

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 January 2019

Public Authority: Parliamentary and Health Service Ombudsman (PHSO)

Address: Citygate
47-51 Mosley Street
Manchester
M2 3HQ

Decision (including any steps ordered)

1. The complainant has requested information about the legal status of CCT (Customer Care Team) reviews. The PHSO responded refusing to disclose the requested information citing section 42 of the FOIA.
2. The Commissioner's decision is that the PHSO is entitled to refuse to disclose the requested information under section 42 of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. On 31 July 2018, the complainant wrote to the DfE and requested information in the following terms:

"In the PHSO Board Open Session Meeting 14 December 2017 it states the following at paragraph 12.8:

'[named individual] asked about the legal status of CCT [Customer Care Team] reviews, and what was the basis of a review if it did not constitute a new decision. [named individual] explained that our legislation did not allow for reviews. There was a risk involved if we did NOT [emphasis mine] follow the legislation. However if we decided that a review was wrong we needed to be PRAGMATIC [emphasis mine]. Ultimately this was a question of our RISK APPETITE [emphasis mine].'

(1) Please provide all relevant documents (discussions, legal briefing notes, unabridged Board Meeting Minutes, guidance etc.) that the PHSO possess with regard to the legal status of reviews of decisions.

(2) Please provide all relevant documents (discussions, legal briefing notes, unabridged Board Meetings, guidance etc.) that the PHSO possess with regard to Alternative Legal Remedy."

4. On 21 September 2018 the PHSO responded. It refused to provide the information requested at part 1 of the request under section 42 FOIA. It said that it was unable to comply with part 2 of the request as it would exceed the cost limit under section 12 FOIA to do so.
5. The complainant requested an internal review on 21 September 2018 in relation to the PHSO's application of section 42 FOIA to part 1 of the request. The PHSO sent the outcome of its internal review on 24 September 2018. It upheld its application of section 42 FOIA to part 1 of the request.

Scope of the case

6. The complainant contacted the Commissioner on 24 September 2018 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine whether the PHSO is entitled to rely on section 42 of the FOIA for the non-disclosure of the requested information.

Reasons for decision

8. Section 42 of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
9. It is a qualified exemption. So, in addition to demonstrating that the requested information falls within the definition of the exemption, the PHSO must consider the public interest arguments for and against disclosure and demonstrate in a given case that the public interest rests in maintaining the exemption.
10. There are two types of legal professional privilege (LPP); advice privilege and litigation privilege.
11. In this case the PHSO considers the withheld information is subject to advice privilege; the withheld information constitutes emails, notes of discussions and legal review. The parties to the communications are PHSO officers and internal lawyers. The communications are made for the dominant purpose of seeking or providing legal advice between a client and a lawyer. The communications are in a legal context as they

are regarding the legal status of reviews of PHSO decisions. It is essential such communications remain protected. PHSO argues that it must have the ability to speak freely and frankly with legal professionals to obtain appropriate and sound legal advice and this is a fundamental requirement of the English legal system.

12. The Commissioner has reviewed the withheld information and she is satisfied that they are confidential communications between PHSO officers and internal lawyers. The pre-dominant purpose of these communications is the seeking and obtaining of legal advice.
13. The Commissioner is therefore satisfied that the withheld information is subject to LPP and section 42 of the FOIA is engaged. She now needs to consider the public interest test.
14. The PHSO argued that a client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the legal system. Legal Professional Privilege protects the confidentiality of communications between client and lawyer. The attached documents are confidential communications between the PHSO client and PHSO lawyer acting in their professional capacity. They clearly relate to legal matters. The communications are email, notes of discussions and legal review and fall under the definition of a communication under Section 42. The importance of Legal Professional Privilege is an important principle, as the first tier tribunal found in *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) , "...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest".
15. The Commissioner considers the PHSO has underestimated the public interest in favour of disclosure in this case. In addition to the usual arguments that disclosure would aid transparency and accountability, the Commissioner considers the matter of making complaints to the PHSO and in particular the legal status of reviews affects a significant amount of people. Access to information which will enable members of the public to understand this process is of notable interest to many and would aid public debate.
16. That being said the Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption simply because of the long standing, important principle of LPP and the clear and important need for all (not just the public sector) to have access to free, frank and candid legal advice. Only in very exceptional cases can this be overridden when considering where the public interest lies. Whilst the legal advice and the matter to which it relates is of interest to

the wider public, the Commissioner does not consider this case is exceptional to rule in favour of disclosure.

17. The Commissioner considers there are stronger public interest arguments in this case in favour of maintaining LPP and the ability of the PHSO to seek and obtain good quality legal advice. The Commissioner agrees with the PHSO that the quality of advice would be diluted if such exchanges were disclosed into the public domain. This would then have a negative impact on the PHSO's decision making and ultimately the statutory functions it is required to perform.
18. For the above reasons, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exemption.

Right of appeal

19. 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

20. 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.
21. 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.....

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF