

Freedom of Information Act 2000 (Section 50)

Decision Notice

8 June 2009

Public Authority: NHS South East Coast
Address: York House
18-20 Massetts Road
Horley
Surrey
RH6 7DE

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to NHS South East Coast ("NHSSEC") on 4 June 2007, 5 July 2007, 12 July 2007 and again made the same request on 3 September 2007, for legal advice provided by a firm of solicitors to the NHSSEC relating to the disclosure of patient medical records which was used by the NHSSEC to formulate a document called 'Principles For The Sharing Of Patient Records'. NHSSEC refused to disclose the information it held relevant to the scope of the request as it stated that it was exempt from disclosure under section 42(1) of the Act. The Commissioner considers that the NHSSEC correctly applied the section 42(1) exemption in this case. The Commissioner does however consider that the NHSSEC breached section 10(1) in its handling of the complainant's request as it failed to comply with its obligations under section 1(1)(a) within the statutory time for compliance. Finally the Commissioner considers that the NHSSEC breached section 17(3) of the Act in its handling of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. In letters dated 4 June 2007, 5 July 2007, 12 July 2007 and finally on 3 September 2007 the complainant made the same request to NHSSEC for a copy of the legal advice provided by a firm of

solicitors to NHSSEC relating to the disclosure of patient medical records which it used to formulate a document called 'Principles For The Sharing Of Patient Records'.

The initial request dated 4 June 2007 was set out in the following terms:

"You say that you have taken advice on this matter [the matter being access to patient's medical records]. May we please know who you consulted, what the actual advice you received was and what legal precedents and authorities were cited to support this view."

By the time the complainant made the final request for this information on 3 September 2007 he was aware of the name of the solicitor's firm that had provided the legal advice he wished to obtain and that the advice had been used to develop the guidance document entitled 'Principles For the Sharing of Patient Records'.

3. On 8 October 2007 the public authority refused the complainant's request for information as it stated that it was exempt from disclosure under section 42(1) of the Act which concerns legal privilege. It clarified that this exemption covered confidential communications between lawyers and their clients and ensured that this confidential relationship was protected.
4. On 8 November 2007 the complainant wrote to the Chief Executive of the public authority to request that an internal review be carried out.
5. On 24 December 2007 the Chief Executive wrote to the complainant with the result of the internal review which had been carried out. The review confirmed that the section 42 exemption had been correctly applied in this case.

The Investigation

Scope of the case

6. In January 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate whether the NHSSEC had correctly applied the section 42(1) exemption.

Chronology

7. On 29 May 2008 the Commissioner wrote to the NHSSEC to inform it that he had received a complaint from the complainant and that the case was eligible for investigation.
8. On 5 August 2008 the NHSSEC wrote to the Commissioner. The NHSSEC provided a copy of the withheld information to the Commissioner.
9. On 18 February 2009 the Commissioner wrote to the NHSSEC. The Commissioner asked it to explain why it considered that the information withheld under this exemption was subject to a claim of legal professional privilege. Furthermore it was asked to provide any submissions it wished to make as to why the public interest favoured the maintaining of this exemption in this case.
10. On 18 March 2009 the NHSSEC responded to the Commissioner. It explained that the request submitted by the complainant was for a copy of legal advice the NHSSEC had received about the sharing of patient records. It explained that this legal advice was subsequently used to inform the development of its own guidance on the principles for the sharing of patient records.
11. It explained that in considering the complainant's request, the NHSSEC considered the legal advice to be subject to legal professional privilege because it obtained the advice in confidence in order to ensure that the development of its own guidance on the release of patient records was compliant with the law.
12. It recognised that there was an argument that public authorities should be transparent in the decisions they make in order to provide accountability and help increase public understanding of why the decisions taken by such authorities have been made.
13. However, in this case, it explained that it believed that the public interest in maintaining the exemption was stronger than the public interest in releasing the information requested, given the need to protect the principle of confidentiality in communications between the organisation and its legal advisers. It stated that it was vital that, as a public authority, it was able to participate in full and frank exchanges with its legal advisers in order to ensure that it complies fully with all legal requirements and responsibilities. The NHSSEC stated that releasing the legal advice requested could undermine the free and frank exchange of advice between itself and its legal advisers in the future, due to the risk that this could be used as a precedent for the release of subsequent legal advice received. The NHSSEC therefore explained that it considered that this would be against the public interest because it would undermine the

organisation's ability to ensure compliance with its public duties and legal responsibilities.

