

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2019

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested information on the discussions and decision relating to quashing or withdrawing reports. The PHSO provided some information but maintained that legal advice was exempt under section 42 of the FOIA. The PHSO also withheld some information on the basis of section 44 and 40 of the FOIA.
2. The Commissioner's decision is that the PHSO has correctly applied the provisions of section 42, 44 and 40 to withhold the remaining information within the scope of the request. She requires no steps to be taken.

Request and response

3. On 25 February 2018 the complainant made a request to the Parliamentary and Health Service Ombudsman ("PHSO") via WhatDoTheyKnow¹ in the following terms:

"In his letter of 1 February to Bernard Jenkin at PACAC relating to withdrawing reports, [name redacted] stated that "Following careful consideration of the issues by our legal team and senior colleagues, I

¹ https://www.whatdotheyknow.com/request/quashing_reports_advice_from_leg

am now able to update you on what our approach will be in relation to such matters going forward". A link to the letter is shown below.

<https://www.parliament.uk/documents/comm...>

a) Please provide all advice, notes, documents, emails etc. from colleagues, the legal team, and Mr Behrens relating to withdrawing or quashing reports.

b) Please also provide the same advice, notes, documents, emails etc. from colleagues, the legal team, and previous Ombudsmen, relating to withdrawing or quashing reports, particularly any advice, notes, documents, emails etc. suggesting reports could not be withdrawn or quashed.

c) Please provide details of how a final report is treated when, after review and further investigation, it is superseded by a second report in which the outcome of the investigation is changed from "not upheld" to "upheld"."

4. On 8 March 2018 the PHSO sought clarification from the complainant as follows:
5. *"I would be grateful if you would clarify whether items a) and b) of your request applies explicitly to the Ombudsman's letter of 1st February 2018 or whether the scope went beyond that to any potential information held."*
6. The complainant confirmed on the same date that the request was intended to cover all information relating to the ability of the Ombudsman to withdraw or quash reports.
7. Following this, the PHSO responded on 16 March 2018 to advise that the information engaged sections 36(2)(b)(ii), 36(2)(c) and 42(1) of the FOIA and further time was needed to consider the public interest test. A final response was sent on 24 April 2018 in which the PHSO confirmed that some information was being withheld on the basis of the originally cited exemptions as well as sections 44(1)(a) and 40(2) of the FOIA. The PHSO did find that for some of the information that engaged section 36 it found the public interest favoured disclosure and this information was released with minor redactions under section 40(2).
8. The complainant requested an internal review on 9 May 2018. He stated that the information released was not substantive and only related to part (b) of the request and no information in relation to part (a) or (c) had been disclosed. The complainant highlighted the public interest arguments in favour of disclosure of the relevant information and to avoid any further 'safe space' arguments stated he would limit his

request to information produced prior to the date of the letter to Bernard Jenkin MP (1 February 2018).

9. The PHSO conducted an internal review and provided the outcome on 18 July 2018. The PHSO upheld its decision to withhold the requested information on the basis of the cited exemptions but did acknowledge it had not fully responded to part (c) and provided some explanations.

Scope of the case

10. The complainant contacted the Commissioner on 19 August 2018 to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation the PHSO concluded that it now longer sought to rely on section 36 to withhold information and disclosed some additional information to the complainant.
12. The Commissioner considers the scope of her investigation to be to determine if the PHSO has correctly withheld the remaining information within the scope of the request on the basis of any of the cited exemptions – section 42, 44 or 40.

Reasons for decision

Section 42 – legal professional privilege

13. Section 42 of the FOIA states that information is exempt from disclosure if it is subject to legal professional privilege (LPP). This is a qualified exemption. So in addition to demonstrating that the withheld information is subject to LPP, the public authority must also consider the public interest test and demonstrate that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
14. There are two types of privilege within the concept of LPP; litigation privilege and advice privilege. In this case the PHSO has claimed that some of the withheld information is subject to advice privilege.
15. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. The Commissioner is of the opinion that advice from a

lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.

16. The complainant argues that the legal advice sought would have been for the interpretation of legislation for operational and strategic purposes and not for litigation purposes and it is therefore in the public interest to disclose it in order to ensure justice and fair treatment for complainants and for public understanding of the way that the legislation is interpreted, that legal advice is disclosed in this case.
17. The information withheld under this exemption is a series of communications, mostly emails, between PHSO employees and PHSO legal advisers relating to the legal status of reviews of PHSO decisions.
18. The Commissioner has reviewed the withheld information and she is satisfied that these are confidential communications between PHSO employees and PHSO legal advisers for the main purpose of requesting and obtaining legal advice relating to the legal status of PHSO decisions. The Commissioner is satisfied that the legal advice was provided in a relevant legal context. The legal advice does relate to PHSO decisions but the Commissioner does not consider this to be information on operational or strategic decisions but rather on the legal position of the PHSO and the Ombudsman's jurisdiction. The Commissioner considers the legal advice is therefore for the purpose of advising the PHSO on the Ombudsman's powers and functions and not on organisational matters.
19. For the above reasons the Commissioner is satisfied that the information identified by the PHSO as legal advice is information subject to advice privilege and therefore that section 42 is engaged. She will now go on to consider the public interest test.

