

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2019

Public Authority: Government Legal Department

Address: One Kemble Street

London

WC2B 4TS

Decision (including any steps ordered)

1. The complainant has requested correspondence between Government Legal Department and one of its "clients", the MHRA. The Commissioner's decision is that Government Legal Department correctly relied on section 42 (legal professional privilege) to withhold the requested information.

Background

2. In Decision Notice (FS50237119) a complainant had made a request under the Freedom of Information Act 2000 (the "Act") to the Medicines and Healthcare Regulatory Authority (MHRA) for information it had redacted from pages 9 to 31 of an Assessment Report setting out the findings of a study conducted on the issue of mortality rates in Linezolid treated patients.
3. The withheld information concerned the patients who took part in the study including their patient identification number, their age and gender as well as information about their symptoms, diagnosis, treatment and treatment outcome.

4. In the Decision Notice (FS50237119) dated 19 February, 2010¹, the Information Commissioner upheld the refusal of the Medicines and Healthcare Products Regulatory Agency (MHRA) to disclose information requested by a complainant. The Information Commissioner ruled that FOIA s.41, an absolute exemption, applied to all the information requested. The Information Tribunal in EA/2010/ 0055² upheld the Information Commissioner's decision.
5. In the above proceedings part of a letter from MHRA to the Commissioner dated 23 October 2009 was mistakenly disclosed by being placed in an "open bundle" documents intended for use by the tribunal. It contained patient identification numbers ('PIDs') that were part of the disputed information in the case.
6. As far as the Commissioner can reasonably discern the proceedings concluded when the new tribunal on 18 April 2016 decided that the disputed information constituted personal data and none of those details (that had been withheld) needed to be disclosed³. Permission to appeal was refused, as was the application for permission to bring a Judicial Review against the decision of the Upper Tribunal to refuse permission to appeal.
7. The Government Legal Department (GLD) provided legal advice to, and represented, MHRA in those proceedings.

Request and response

8. On 25 September 2017 the complainant made to GLD, inter alia, the following request for information under the FOIA:
 - Correspondence between GLD and the MHRA regarding patient numbers disclosed in a letter dated 23 October 2009 for case EA/2010/0055 from 2014-2016.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2010/515900/FS_50237119.pdf

²

[http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i442/Decision%20&%20PTA%20\(w\).pdf](http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i442/Decision%20&%20PTA%20(w).pdf)

³ <https://www.casemine.com/judgement/uk/5b35bf9e2c94e01ed25519c8>

9. GLD responded on 24 October 2017 and refused to provide the requested information citing the section 42(1) FOIA exemption.
10. Following an internal review the GLD wrote to the complainant on 1 March 2018. It stated that it upheld its decision.

Scope of the case

11. The complainant contacted the Commissioner 23 May 2018 to complain about the way his request for information had been handled.

Reasons for decision

12. 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.”

13. Legal professional privilege was defined by the Information Tribunal 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 litigation⁴.”

14. 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.
15. Having viewed the withheld information, the Commissioner notes that it was generated by litigation that culminated in the decision from the Information Tribunal numbered EA/2010/ 0055. GLD provided legal

⁴ EA/2005/0023, Bellamy v Information Commissioner (EA/2005/0023)

advice to, and represented, MHRA in those proceedings. It therefore attracts legal professional privilege that could be maintained in legal proceedings. Accordingly the exemption is engaged.

16. As section 42(1) is a qualified exemption, the Commissioner next considered whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

Public interest arguments in favour of not disclosing the requested Information

17. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner* (EA/2005/0023) in which it was stated:

"...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 interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."

18. It is in the public interest that the decisions taken by government are taken in a fully informed legal context where relevant. Government departments therefore need high quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of the facts.
19. The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position.
20. Without such comprehensive advice the quality of the government's decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest.
21. Disclosure of legal privileged correspondence has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice (contained within information sought) having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at

least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis.

22. The Commissioner notes that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner therefore takes cognisance of the comments of the Tribunal in *Calland v Information Commissioner* (EA/2007/0136) that the countervailing interest must be "clear, compelling and specific".

Public interest arguments in favour of disclosing the requested Information

- There is a very strong public interest in promoting openness, transparency and to further public understanding in relation to this matter.
 - There is a public interest in public authorities being accountable for the quality of their decision making.
 - Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability.
 - Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.
 - There is a public interest in knowing whether or not legal advice has been followed.
 - Aid understanding of how a letter (containing withheld information) was mistakenly placed in an open bundle.
23. On balance the Commissioner considers that the public interest in favour of disclosure is plainly outweighed by the public interest in favour of maintaining the exemption. In this particular instance the potential disclosure of legally privileged material has a high potential to prejudice the government's ability to defend its legal interests in relation to the litigation which was being undertaken at the time - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear of it being publically disseminated in the relatively near future. The litigation generated by FS50237119 appears to have concluded in 2016 and accordingly this (relative) nearness does not diminish the public interest arguments to any great extent.

24. A read of the withheld information does not discern any actual specific reasons for disclosure other than the general ones noted above. The potentially specific reason, to understand how withheld information was placed in an open bundle, has little traction. This is so, as the issue was discussed and the reasons recorded, in a publically available tribunal decision.
25. In the circumstances, the Commissioner has therefore concluded that there was no compelling justification for disclosing the withheld information in the public interest. Section 42(1) was therefore correctly applied in this case.

Right of appeal

26. 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: GRC@hmcts.gsi.gov.uk

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

27. 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.
28. 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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