

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2012

Public Authority: Liverpool Women's Hospital NHS Foundation Trust (The Trust)

Address: Crown Street
Liverpool
L8 7SS

Decision (including any steps ordered)

1. The complainant has requested any legal advice received by the Trust from Timothy Pitt-Payne QC on the issue of 'gagging orders'. The Trust identified information within the scope of the request but withheld this on the basis that 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 the Trust has correctly applied this exemption and the public interest favours withholding the requested information.

Request and response

3. On 8 June 2011 the complainant wrote to the Trust in relation to what he described as *"13 agreements with silencing clauses... the attempt to use a 'gagging order' or court injunction against ... speaking to his MP"* and Timothy Pitt-Payne QC's legal advice on the drafting of these agreements. The complainant specifically asked that:

"you disclose to me any legal advice received from Mr Pitt-Payne on these issues."
4. The Trust responded on 16 June 2011 stating that if information was held it would be covered by legal professional privilege and therefore be exempt from disclosure. The complainant responded on the same day to ask for an internal review of this decision and for confirmation as to whether the Trust was claiming advice privilege or litigation privilege.

5. On 11 July 2011 the Trust wrote to the complainant asking him to confirm his grounds for requesting an internal review and on the 15 July 2011 the complainant responded. In his response the complainant explained that as the Health Select Committee was likely to hold an inquiry into whistle blowing in the NHS he therefore wanted to know whether this Committee should be focusing on the Trust or its lawyers.
6. Following an internal review the Trust wrote to the complainant on 26 August 2011. It confirmed its view that the information it held within the scope of the request attracted legal professional privilege and that there was a strong public interest in the maintenance of this and the confidentiality of communications between legal advisers and clients. The Trust did not clarify at this stage whether it considered the information to attract advice privilege or litigation privilege.

Scope of the case

7. The complainant contacted the Information Commissioner ("the Commissioner") to complain about the decision of the Trust to withhold information within the scope of his request. In particular the complainant provided some background to his request and explained that he understood the Trust had entered into 13 compromise agreements with clinicians between 1998 and 2008. The complainant stated that these compromise agreements contained confidentiality clauses.
8. The Commissioner therefore considers the scope of his investigation to be the decision by the Trust to withhold any information under section 42 of the FOIA which it had identified it as being legal advice provided by Mr Pitt-Payne on the subject of confidentiality clauses in these 13 compromise agreements.

Reasons for decision

9. 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."

10. The Trust has identified several pieces of information which it considers within the scope of the request. 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.”

11. 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.
12. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because the withheld information consists of legal opinions and advice provided to the Trust by a professional legal adviser on the issue of confidentiality clauses in compromise agreements..
13. As such the Commissioner finds that the requested information is subject to legal advice privilege and also notes that the Trust considers this issue to still be ‘live’ and would use this advice to guide its thinking in future issues around this subject. The Commissioner consequently finds that the legal professional privilege exemption is engaged.
14. 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

15. The public interest arguments in favour of the information being disclosed revolve around creating greater transparency in the workings of the Trust. In particular disclosure may assist the public in understanding how the Trust makes decisions.

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

16. The Commissioner acknowledges there has been some general and political interest in the subject of whistleblowing in the NHS and the Health Select Committee, at the time of the request, were intending to launch an inquiry into this issue. On 7 December 2011 a Health Select Committee session took place on "Professional responsibility of healthcare practitioners"². Discussions in this session mentioned the use of confidentiality clauses in compromise or severance agreements and the impact of this on whistleblowing within the NHS.

Public interest arguments in favour of maintaining the exemption

17. 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.
18. A disclosure of that advice would potentially undermine the client's position in any legal dispute with 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.
19. The Trust has explained that the legal advice it received relates to an issue which is still relevant and live. The compromise agreement drawn up by the Trust is still in place and disclosure of the legal advice around this issue has significant potential to prejudice the Trust's ability defend its legal interests.

Balance of the public interest arguments

20. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. He also recognises that the general issue of confidentiality clauses in compromise agreements has drawn wider attention. However, the Commissioner cannot see how the disclosure of

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<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhealth/1699/11120702.htm>

legal advice received by the Trust in relation a specific compromise agreement would help to inform the debate on whether confidentiality clauses are contributing to issues with whistleblowing in the NHS.

21. The Commissioner finds that the privilege attached to the withheld information has not diminished by being provided to a third party, especially given the specific circumstances of this case. As the Trust considers the information to still be relevant and would be relied upon in any future considerations of this issue, the Commissioner considers the privilege attached to the information has not been waived and is still relevant now.
22. The Commissioner's view is that there are stronger public interest arguments in favour of maintaining the exemption. He considers the Trust'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 the Trust 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."*
23. 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. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. He therefore concludes that the Trust correctly withheld the requested information under the exemption at section 42.

Right of appeal

24. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

25. 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.
26. 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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