

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2024

Public Authority: NHS Resolution
Address: 10 South Colonnade
Canary Wharf
London E14 4PU

Decision (including any steps ordered)

1. The Commissioner's decision is that NHS Resolution was entitled to withhold the requested information about pharmaceutical services under section 42(1) of FOIA as the information is protected by legal professional privilege.
2. It's not necessary for NHS Resolution to take any corrective steps.

Request and response

3. The complainant made the following information request to NHS Resolution (NHSR) on 2 February 2024:

"RE: THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL SERVICES) REGULATIONS 2013 ["THE REGULATIONS"]

SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]

This is a FoIA request.

Please supply me with a copy of the current guidance / advice / legal advice / training materials / checklist / any other information given to

the decision maker(s) who is (or are) determining appeals from the Commissioner/s under the above regulations.”

4. NHSR’s final position was that the relevant information it holds is exempt from disclosure under section 42(1) of FOIA.

Reasons for decision

5. This reasoning covers whether NHSR is entitled to withhold the requested information under section 42(1) of FOIA.
6. Under section 42(1), 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.
7. 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 advisor so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and their client remain confidential.
8. There are two types of LPP – advice privilege and litigation privilege.
9. In its internal review, NHSR said that the withheld information comprises communications containing legal advice around certain documents and issues associated with determining appeals, ie it’s confidential communications between solicitor and client, which are covered by legal professional (advice) privilege.
10. NHSR has provided the Commissioner with a copy of the information it’s withholding. He’s reviewed this information and agrees that it can be categorised as legal advice that attracts LPP. NHSR was therefore correct to apply section 42(1) of FOIA to it. However, section 42 is subject to the public interest; even though the information attracts LPP it may still be disclosed if there’s sufficient public interest in its disclosure.

Public interest test

11. In its internal review, NHSR confirmed that it’s firmly of the view that the public interest lies “(strongly)” in favour of maintaining the exemption in this instance. It said that there’s a strong public interest in organisations being able to seek and receive frank and unfettered legal

advice confidentially, and to decide how to proceed once it's received that advice. NHSR noted that the eventual approach taken may or may not be the same as the as that advised by lawyers.

12. NHSR went on to say that First-tier Tribunal appeal cases have found that there needs to be "some clear, compelling and specific justification for disclosure... so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential." NHSR said that in its view there were no special factors at play that would "outweigh this exemption."
13. NHSR noted that there's a public interest in the 'open justice' principle (ie not only that justice is done, but that justice is seen to be done). It recognised that one of the ways in which that could be served would be to disclose any legal advice available to decision makers. But NHSR considered that the public interest is served in other ways, including through material it already publishes.¹
14. NHSR concluded by confirming that, because the advice the complainant has requested is current and relevant to NHSR's work, the public interest favoured non-disclosure at that time.
15. The Commissioner appreciates the complainant has an interest in the information they've requested but he agrees with NHSR that the balance of the public interest favours withholding it. LPP carries with it a very strong inherent protection due to the nature of the information that it covers, and the function that it plays in administering justice. Arguments for disclosure in this case aren't sufficiently strong to overturn that protection.
16. The Commissioner's decision is therefore that NHSR is entitled to apply section 42(1) of FOIA to the requested information and the public interest favours maintaining this exemption.

¹ <https://resolution.nhs.uk/wp-content/uploads/2018/10/Primary-Care-Appeals-Dispute-Resolution-Guidance-Note.pdf>

Right of appeal

17. 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

18. 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.
19. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF