

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2014

Public Authority: NHS Nene Clinical Commissioning Group
Address: Francis Crick House
6 Summerhouse Road
Northampton
NN3 6BF

Decision (including any steps ordered)

1. The complainant has requested the full LGSS Law report regarding the complaint raised by [named company] about the NHS Care Homes Contract for Continuing Healthcare. NHS Nene Clinical Commissioning Group (the CCG) refused to disclose the LGSS report under section 42 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner considers that the CCG was correct to withhold the report under section 42 FOIA. As regards the attachments to the report the CCG does not consider that these would fall within the scope of the request. The Commissioner disagrees and considers that these would fall within the scope of the request but would not be exempt under section 42. The Commissioner considers that the withheld report contains some of the complainant's own personal data which would also be exempt under section 40(1) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the seven documents attached to the LGSS report or issue a fresh refusal notice citing any exemptions it is relying on to refuse to disclose this information.
4. The public authority must take these steps within 35 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.

Request and response

5. On 15 December 2013 the complainant requested the full LGSS report.
6. On 29 January 2014 Greater East Midlands Clinical Support Unit (the CSU) responded on behalf of the CCG. It refused to disclose the requested information as it said it was exempt under section 42 FOIA.
7. The complainant requested an internal review on 4 February 2014. The CSU sent the outcome of its internal review on 4 March 2014. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 28 March 2014 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the seven documents attached to the LGSS report would fall within the scope of the request and whether the CCG has correctly applied section 42 FOIA to the withheld information. He has also considered whether section 40(1) FOIA should have been applied to some of the information within the withheld report.

Reasons for decision

10. The CCG has explained that it does not consider that the seven documents attached to the LGSS fall within the scope of the request. It considers that only the body of the report falls within the scope of the request.
11. The Commissioner does consider that documents which are attached to and referred to within the LGSS report would fall within the scope of the request as they form part of the basis and background to the report.
12. The Commissioner's Guidance on the application of section 42 FOIA can be accessed using the following link:

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx

13. At page 6 of the Guidance it states that:

"Enclosures and attachments to a communication, and pre-existing documents

18. Any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. The authority must consider each document individually.

19. If an enclosure existed before litigation was contemplated or before it was considered possible that legal advice might be needed, LPP will not usually apply to it. There is however one important exception to this rule. When a lawyer uses their skill and judgement to select pre-existing documents that weren't already held by the client, for the purposes of advising their client or preparing for litigation, then LPP can apply."

14. Upon considering the seven documents attached to the report the Commissioner does not consider that section 42 would be applicable to this information. The CCG has not provided the Commissioner with any submissions to explain why section 42 FOIA would apply to this information.

15. As no alternative exemptions have been applied by the CCG to the seven documents attached to the report, the Commissioner considers that this information should be disclosed to the complainant or a fresh refusal notice issued citing the grounds upon which it is refusing to provide this information. He has however gone on to consider whether section 42 FOIA was correctly applied to withhold the body of the report.

Section 42

16. Section 42(1) FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.

17. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.

18. The CCG has confirmed that in this case that it is relying upon advice privilege.
19. Advice privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
20. The CCG explained that the legal adviser to the CCG is LGSS Law, a professional legal advisor acting in a professional capacity. It clarified that LGSS Law is a local government shared services provider of legal advice to public sector clients.
21. The CCG confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
 - a. confidential;
 - b. made between a client and professional legal adviser acting in their professional capacity; and
 - c. made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
22. The CCG also confirmed that it was satisfied that the privilege attached to the withheld information had not been waived.
23. Upon considering the withheld information and the submissions provided by the CCG, the Commissioner considers that the section 42 exemption was correctly engaged.
24. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.
25. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is

important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...".

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."

26. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner* (EA/2007/0136) that the countervailing interest must be "*clear, compelling and specific*".

Public interest arguments in favour of disclosing the requested information

27. The CCG considers that there is a general presumption in favour of disclosure and the need for accountability and transparency of public bodies.

Public interest arguments in favour of maintaining the exemption

28. The CCG said that the content of the withheld report is external specialist advice provided by the CCG's legal advisors on whether the process carried out by the CCG's predecessor complied with relevant legislation. It argued that the general maintenance of the confidentiality of communications between a lawyer and client is a matter which is strongly in the public interest, and therefore it said the CCG has given it significant weight. It argued that it is important that the CCG, and other public authorities, are able to obtain candid legal advice in order to assist them to make appropriate decisions. It said that this would be less likely to occur if the client and the lawyer concerned knew that their communications would be made public.
29. It argued that there is a strong weight built in favour of maintaining the exemption (*Bellamy v ICO (No 1)* [EA/2005/0023]), and this would require a significant public interest in the disclosure of the information in order to override that privilege. It said that there must be some clear, compelling and specific public interest justification for disclosure which must outweigh the strong public interest in protecting communications

which are intended to be confidential. It said that it does not consider that there is any specific public interest justification for disclosure.

30. It explained that in *Foreign and Commonwealth Office v Information Commissioner* [EA/2007/1992], the Tribunal found that the public interest in disclosure of privileged information is weak where it simply enables the requestor to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. In this case it explained that the complainant is a representative of [named company], the entity which the legal advice concerns, and who may seek to use it against the CCG.
31. Finally it explained that the complainant had already received a summary of the withheld report which goes some way to meeting the public interest in favour of disclosure.

Balance of the public interest

32. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and accountability in the CCG's decision making processes and to ensure it is operating fairly and effectively.
33. The Commissioner also considers that there is a very strong public interest in the CCG being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided. This in turn may have a negative impact upon the quality of decisions made by the CCG which would not be in the public interest.
34. Upon viewing the withheld legal advice the Commissioner considers that at the time of the request the advice was fairly recent and furthermore he has not been presented with evidence that would suggest that the withheld advice has been misapplied.
35. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 42 was therefore correctly applied in this case.

Section 40(1)

36. Whilst the Commissioner considers that section 42 FOIA was correctly applied to the withheld report, he would also highlight that it does contain some information which would amount to the complainant's own personal data. This information would also therefore be exempt under section 40(1) FOIA.

Right of appeal

37. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

38. 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.
39. 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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