14. It finally suggested that its own guidance on the sharing of patient records clearly set out the rights of patients' families and other parties in gaining access to individual patient information and the process for applying to be given access rights to this information. The NHSSEC provided the Commissioner with a copy of this guidance, which it confirmed had been made available to the complainant previously and is available to members of the public on request.

Analysis

Procedural

Section 1(1)

15. Section 1(1) of the Act states that:

“Any person making a request for information to a public authority is entitled –

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.”*

16. The Commissioner has considered whether the NHSSEC has complied with section 1(1)(a) of the Act.
17. The complainant made his initial request for information on 4 June 2007. The NHSSEC did not respond to the request in accordance with the Act until 8 October 2007. On this date the NHSSEC implied that the information was held and explained that it would not disclose the information as it was exempt by virtue of section 42 of the Act. It also explained that this exemption related to confidential communications between lawyers and their clients.
18. As the NHSSEC confirmed that the information was held and applied an exemption as a basis for withholding that information prior to the internal review, the Commissioner considers that it complied with section 1(1)(a) of the Act in its handling of this request.

Section 10(1)

19. Section 10(1) of the Act requires that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt of the request.
20. The Commissioner considers that the NHSSEC did not confirm that the information was held under section 1(1)(a) of the Act within 20 working days of the date of the request.
21. As the University did not comply with section 1(1)(a) within 20 working days the Commissioner considers it breached section 10(1).

Section 17(3)(b)

22. Section 17(3) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

23. In this case the Commissioner considers that the NHSSEC did not provide the complainant with its arguments in relation to why the public interest in favour of maintaining the exemption outweighed the public interest in disclosing the information within the statutory time for compliance.

Exemption

Section 42

24. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
25. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated

or pending and litigation privilege where litigation is contemplated or pending.

26. After considering the information in question the Commissioner believes that in this case the category of privilege the NHSSEC is relying upon is advice privilege. This privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity.
27. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
28. After considering the requested information in this case which was withheld under the section 42(1) exemption, the Commissioner is satisfied that it falls within the scope of this exemption.
29. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
30. The Commissioner is mindful of the Tribunal's decision in *Bellamy v ICO (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..."

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."

31. The Commissioner has therefore considered these comments in the context of this case, and considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional.

Factors favouring maintaining the exemption

32. The NHSSEC explained to the Commissioner that it was vital that it was able to participate in full and frank exchanges with its legal advisers in order to ensure that it complied fully with all of its legal

requirements and responsibilities. The NHSSEC stated that releasing the legal advice which had been requested could undermine the free and frank exchange of advice between itself and its legal advisers in the future. It stated that this was due to the risk that this could be used as a precedent for the release of subsequent legal advice received. The NHSSEC therefore explained that it considered that this would be against the public interest because it would undermine the organisation's ability to ensure compliance with its public duties and legal responsibilities.