Public interest test

20. The complainant argues that there is huge public interest in the disclosure of information which allows for scrutiny of the Ombudsman. He states that that Ombudsman is not open to scrutiny in any way other than the annual parliamentary inquiry by the PACAC select committee and as a result the PHSO's operations and governance are not transparent.
21. The complainant has stated that the PHSO changed its policy on the quashing of reports without any proper explanation beyond a short letter to the PACAC select committee and the new policy allows the Ombudsman to 'quash' reports issued in exceptional circumstances. Prior to this reports could only be 'quashed' through the High Court. The complainant points to a particular case in which individuals applied to

the High Court to have a report quashed at personal expense that was then, following the change in policy, quashed by the Ombudsman².

22. The PHSO accepts that disclosure would increase transparency and that there is a public interest in seeing what legal advice was sought in making the decision in this case.
23. However, the PHSO argues that there is a strong argument in favour of the general principle of obtaining legal advice for the administration of justice. There is a strong public interest in upholding this principle, which is intended to ensure confidentiality between professional legal advisers and their clients (in this case, the Ombudsman and Legal Officers). The PHSO considers it is in the public interest that its decisions are fully-informed and draw on legal advice where appropriate and disclosing such advice would be likely to prevent the PHSO from being able to successfully defend its legal interests.
24. The Commissioner has considered the public interest arguments for and against disclosure and reached the decision that the public interest rests in maintaining the exemption. She will now explain why.
25. The Commissioner acknowledges the public interest in openness, transparency and accountability. She considers there is a public interest in allowing members of the public access to information which will enable them to understand more clearly why particular decisions have been made.
26. The Commissioner considers those affected by the changes which were advised on will have legitimate reasons for requiring access to information which may assist them in understanding more concisely how this decision was reached and the legal basis for it. In this case it can be argued that the Ombudsman being able to quash his own reports is a significant change as it allows for reports that would have previously only been quashed via the High Court to be quashed at a much earlier stage.
27. However, in this case there are also strong and compelling public interest arguments in favour of maintaining the exemption, which in the

² <https://www.barkinganddagenhampost.co.uk/news/high-court-orders-new-inquest-into-death-of-barking-mother-elsie-brooks-at-king-george-hospital-ilford-1-5646757>

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-and-constitutional-affairs-committee/parliamentary-and-health-service-ombudsman-scrutiny-201617/written/74286.html>

Commissioner's opinion, outweigh the public interest arguments in favour of disclosure.

28. There is a strong public interest in maintaining the important principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. A client's ability to speak freely and frankly with his or her legal adviser to obtain appropriate legal advice is a fundamental requirement of the English legal system. Disclosure of legal advice would be likely to prejudice the PHSO's ability in future to speak so freely and frankly with its legal adviser(s) and this may in turn result in less candid or less appropriate legal advice being received. There would then be a negative knock on effect on the PHSO's decision making and potentially place it at an unfair disadvantage where the legal advice is relied upon or is relevant to legal proceedings or defending legal claims. It is in the public interest to maintain the PHSO's ability to obtain free, frank, candid and appropriate legal advice to ensure that it is making the most appropriate decisions and meeting its statutory functions as best it can.
29. The Commissioner notes that disclosure would enable those affected by the changes to understand more clearly how this decision was reached. However, she does not consider such public interest arguments are compelling enough in this case to override the importance principle of legal professional privilege. In the First-tier Tribunal hearing of *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023, 4 April 2006)* the tribunal said:

"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 public interest."
30. In this case the Commissioner is not persuaded that the public interest arguments in favour of disclosure equal or outweigh the public interest in maintaining the important principle behind legal professional privilege or the PHSO's application of section 42 of the FOIA.

