

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 December 2023

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

Decision (including any steps ordered)

1. The complainant has requested copies of legal advice. The PHSO withheld the requested information under section 40(1) (personal information) of FOIA.
2. The Commissioner's decision is that the requested information engages section 40(1) and therefore is exempt from disclosure.
3. The Commissioner does not require further steps.

Request and response

4. On 4 August 2023, the complainant wrote to the PHSO and requested:

"I am writing to you regarding the letter which I received from [Redacted] on 3 August 2023.

Pending my full response, please could you disclose copies of all legal advice and discussions received or generated by the PHSO, in respect of the Health Service Commissioners Act 1993 in relation to this case.

I would appreciate the above information being issued at the earliest possible opportunity, in order that I can address in detail the legal advice which [Redacted] received. With reference to my letter of 20 April 2023. Item 1 of which remains unaddressed. I am deeply concerned that this could be the second occasion of which incorrect legal advice has misled a Caseworker.

I look forward to receiving this information as soon as possible, or should it be strictly necessary to consider this a subject access request, within one month."

5. The PHSO responded on 29 August 2023, handling the request as a 'subject access request'¹. It explained:

"After considering your information request, we will not be disclosing the information to you. This is because the information is considered legal professional privilege and applies to the communications between a legal representative and client, as they are for the purpose of providing legal advice. Therefore, we will not be disclosing the information by virtue of Schedule 2(19)(b) of the Data Protection Act 2018 - "information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser."

6. The complainant requested an internal review on the same day. They stated:

"With regard to Schedules 2 & 42 of the Freedom of Information Act 2000, an exemption for legal professional privilege does not apply where the public interest in disclosing the information outweighs the public interest in maintaining the exemption. I am therefore requesting an internal review to reconsider my request on that basis."

7. The PHSO provided the outcome to its internal review on 22 September 2023. It upheld its decision to process the request under the Data Protection Act 2018 ('DPA 18'). However, it also confirmed the requested information would be exempt under section 42 (legal professional privilege) of FOIA.

8. During this investigation, the PHSO explained to the Commissioner that:

"This request was not dealt with under the Freedom of Information Act as it was a request for information relating to [Requestor's] specific case which would never be disclosed under Freedom of Information Act. Case related information of this nature is exempt under the

¹ [Right of access | ICO](#)

Freedom of Information Act as per Section 44(1)(a), because disclosure is prohibited by another enactment.”

9. The PHSO then finally confirmed to the Commissioner that the requested information was exempt under section 40(1) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 4 October 2023 to complain about the way their request for information had been handled. The complainant disputes “that this legal advice is personal. It applies to all other cases that involve contractors appointed by the NHS”. They also argued it was in the public interest to disclose the information.
11. The Commissioner will consider whether the request has been handled appropriately. First, he’ll need to consider whether the request has been handled under the correct access regime. He’ll also consider whether the information has been withheld appropriately.

Reasons for decision

12. The Commissioner acknowledges that legal advice has the potential to be generic or personal. Legal advice could relate to purely theoretical or historic matters or it could be given in response to a particular claim by a specific individual.
13. It’s an organisation’s, not an individual’s, responsibility to recognise the most appropriate access regime upon receiving a request. When an individual is requesting access to their own personal data, the appropriate regime is always a SAR, even if the requestor cites FOIA.
14. According to section 3(2) of the DPA, personal data is “any information relating to an identified or identifiable living individual.” Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
15. As part of this investigation, the Commissioner has seen the legal advice that’s been requested and he’s satisfied that it represents the complainant’s personal data.
16. It details the chronology that led the complainant to make their complaint to the PHSO and how the complaint was handled. All of the legal advice is given in relation to circumstances involving the complainant. It is personal to them.

17. Therefore, the Commissioner is satisfied all of the withheld information is the complainant's personal data and is therefore exempt under section 40(1). Section 40(1) is an absolute exemption; there is no need to consider the public interest.
18. It's not the role of the Commissioner (in his capacity looking at FOI complaints) to comment on whether the PHSO handled the SAR appropriately, including whether it applied any exemption under the DPA18 correctly. If the complainant continues to have concerns, this can be brought to the Commissioner separately.²

Other matters

19. The Commissioner appreciates that the PHSO first and foremost handled the request as a SAR, as it was correct to. However, when the complainant disagreed, and pushed for a response under FOIA, the PHSO then sought to introduce section 42 and section 44(1)(a) rather than citing section 40(1) as it should have done.
20. If a requestor is requesting their own personal data, the request should always be handled as a SAR, and if the complainant presses to have the matter look at under FOIA, the information will always be exempt under section 40(1). No other exemption needs to be considered.
21. Furthermore, during this investigation the PHSO repeatedly referenced such requests as this as 'requests for material evidence and therefore dealt with under our own legislation.' The Commissioner won't comment on this any further, except to say that the PHSO must always ensure its meeting its requirements under FOIA and the DPA18 when dealing with requests for information received under these pieces of legislation.

² [Data protection and personal information complaints tool | ICO](#)

Right of appeal

22. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

23. 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.
24. 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

Alice Gradwell
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Information Commissioner's Office
Wycliffe House
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