

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2019

Public Authority: NHS Commissioning Board (NHS England)

Address: 22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested the legal advice received by NHS England (NHSE) following a meeting with a named doctor. NHSE identified information within the scope of the request but withheld this on the basis that the information was legally professionally privileged and therefore exempt under section 42 of the FOIA.
2. The Commissioner's decision, after considering the public interest test, is that NHSE has correctly applied this exemption and the public interest favours withholding the requested information.

Request and response

3. There has been a considerable amount of correspondence on this matter which has been summarised by the Commissioner as follows.
4. On 13 December 2017 the complainant requested the following information:

'Please let me have a copy of the minutes of the meetings with the local decision making group which I understand took place on 31.8.2017 and following on from my meeting with [redacted name of doctor A] on 9.11.2017.

Please let me have a copy of the legal advice you received I understand on 1.8.2017 and following on from my meeting with [redacted name of doctor A] on 9.11.2017.

I believe that I am entitled to the above information under the Data Protection Act.

Additionally, [redacted name of doctor A] said in his letter to me of 25.10.2017 that my 'comments' on the Terms of Reference would be passed on to the case manager. Please let me know which comments will be passed on. I believe the attached Terms of Reference which contains my comments in green and the revised Appendix (attached) should be passed on to the case manager. Please confirm.'

5. The complainant contacted the Information Commissioner on 12 February 2018 as there had been no response.
6. On 19 February 2018 NHSE considered the request as a subject access request. It provided some information but withheld the part of the request for the legal advice under the Data Protection Act 1998 (DPA), section 7.
7. On 26 March 2018 the Commissioner provided her view that NHSE had breached the DPA as it had not responded to the subject access request within 40 days.
8. On 28 March the complainant asked the Commissioner if the legal advice could be released under FOIA.
9. On 29 March the Commissioner advised the complainant that there is an FOIA exemption (section 42) that NHSE could apply to the legal advice. Her initial view was that the exemption is likely to apply in this case but he should first complain directly to NHSE asking it to conduct an internal review.
10. On 1 April the complainant asked NHSE to conduct an internal review into its refusal to release the 2 sets of legal advice requested under FOIA. He provided arguments why the information should be released to him under DPA or FOIA:

'The information would in any case not be exempt under the Freedom of Information Act (FOIA) and NHSE should have released it. It does not matter under which Act information is requested. NHSE were required to offer advice and assistance under s.16 of the FOIA and have released the information whether under the Data Protection Act or the Freedom of Information Act.'

11. On 4 April NHSE acknowledged the request for an internal review.
12. On 12 June the Commissioner wrote to NHSE as the complainant had not received a decision regarding his request for an internal review.

NHSE was asked to issue an internal review response within 10 working days.

13. On 18 June NHSE responded to the complainant stating that it had assessed the communication of 1 April as a request under FOIA and it would be answered within 20 working days.
14. On 28 June the Commissioner advised both parties that the complaint had been accepted for investigation under section 50 of FOIA.
15. On 12 July NHSE confirmed that it held recorded information in relation to the FOIA request of 1 April. It withheld the information citing section 42, legal professional privilege:

'Legal advice was provided explicitly to [redacted name of doctor B] of NHS England London. Such information is subject to legal professional privilege and so is exempt under section 42 of the FOIA. There is a strong public interest in preserving legal professional privilege and safeguarding absolute candour in all communications between lawyer and client to ensure access to free and frank legal advice.'

We hope this information is helpful. However, if you are dissatisfied, you have the right to ask for an internal review.'

Scope of the case

16. The complainant first wrote to the Commissioner on 12 February 2018 and the FOIA case was accepted on 28 June 2018.
17. The Commissioner notes that NHSE withheld the legal advice under both the DPA and the FOIA. This investigation will only consider the FOIA complaint. The Commissioner also notes that NHSE dealt with the request for an internal review (1 April) as an FOIA request and offered the complainant the opportunity to request an internal review (12 July). Given the delays in this case, the Commissioner did not insist on the complainant seeking an internal review and NHSE stated that the complainant had not requested an internal review after July.
18. The Commissioner considers the scope of her investigation to be the decision by NHSE to withhold the legal advice under section 42 of the FOIA.

Reasons for decision

19. Section 42(1) of the FOIA states that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

20. NHSE has identified two pieces of information which it considers to be within the scope of the request. These have been provided to the Commissioner as the withheld information.

21. The Commissioner has first assessed whether the withheld information is subject to legal professional privilege. Legal professional privilege was defined by the Information Tribunal¹ as *"... a set of rules or principles which are designed to protect the confidentiality between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."*

22. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.

23. In its submissions to the Commissioner, NHSE stated that it was relying on the legal advice privilege in this matter. It explained that the withheld information was provided by Bevan Brittan to a named doctor (an NHSE employee) on behalf of the NHS England London region.

24. The Commissioner has reviewed the withheld information and is satisfied that it is clearly legal advice. This is because the withheld information consists of legal opinions and advice provided to NHSE by a professional

¹ *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*

legal adviser on the issue of the commissioning of an investigation and the Terms of Reference.

25. NHSE considers this issue to still be 'live' as the advice has not been shared with the public or any third parties. It has only been shared within NHSE as far as has been necessary in relation to the original investigation and the following SAR and FOIA request. The Commissioner consequently finds that the legal professional privilege exemption is engaged and has not been lost.
26. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

27. NHSE recognised the inherent public interest in information being made available to the public via FOIA, and in understanding that NHSE is carrying out work in accordance with its own Terms of Reference.
28. The complainant has a personal interest in this information and stated that '*I as a party had to agree the terms of reference for the investigation and I could not have been expected to be in a position to do that if I did not know the legal advice received in relation to it*' and that the legal advice was provided to one named doctor (redacted name B) but it was another named doctor (as the Higher Level Responsible Officer)(redacted name A) who had responsibility for ensuring that the investigation was conducted in accordance with the framework.

Public interest arguments in favour of maintaining the exemption

29. There is a strong element of public interest inbuilt in this exemption, the central public interest arguments in favour of maintaining the exemption are those inherent in the concept of legal professional privilege. There is clearly a very strong and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence.
30. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions.

31. NHSE has explained that the legal advice it received relates to an issue which is still relevant and live.

Balance of the public interest arguments

32. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable in a decision making process.
33. The Commissioner's view is that there are stronger public interest arguments in favour of maintaining the exemption. She considers that NHSE's argument that it should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made to be a strong argument. Disclosure could lead to NHSE being unable to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure. The Commissioner is also mindful of the Tribunal's comments in the *Bellamy* case that *"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest."*
34. The Commissioner notes that in this case, the complainant has provided personal reasons for the disclosure of the legal advice and these are not the same as a public interest in the disclosure of the legal advice.
35. In conclusion, it is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case.

Right of appeal

36. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

37. 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.
38. 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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