Section 44 – statutory prohibitions on disclosure

31. Section 44 is an absolute exemption, which means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.
32. Section 44 of the FOIA states that:
 - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

- (a) is prohibited by or under any enactment,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.
33. The PHSO has sought to rely on the section 44 exemption under the FOIA to withhold information obtained for the purposes of investigations. In the discussions within the PHSO on the subject of quashing there was information shared on particular investigations to illustrate points and to outline ongoing issues.
34. The PHSO stated that the relevant legislation from which it draws its powers the Parliamentary Commissioners Act 1967 (PCA). Section 11 of the PCA, headed 'Provision for secrecy of information' states at subsection (2) that information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except –
- (a) for the purposes of the investigation and of any report to be made thereon under this Act;
 - (aa) for the purposes of a matter which is being investigated by the Health Service Commissioner for England or a Local Commissioner (or both);
 - (b) for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or
 - (c) for the purposes of any proceedings under section 9 of this Act;
- and the Commissioner and his officer shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the course of an investigation under this Act.
35. The Commissioner recognises that this legislation prohibits disclosure of information obtained during an investigation. She also acknowledges the provision of privacy at section 7(2) of the PCA *'Every investigation under this Act shall be conducted in private'*.
36. The Commissioner has reviewed the information withheld under this exemption and is satisfied that the withheld information was obtained by

the PHSO during the course of its investigations and therefore the withheld information falls within the prohibition.

The PHSO makes reference to exemptions outlined in section 11(2) of the PCA that it can use to dis-apply the prohibition or the gateways available to it should it decide to disclose information in a given context. The Commissioner's view is that it is to the discretion of the PHSO in a given case whether it uses an exemption to dis-apply the prohibition and therefore use this gateway. It is not within the Commissioner's remit to question the use, or not, of the exemption or gateway in a particular case. This is a decision for the PHSO alone. Therefore for these reasons, if the PHSO decides not to use an exemption or gateway to dis-apply the prohibition in a particular case, the prohibition from disclosure under section 44(1)(a) must continue to apply.

37. There is no means of challenging this under the FOIA. The FOIA itself cannot provide an exemption from a statutory prohibition. Gateways allow disclosure for specific purposes but FOIA is about general disclosure to the world at large.
38. The Commissioner's view follows the binding decision of the Upper Tribunal in 2011 (*Ofcom v Gerry Morrissey and the IC*, 2011 UKUT 116 AAC). The Commissioner will not question or examine the reasonableness of the authority's decision. The Commissioner will only verify that the authority has made that decision and will not consider whether its decision was reasonable.
39. For the above reasons, the Commissioner has concluded that the pHSO has correctly exempted the identified information from disclosure under section 44(1)(a) of the FOIA.
40. As the Commissioner is satisfied that the withheld information is exempt from disclosure under section 44(1)(a) she has gone on to consider the use of section 40 to redact names and contact information from the information that has already been disclosed.

Section 40 – personal data

41. As this request and the PHSO's initial handling of the request pre-dates the introduction of the Data Protection Act 2018 and General Data Protection Regulation the Commissioner has considered the decision to redact names and contact information under the Data Protection Act 1998 (DPA) as the appropriate legislation at the time the request was dealt with.
42. Section 40(2) of the FOIA states that:

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which does not fall within subsection (1), and

(b) the first condition below is satisfied.

The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

(a) would contravene any of the data protection principles,

Is the withheld information personal data?

43. Personal data is defined by the DPA as any information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller.
44. The redacted information in this case is the names and contact information of officers at the PHSO. This clearly falls within the definition of personal data as set out in the DPA because it 'relates to' identifiable living individuals.

Would disclosure contravene any of the Data Protection Principles?

45. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's consideration below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.
46. When a public authority discloses information under the FOIA, it is essentially disclosing it to the world and not just the person making the request.
47. The PHSO has redacted the names and contact information of employees who are not senior. The complainant has argued that some of the names redacted are in fact senior members of staff but the

Commissioner has seen no evidence that this is the case, the approach taken by the PHSO to the redactions made appears to be consistent throughout as some names have been disclosed where they are more senior members of staff and only more junior colleagues have had their personal information redacted from the disclosed information.

48. The Commissioner is of the view that disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.
49. The Commissioner is of the view that disclosure must not cause unwarranted interference with an employee's rights. This means that the public authority should follow a proportionate approach; it may be possible to meet the legitimate interest concerned by disclosing some of the information, rather than all the detail that has been asked for. As mentioned above, the Commissioner considers the PHSO has taken a proportionate approach to this and has disclosed personal information where senior members of staff with accountability for decisions are involved.
50. The PHSO has told the Commissioner that it acknowledges that there is a public interest in transparency and accountability of public authorities in relation to complaints. However it also sees that this needs to be balanced with the expectations and legitimate rights of its employees.
51. After reviewing the above and on consideration that the officers are not of a senior level, the Commissioner is satisfied that any legitimate interest in disclosure does not outweigh the individuals' rights to privacy in this case.
52. The Commissioner's decision is that section 40(2) of the FOIA is engaged in this case.

Right of appeal

53. 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

54. 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.
55. 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

Jill Hulley
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