, C, D and F – although it notes that, in one case, the patient's family had expressed a wish to put the matter in the past and move on. Each patient is referred to only by their age and gender.
60. Dame Marianne's report also contains descriptions of the circumstances that had led to an ambulance being called for patients A, C, D and F. Those descriptions closely match the equivalent sections of the interim report. They also match the descriptions reported in the media.
61. The public authority argued that, if the interim report were to be released, it would be possible to link patients A, C, D and F to the equivalent section of Dame Marianne's report, thereby identifying them and breaching their privacy.
62. In the Commissioner's view, there is sufficient detail in the public domain to allow an individual to link the description in Dame Marianne's report to the media reports naming the patients and therefore identify patients A, C, D and F.
63. The interim report does not add any medical information that is not already published in Dame Marianne's report and, whilst it would make identification of patients A, C and D easier (because it includes their initials), in the Commissioner's view these patients are already identifiable from what is already in the public domain.
64. Therefore in respect of patients A, C, D and F, the Commissioner is satisfied that, to the extent the interim report contains medical information about them, this information is already in the public domain. The information therefore does not have the quality of confidence and so no actionable breach could occur. Thus section 41 of FOIA cannot apply to this information.
65. In the case of patient B, the Commissioner accepts that this individual's identity is also in the public domain. They are named in articles in either the local or national press and a description of why an ambulance was called for them has also been reported.
66. The Commissioner notes that some of the media reporting is based on a leaked copy of the interim report. He will not always accept that information which has been leaked is in the public domain.
67. However, given how widespread the reporting of Patient B's name has been, with no apparent effort to correct or prevent such reporting, the Commissioner considers it would be perverse to argue that this information is not in the public domain. He would also note that, if he were to consider Patient B's name were not in the public domain, it would follow that they would not be identifiable either – except by those

who already knew the circumstances in which the ambulance was called. It would be illogical to claim both that patient B's identity is not in the public domain and that the public could nonetheless identify them.

68. The Commissioner therefore considers that Patient B's identity and the circumstances in which an ambulance was called for them is in the public domain. The information therefore does not have the quality of confidence and so no actionable breach could occur. Thus section 41 of FOIA cannot apply to this information.
69. There are some further details of patient B's medical information which the Commissioner does not consider to be in the public domain. This information does have the necessary quality of confidence, was provided in confidence and would cause a loss of privacy to Patient B if it were published.
70. The conditions for a breach of confidence are therefore established in respect of this information and the Commissioner will consider below whether this would be an actionable breach.
71. Finally, the Commissioner turns to patient E.
72. Patient E has not been named in any media reports that the Commissioner has been able to identify and is not referred to in Dame Marianne's report.
73. The interim report contains details of why an ambulance was called for patient E as well as some more general information about their medical history.
74. The Commissioner is satisfied that all the tests necessary for a breach of confidence are satisfied in respect of patient E. The information about them is not trivial, not in the public domain and there is an implied duty to keep such information confidential. Publication would cause a loss of patient E's privacy and that is sufficient to demonstrate that they would suffer detriment. As already noted, the duty to keep confidences does not end when the confider dies.
75. For a breach to be actionable, any legal action taken must be likely to succeed. In order to measure the chances of success, the Commissioner must consider whether the public authority would be able to rely on a public interest defence.
76. Being able to rely on a public interest defence is not the same as applying the public interest test. When publishing with someone's private information, the public authority must be able to demonstrate that publication is a proportionate interference with the confider's right to a private life.

77. The information being considered here is: some medical information about patient E; the circumstances in which an ambulance was summoned for them and; a small amount of medical information relating to patient B.
78. The Commissioner recognises that the public authority itself has admitted "[historical failings](#)" around disclosures to the coroner. Numerous reports have highlighted areas where information could have been provided at an earlier stage. There is a pressing public interest in such information.
79. However, in the circumstances of this case, the Commissioner does not consider that disclosure of this particular information would serve that interest. The information in question does not relate to any process of disclosure, nor to any other incident in which the public authority's conduct has been criticised. It is purely medical information relating to either patient B or patient E or the reason why an ambulance was called for patient E.
80. In the circumstances, the Commissioner considers that publishing the information would be a disproportionate interference with patient B and E's right to a private life.
81. Consequently the public authority would not be able to rely on a public interest defence if it were sued, the breach of confidence would be an actionable breach and therefore section 41 of FOIA would be engaged.
82. The Commissioner has specified, in the confidential annex, the material the public authority may rely on section 41 of FOIA to redact.

Section 36 – prejudice to effective conduct

83. Section 36 of FOIA allows a public authority to withhold information that would harm the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice the effective conduct of public affairs.
84. In order for the exemption to be engaged, a very senior individual within the organisation, known as the qualified person, must provide an opinion stating that these harms would be caused by disclosure. That opinion must be a reasonable one.
85. The public authority has provided the Commissioner with a completed copy of his template for recording the opinion of the qualified person. That document is dated 23 April 2024 and is signed by Helen Ray. Ms Ray was at the time (and remains) the public authority's Chief Executive.

86. The Commissioner is satisfied that Ms Ray is entitled to act as the qualified person for the purposes of section 36 of FOIA. In signing the document she adopted the arguments contained within it as her opinion. The Qualified Person therefore provided her opinion on 23 April 2024.
87. When deciding whether the Qualified Person's opinion is reasonable, it is not for the Commissioner to step into the shoes of the Qualified Person. An opinion doesn't become reasonable simply because the Commissioner disagrees with it. An opinion will be unreasonable if it is irrational, absurd, fails to identify an applicable interest or fails to explain why the claimed harm would occur.
88. The Qualified Person argued that disclosing any of the interim report would inhibit the free and frank provision of advice because:
- "Future external reviews may not exercise the freedom and frankness required for good decision-making if this document were disclosed. Based on previous examples of publicity, that would lead to a chilling effect on those whom we rely upon to be open with us for the purpose of audit."
89. Disclosure would also inhibit the free and frank exchange of views for the purposes of deliberation, according to the Qualified Person, because:
- "Internal discussions on patient care would be inhibited by staff who would likely feel a chilling effect that their discussions would likely be made public."
90. Finally, disclosure would also "otherwise" prejudice the effective conduct of public affairs, according to the Qualified Person, because:
- "It would likely prevent future reviews taking place with an honesty and candour needed to ensure that corrections can be made to improve our services, as has happened in this case; and also that disclosure would lead to distraction and diversion of our resources away from meeting the recommendations of the Independent Review and our core tasks, prejudicing their effective conduct."
91. Supporting these arguments, the public authority argued that:
- "The document requested and subsequently withheld contains patient identifiable information and the findings and opinions from external reviews that, if made public, would likely inhibit the future frankness and candour that we require to ensure our decisions are robust and informed..."
- "In this case, the candour and frankness of the withheld report supported our decision-making by identifying concerns with our

systems and processes for coronial disclosures. This allowed us to take action to correct these. This remedial action was subsequently reaudited and reviewed by the CQC to ensure that these issues would not reoccur.

“Subsequent allegations that we continue to fail in respect to the issues covered in these reports led to the Secretary of State for Health, on 14 June 2022, instructing an independent review to investigate these matters.

“This document was disclosed to the independent review, led by Dame Marianne Griffiths, who published her findings in July 2023.”