33. The Commissioner considers that it is in the public interest that the NHSSEC is able to seek legal advice to ensure that it complies fully with its legal obligations and responsibilities. In this case the advice was sought to ensure it was providing patient information and medical records that it held in accordance with the legal rights and human rights of patients and those who wished to obtain that information. The Commissioner believes that it is in the public interest for the NHSSEC to be able to seek this advice in a free and frank manner.
34. The Commissioner also considers that if the information were released into the public domain it may have some detrimental effect on the free and frank exchange of advice between the NHSSEC and its legal advisers in the future.
35. The Commissioner has taken into account the fact that the information was live at the time of the request, in that it was still being relied upon by the NHSSEC. The legal advice was used by the NHSSEC to produce guidance on the sharing of patient records which is publicly available on request. The guidance based on the legal advice is currently being relied upon by the Trust.
36. The Commissioner has also considered whether or not the legal advice was recent. In the Tribunal case of Kessler/Ministry of Defence (EA/2007/0043) advice which was weeks old was described as "relatively recent", in Kitchner & Derby County Council (EA/2006/0044) advice which was 6 years old was described as "still relatively recent" whereas in Mersey Tunnel Users Association / Merseytravel [EA/2007/0052] advice which was over 10 years old was considered "not recent". Upon consideration of the withheld information the Commissioner believes that it is recent.
37. The Commissioner is also mindful of the Tribunal decision of Foreign & Commonwealth Office v ICO [EA/2007/0092] in which it was stated:

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is

misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."

The Tribunal went on to state that such arguments of misrepresentation should be supported by, "cogent evidence".

38. Upon viewing the legal advice which was the subject matter of the complainant's request and the guidance the Trust produced detailing its policy on the sharing of patient records the Commissioner has not found evidence that the legal advice was misrepresented by the Trust.
39. However the above factors must be balanced against the public interest factors in favour of disclosing the legal advice which the complainant has requested.

Factors in favour of disclosing the information

40. The NHSSEC recognised that there was an argument that public authorities should be transparent in the decisions they make in order to ensure accountability and help increase public understanding of why the decisions taken by such authorities have been made.
41. The Commissioner considers that Parliament did not intend this exemption to be used as an absolute exemption. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel* (EA/2007/0052) the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel, the Tribunal placed particular weight on the fact that the legal advice related to an issue of public administration and therefore the advice related to issues which affected a substantial number of people.
42. In this case the Commissioner considers that the legal advice obtained by the NHSSEC which lead to it producing policy guidance relating to how and when an individual may access a third party's medical/health records, affects all patients or those connected to patients under the care of any of the hospital Trust's which come under the remit of the NHSSEC. Therefore the Commissioner considers that the legal advice requested by the complainant does affect a substantial number of people.
43. The Commissioner also considers that there is a strong public interest in public authorities being transparent in their decision making and in people understanding the reasons behind decisions made. In this case disclosure of the legal advice may assist the

public in understanding under what circumstances medical records of a third party can be accessed and the legal basis for this.

44. In balancing the public interest considerations the Commissioner considers that because the legal advice in question affects a substantial number of people this is a significant factor in favour of disclosure. However, in favour of maintaining the exemption, the Commissioner is particularly mindful that disclosure could have a detrimental effect on the Trust's free and frank exchanges with its legal advisers in the future. The Commissioner is also minded that the advice is recent and still being relied upon and he has found no evidence that the legal advice has been misrepresented by the NHSSEC. After considering all of the above arguments, the information itself and the guidance produced as a result of the legal advice, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
45. The full text of section 42 can be found in the Legal Annex at the end of this notice.

The Decision

46. The Commissioner's decision is that the NHSSEC correctly applied the section 42(1) exemption in this case.
47. The Commissioner considers that the NHSSEC breached section 10(1) of the Act as it failed to comply with its obligations under section 1(1)(a) within the statutory time for compliance.
48. The Commissioner also considers that the NHSSEC breached section 17(3)(b) as it failed to provide the complaint with its public interest arguments in relation to its application of the section 42(1) exemption within the statutory time for compliance.

Steps Required

49. The Commissioner requires no steps to be taken.

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 8th day of June 2009

Signed

**Nicole Duncan
Head of FOI Complaints**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –
“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Time for Compliance

Section 10(1) provides that –
“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –
“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –
“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –
“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –
“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –
“In this section –
“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.”

Legal Professional Privilege

Section 42(1) provides 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.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”