

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 June 2024

**Public Authority:** Parliamentary and Health Service Ombudsman

**Address:** Millbank Tower

30 Millbank

London

SW1P 4QP

### **Decision (including any steps ordered)**

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1. The complainant has requested, from the Parliamentary and Health Service Ombudsman (PHSO), information about “the legal status of non-CCT [Customer Care Team] reviews and the re-opening of final decisions”. PHSO disclosed some information but withheld certain legal advice, citing section 42 of FOIA (legal professional privilege) as its basis for doing so.
2. The Commissioner’s decision is that PHSO was correct to refuse to disclose the legal advice in question on the basis of section 42 of FOIA.
3. The Commissioner doesn’t require further steps.

### **Request and response**

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4. On 12 August 2021, the complainant wrote to PHSO and requested information in the following terms:

“Please provide all relevant documents (discussions, legal briefing notes, unabridged board meeting minutes, guidance etc.) that the PHSO possess with regard to the legal status of non-CCT reviews and the re-opening of final decisions.”

5. On 9 October 2023, PHSO issued a fresh response to the request, disclosing some information but withholding legal advice on the basis of section 42 of FOIA.
6. Following an internal review PHSO wrote to the complainant on 7 November 2023. It upheld its application of section 42(1) of FOIA, and it added:

“Whether or not a review was carried out by the Customer Care Team or other team the legal status remains the same”.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 3 December 2023 to complain about PHSO’s fresh response to their request.
8. Their correspondence of 3 December 2023 simply asked the Commissioner to investigate their request, which they said was “refused at internal review”.
9. The Commissioner attempted informal resolution of the complaint, as he outlines below.
10. PHSO had explained to the Commissioner that the information being withheld under section 42 in the present case is the same ‘external legal advice’ that PHSO withheld in another, recent ICO case IC-45092-T8X4<sup>1</sup>.
11. The Commissioner conveyed this to the complainant, and said that he considered informal resolution would be appropriate. He noted that in IC-45092-T8X4 the Commissioner had agreed with PHSO’s application of section 42 to the same information.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/2619382/ic-45092-t8x4.pdf>

12. However, the complainant ultimately rejected informal resolution, in an email simply saying they'd like a decision notice.
13. The Commissioner emphasises that the complainant hasn't disputed that the information being withheld in the present case is the external legal advice that PHSO withheld in IC-45092-T8X4. Furthermore, the complainant hasn't told the Commissioner that they consider other relevant information is held by PHSO, or specified any such information.
14. The Commissioner also notes that in their ICO complaint correspondence, the complainant hasn't specified any reasons for challenging PHSO's view that the section 42 exemption should be maintained in respect of the legal advice being withheld in the present case.
15. The Commissioner considers that the scope of this case is to decide whether PHSO was correct to refuse disclosure of the external legal advice PHSO has explained it's withholding on the basis of section 42 of FOIA.
16. The Commissioner hasn't seen a copy of the legal advice itself as part of the present case. He considers that he's able to make a decision without doing so, given other information available to him (including the published decision notice for IC-45092-T8X4) indicating the topic of the external legal advice.
17. The Commissioner is confident that the legal advice in question falls within scope of the request. He highlights that the scope of the request includes information about "the re-opening of final decisions", and considers that the legal advice falls within scope of that part of the request, based on the descriptions he's seen of the legal advice during his investigation. His understanding is that it's about the principle of *functus officio* ('having performed his office'), as it relates to PHSO (see IC-45092-T8X4).

### **Reasons for decision**

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18. Section 42(1) of FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

19. As noted above (see paragraphs 10 and 11), the Commissioner has previously upheld PHSO's application of section 42 of FOIA to the same withheld information.
20. Whilst IC-45092-T8X4 relates to a request made and responded to in 2019, the original request in the present case dates to 2021, just two years later.
21. The Commissioner finds that PHSO was correct to withhold the information under section 42 in the present case too, and he directs readers to his published decision notice for IC-45092-T8X4 and the reasoning set out there (see paragraphs 42 – 56 of that decision notice).
22. He makes some further points below, to add to those in IC-45092-T8X4.
23. The complainant has indicated a desire to know whether PHSO's processes around reviews and re-opening decisions or investigations are or were "legal" or lawful.
24. Clearly, it's not the Commissioner's role to consider the lawfulness of such processes; and the Commissioner does acknowledge that there's a public interest in transparency in relation to PHSO's decisions and processes. However, the Commissioner considers that it's worth highlighting that disclosure of the withheld information is unlikely to achieve the complainant's apparent aim outlined above at paragraph 23.
25. The withheld information is the advice of the legal adviser(s) about 'functus officio', as it relates to PHSO. It's not binding, or representative of a definitive view.
26. The Commissioner suggests that legal certainty about the status of PHSO reviews and the re-opening of PHSO's 'final' decisions can only be obtained through the courts, and that the proper way to achieve the aim outlined above is to seek a judicial review.
27. In light of such considerations, and whilst he acknowledges a public interest in transparency and in ensuring PHSO's processes are lawful (see IC-45092-T8X4), the Commissioner affords limited weight to the public interest in disclosure of the specific legal advice being withheld in this case.
28. By contrast, the Commissioner affords significant weight to the public interest against disclosure, given the ongoing interest in PHSO's review

and similar processes and the likelihood of disclosure prejudicing PHSO's conduct of any related legal challenge(s).

29. He also gives significant weight to the important wider consideration that the possibility of legal advice being made public is likely to restrict the requesting and provision of legal advice by and to public authorities.
30. In conclusion, the Commissioner finds that PHSO was correct to rely on section 42 of FOIA to refuse disclosure of the external legal advice PHSO is withholding.

## Right of appeal

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31. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Daniel Kennedy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**