92. Whilst the Commissioner has carefully considered the Qualified Person's opinion, he does not consider that it is reasonable in any of the three respects.
93. In respect of inhibiting free and frank advice, the Commissioner does not consider that the Qualified Person has drawn an appropriate connection between disclosure and any inhibition.
94. The interim report was drawn up by an organisation called AuditOne. AuditOne is a non-profit NHS consortium that provides audit, counter-fraud and consultancy services to its clients.
95. The public authority must have contracted with AuditOne to produce this (and the final) report and the Commissioner considers it highly likely that AuditOne received some form of remuneration for the services it provided.
96. [AuditOne's website](#) highlights its “proven track record of delivering high quality internal audit, counter fraud and consultancy services.” The Commissioner does not consider it reasonable to suppose that AuditOne would carry out work of a lower quality, if contracted to do so in future, because of a fear of disclosure and no evidence has been put forward to suggest that would be the case. It would be contrary to AuditOne's commercial interests to be seen as providing an inferior product compared to other similar organisations.
97. The Qualified Person referred to “previous examples of publicity” having caused a chilling effect, but the public authority has not explained what those examples are or why they are relevant to the present case.
98. The Commissioner also notes that the document itself contains no confidential markings. The document does, however, contain a section specifically dedicated to dealing with FOIA requests for the document. Whilst the public authority is required to consult AuditOne about the

possible disclosure of any part of the report, this section does not preclude the document from being disclosed.

99. The Commissioner is not aware that AuditOne has made any representations against disclosure.
100. On that basis, the Commissioner does not consider that the Qualified Person's opinion, that disclosing this report would dilute the quality of future similar reports, is reasonable.
101. In respect of disclosure inhibiting the free and frank exchange of views for the process of deliberation, the Commissioner once again considers that the Qualified Person has failed to draw an appropriate causal link between disclosure and harm.
102. The interim report does not represent a process of deliberation. It contains the findings of an independent person on some of the public authority's decision-making.
103. The interim report, once presented, may well have been discussed within the public authority, but the document does not contain any indication of what those discussions were.
104. In the Commissioner's view it is irrational to claim that disclosing a document would inhibit senior leaders at the public authority from discussing it candidly. Not only is the document incapable of recording such discussions but senior leaders should be robust individuals, not easily deterred from their duty of candour.
105. To the extent that the interim report reveals opinions of staff (and the Commissioner is not persuaded that it does to any significant extent) that has already been taken care of through the redactions of personal information (other than that of senior leaders) highlighted earlier in this notice. The Commissioner would also note that such opinions would not form part of any process of deliberation.
106. On that basis, the Commissioner does not consider that the Qualified Person's opinion, that disclosing this report would inhibit internal discussion, is reasonable.
107. Finally the Commissioner has considered whether it is reasonable to believe that disclosure of this interim report would "otherwise" prejudice the effective conduct of public affairs.
108. In order for disclosure to "otherwise" prejudice the effective conduct of public affairs, the Qualified Person must identify some form of prejudice or harm that would not be covered by any other FOIA exemption.

109. The Qualified Person's opinion referred to the need to ensure that future reviews take place with an "honesty and candour." To the extent that this refers to the quality AuditOne's work, or the decision-making that would take place off the back of it, this has already been covered under inhibition to the free and frank provision of advice or exchange of views, so it will not "otherwise" prejudice the effective conduct of public affairs.

110. To the extent that the Qualified Person is referring to the willingness of staff to participate in such reviews, the Commissioner is not persuaded that this is realistic because:

- all NHS staff are subject to a duty of candour, there are likely to be serious consequences if staff (particularly senior staff) are seen to be failing to cooperate fully with such investigations; and
- in any case, as the Commissioner has already pointed out, senior staff should not easily be deterred from being robust and candid in their views; and
- more junior staff will have their names redacted so should still have confidence in speaking up; and
- in the Commissioner's experience most NHS staff want to ensure that the service they provide is the best it can be. Therefore regardless of any duty of candour, they are likely to speak to investigations such as this because they see improvements that need to be made.

111. Even if the Commissioner were persuaded that the possibility of harm were slightly more than hypothetical, any harm would be at the lower end of the severity scale for the same reasons as described above. It would also be easily outweighed by the public interest in transparency about the "historical failings" the public authority has admitted to.

112. Finally, the Commissioner turns to the possibility that disclosure would cause "distraction and diversion of our resources away from meeting the recommendations of the Independent Review and our core tasks."

113. The Qualified Person has not explained why disclosure would cause distraction and it is difficult for the Commissioner to see why that would be the case.

