

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2020

Public Authority: Parliamentary and Health Service Ombudsman

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

Decision (including any steps ordered)

1. The complainant has requested particular internal guidance from the Parliamentary and Health Service Ombudsman (PHSO). PHSO advised that it does not hold the internal guidance requested but holds relevant legal advice. PHSO's position is that the legal advice is exempt from disclosure under section 42(1) of the FOIA (legal professional privilege) and that the public interest favours maintaining this exemption.
2. The Commissioner's decision is as follows:
 - The information that PHSO holds that falls within the scope of the complainant's request is exempt from disclosure under section 42(1) of the FOIA. The public interest favours maintaining the exemption.
3. The Commissioner does not require the PHSO to take any remedial steps.

Request and response

4. In 2018 the complainant had submitted a complaint about the Pension Ombudsman to PHSO. PHSO had advised him on 14 September 2018 that it would not take further action on his complaint. The complainant had submitted the request for information below to PHSO on 14

September 2018. PHSO subsequently advised the complainant that it had no record of that request and could not confirm its receipt. The complainant has provided the Commissioner with a copy of the request and she has noted that it was sent to a named officer at PHSO. The Commissioner reminds the PHSO that its officers should be trained to recognise requests for information and that, if necessary, officers should forward requests to the relevant team to deal with.

5. On 29 August 2019 the complainant re-submitted the request to PHSO as follows:

"I wish to complain regarding the outcome of the above. The complaints also concerned TPAS data disclosure(s) which was not detailed therein; additionally, I telephoned to ascertain [sic] progress, yet was advised my Caseworker was awaiting guidance as to whether 'delay' could be investigated or not. My outcome does not confirm why admitted delays could not be considered under your remit, and it appears that my concerns have been unfairly disposed of, without any regular update(s) from Caseworker. I would like to see your internal Guidance why issues cannot be investigated further."

6. The PHSO responded to the request on 26 September 2019. It stated that it does not hold internal guidance but holds relevant legal advice which it is withholding under section 42(1) of the FOIA.
7. Following an internal review, the PHSO wrote to the complainant on 23 October 2019. It maintained its reliance on section 42(1), confirming that it considered the public interest favoured maintaining this exemption.

Scope of the case

8. The complainant contacted the Commissioner on 22 October 2019 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether the relevant information that the PHSO holds is exempt from disclosure under section 42(1) of the FOIA, and the balance of the public interest.

Reasons for decision

Section 42 – legal professional privilege

10. The PHSO is withholding under section 42(1) of the FOIA a document that concerns whether, and to what extent, the PHSO can investigate

the actions of the staff of the Pensions Ombudsman. The PHSO has provided the Commissioner with a copy of this document.

11. Section 42(1) 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.”

12. This exemption is subject to the public interest test.

13. The purpose of legal professional privilege (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, LPP evolved to make sure communications between a lawyer and his or her client remain confidential.

14. The Commissioner notes that it is recorded on the document that is being withheld that its author was a (former) Legal Advisor and its owner is a Legal Advisor. The document includes a discussion of the relevant legislation, what is in and out of remit in respect of the PHSO and the Pensions Ombudsman and a summary. The document was written in 2008 and, while the Commissioner has noted the PHSO's view on this (below), she considers that the advice the document contains was still 'live' at the time of the request, and currently, in that it may well be drawn on in the future.

15. The Commissioner is satisfied that the document in question can be categorised as internal legal advice and can therefore be withheld under section 42(1) of the FOIA. She has gone on to consider the public interest test.

Public interest test

Public interest in releasing the requested information

16. The complainant has not provided the Commissioner with any public interest arguments for the information's release.

17. The PHSO provided the following arguments in its internal review response:

- There is an argument for transparency over information created and held by public authorities. It allows the public to gain knowledge of how a public authority functions in relation to a specific matter.

- There is also a public interest argument in knowing that PHSO is producing reasonable legal advice. If not, knowing what was created and who was involved increases accountability in PHSO.
- The information is several years old and is not currently being relied on by PHSO for its complaint function. This reduces the protection that can be afforded to legally privileged information.

Public interest in withholding the requested information

18. The PHSO provided the following arguments in its internal review response:

- LPP carries a strong inherent argument against disclosure due to the importance of the principle behind it. It is designed to promote open communications between client and lawyer to ensure robust advice can be provided, which is vital to the administration of justice. Disclosure of the information would likely inhibit the openness of these communications and so affect the administration of justice.
- The advice is no longer live and is several years old, which diminishes the arguments for transparency and accountability. This information does not impact on discharge of the Parliamentary Commissioner's function, so there is a much reduced need to understand what is contained within the advice.
- The information, even when live, did not affect a large proportion of complaints or have a vast impact upon PHSO's work. This adds further detail which highlights that the arguments for transparency and accountability in this instance are much reduced.

Balance of the public interest

19. The Commissioner agrees with the PHSO that LPP carries with it a strong inherent protection due to the nature of the information that it covers, and the function that it plays in the administration of justice. The Commissioner has not been presented with any argument in favour of disclosure which is sufficiently strong to overturn the protection that LPP requires. The Commissioner's decision is therefore that the public interest favours maintaining the section 42(1) exemption.

Right of appeal

20. 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@justice.gov.uk

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

21. 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.
22. 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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