114. Some very serious allegations have been levelled at the public authority. That may well lead to questions that the public authority will find uncomfortable, but legitimate scrutiny of a public authority does not represent a distraction from core tasks. Being open and transparent **is** a core task for any public authority. To the extent that disclosure would

increase queries from the media or the public, the Commissioner considers that is justified by the material in the public domain.

115. In any case, the submission provided to the Qualified Person noted the public authority's view that some of the interim report's contents had been "mis-represented." Publishing the report would allow for any inaccuracies or mis-representations in the reporting to be corrected.
116. On that basis, the Commissioner does not consider that the Qualified Person's opinion, that disclosing this report would otherwise prejudice the effective conduct of public affairs, is reasonable. As such, section 36 of FOIA does not apply.

Section 42 – legal professional privilege

117. Section 42 of FOIA allows a public authority to withhold information that is covered by legal professional privilege.
118. The public authority has argued that the interim report contains within it material from two specific pieces of legal advice it has received.
119. The Commissioner accepts that the interim report does clearly refer to specific legal advice that it has received. However, he does not accept that this information continues to be covered by privilege – if indeed it ever was.
120. The first issue is that, as the public authority has pointed out, the interim report does not **quote** the legal advice. The text of the report **reflects** some of the advice, but it is AuditOne's summary of that advice. The public authority has highlighted passages within this section that do not appear in the original advice.
121. That, in itself, does not prevent information from being privileged. If the summary is so similar to the original advice that disclosing the summary would reveal what that advice was, the exemption will still apply.
122. The second issue is that, in its final report, AuditOne gave a fairly detailed summary of the contents of the legal advice the public authority had received from its legal advisors – Ward Haddaway. The public authority disclosed the final report [in response to a FOIA request](#).
123. Therefore, even if the Commissioner were to accept that AuditOne's summary of the legal advice in the **interim** report was sufficiently similar to the actual advice itself that it would reveal privileged information, any privilege in the information was waived when the public authority placed the **final** report in the public domain by disclosing it under FOIA. The relevant section of the interim report, for the most

part, does not stray significantly from what is in the final report. Nor is it a considerably more developed or nuanced version.

124. There are two passages in the interim report that do not appear in the final report. Given the nature of the information they contain, they may have been included in the original advice. However, the public authority has not provided the Commissioner with copies of the original advice, so he cannot verify whether they came from Ward Haddaway or from AuditOne.
125. As it is the public authority's responsibility to demonstrate why this information is privileged and to provide the necessary evidence to support its assertions, the Commissioner determines that these passages do not engage the exemption either.
126. The Commissioner therefore takes the view that section 42 does not apply to any of the report.
127. Consequently the interim report is largely not covered by any exemption and must be disclosed – with the exception of the information specified in the Confidential Annex.

Confidential Annex

128. In order to preserve a meaningful right of appeal, the Commissioner has found it necessary to place certain matters within a confidential annex. This is because the matters involved necessarily involve reference to the contents of the information the public authority wishes to withhold.
129. The confidential annex will only be provided to the public authority.
130. The confidential annex sets out detailed instructions as to the information to be disclosed and that which should be redacted. It does not contain any further analysis or reasoning behind the Commissioner's decision. The reasoning for the decision is set out in full in this notice.
131. The confidential annex also involves discussion of another matter. The Commissioner cannot reveal its nature without also revealing its substance. However, for the complainant's benefit, it does not relate to any matter that does, or could, fall within the scope of the complaint.

Other matters

132. The Commissioner is aware that the complainant has received a redacted version of the withheld information outside of FOIA.

133. Whilst the copy of the information the Commissioner is ordering the public authority to disclose will contain far fewer redactions than the version already disclosed, the version to be disclosed will also contain some redactions that are not in the version the complainant already has. This is because some of the information will be known to the complainant (and their clients), but not to the wider world.

Right of appeal

134. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

135. 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.

136. 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

Roger Cawthorne
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