

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

27 July 2009

**Public Authority:** The Department of Health  
**Address:** Department of Health,  
Richmond House,  
79 Whitehall,  
London  
SE1 6LH

### Summary

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The complainant requested the legal advice given to the Department of Health (DoH) regarding the proposed implementation of the NHS database (the 'Spine'). His request was declined by the DoH relying on the section 42(1) exemption concerning legal professional privilege. The Commissioner has considered the application of this exemption and is satisfied that the public authority has applied the section 42(1) exemption correctly and that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### The Commissioner's Role

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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

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2. The complainant requested the following information from the DoH on 1 November 2007: *"I am writing to apply under the provisions of the Freedom of Information Act for the...legal advice provided to the Department of Health with regard to the NHS Database proposals."* It would appear that this request was received by the DoH on the same day as it was sent by email.
3. The DoH provided a response to the complainant on 23 November 2007 in which it refused to disclose the information he requested on the basis of the exemption contained in section 42.

4. The complainant requested an internal review of the DoH's decision on 1 December 2007 outlining 2 grounds for his appeal:

*"1. Legal privilege does not apply in respect of advice that has already been selectively divulged..."*

*2. Under the provisions of Paragraph 2 (2) (b) of the Freedom of Information Act, the exemption from publication provided by legal privilege can only be applied if 'in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'"*

5. In the same letter the complainant outlined the reasons why he believed the public interest favoured disclosure of the information. These reasons are set out in paragraph 32.

6. After the DoH confirmed that the complainant's letter had been seen by the Chief Medical Officer, the complainant sent an email on 2 January 2008 asking for a further document to be considered in the context of the review which would confirm the *"lack of clarity with regard to the legality of NHS/CfH [Connecting for Health] proposals"*.

7. On 18 March 2008 the DoH wrote to the complainant with the results of the internal review it had carried out. The conclusion the internal review reached was that the information requested had been correctly withheld by virtue of section 42(1):

*"Your suggestion that by reporting, indirectly, the broad conclusions of legal advice will effectively erode any underlying claim to protection of the verbatim content of that advice pursuant to section 42 ...is misguided. Legal professional privilege is not waived so readily or in such circumstances."*

8. The DoH took issue with the complainant's citing of guidance material published by the NHS Connecting for Health for the benefit of NHS staff. The conclusion reached was that the fact that an assertion was made based on commissioned legal opinion did not undermine privilege. The verbatim contents of the legal advice given have not been revealed. Had the substantial contents been revealed then privilege might have been undermined but this was not the case.

9. It was stressed in the same letter that the points the complainant made with regard to public interest and the 'sealed envelope' function (relating to a facility to electronically restrict potentially sensitive information) and the Secondary Uses Service which provides anonymised patient data for uses other than direct clinical care were not considered as part of the commissioned legal advice.

10. The conclusion of the internal review was that confidentiality was vital and that *"without such protection, the value of advice (and consequently the quality of decisions) would be reduced and potentially ill informed. This would not be in the public interest."* The internal review asserted that recent case law supported

their decision by according “great weight” to legal professional privilege in any consideration of the public interest test.

## Background to Request

11. The NHS Care Records Service is an electronic care record for England, potentially covering in excess of 50 million people, as defined by Connecting for Health’s website. The Summary Care Record is an outline of patient key health information that is intended to be available to anyone in the NHS in England treating a patient and will be stored on a secure NHS computer. The Summary Care record will begin to record patient medication, reactions to medication and allergies and will build in time to include important health issues. The intention is that eventually discrete records in different locations where a patient receives care will be replaced as records are linked and more detailed records are created. Patients will be able to access their information online and choose which information is available to those treating them. They will also be made aware of the creation of these records and given a series of options.

## The Investigation

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### Scope of the case

12. On 13 May 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner for assistance in determining why the requested information was withheld and whether the exemption contained in section 42(1) (legal professional privilege) was, in fact, correctly applied.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

14. On 13 May 2008 the complainant contacted the Commissioner. He was attempting to clarify the legal basis upon which the DoH had decided to act in setting up electronic health information on a centralised database through Connecting for Health. He felt that the Connecting for Health arrangements needed not only to be lawful but to be seen to be lawful.
15. Although the complainant recognised the importance of legal privilege, he made multiple points to support his view that the advice should be provided to him under the Act (paragraph 32).
16. The complainant argued for the possibility that partial release had occurred which would waive privilege but had no evidence that the verbatim text had been released. Additionally the complainant rehearsed the various arguments and Tribunal decisions which he acknowledged suggested that the concept of partial waiver only applies in the context of litigation and not to advice privilege.

However, he postulated the idea that the Tribunal had suggested that partially divulged advice undermined the maintenance of privilege.

17. The complainant stressed the fact that the proposed database is of "significant public interest" given that it raises concerns such as confidentiality and privacy regarding the medical records of each citizen.
18. It is the complainant's contention that the prospect of litigation should not deter publication as he has been assured by the DoH that their proposals are lawful and that under the Information Commissioner's Data Protection remit the Assistant Information Commissioner had confirmed to the Select Committee on Health (May 2007) that Connecting for Health's proposals were lawful.
19. On 3 February 2009 the Commissioner contacted the complainant outlining the scope of his investigation and asking for any further comments.
20. The Commissioner also wrote to the DoH on the same date asking them to arrange to make a copy of the legal advice requested available with each element marked to indicate which sections/exemption(s) the DoH had applied in order that the Commissioner could make an informed decision with regard to the DoH's application of section 42(1).
21. The Commissioner asked the DoH for a full and detailed explanation regarding the application of section 42(1). The DoH was additionally asked whether the information was withheld under advice or litigation privilege and to whom the legal advice had been disclosed, partially or in full, prior to the complainant's request for information. The Commissioner also requested a full explanation of all the public interest factors that the DoH had taken into account in reaching the decision that the information should be withheld.
22. On 19 March 2009 the DoH sent an email letter (dated 13 March 2009) to the Commissioner and an attachment containing the legal advice obtained from Counsel concerning the proposed NHS Database.

## Findings of fact

23. The Commissioner is aware that the *Select Committee on Health – Sixth Report* (published 25 July 2007) contained evidence from the complainant to the effect that:

*" Officials have received reassurance from counsel that the planned process for uploading data to the summary care record is lawful".*

He had been informed of this fact by the BMA in a letter, dated 31 January 2007. However, by that time it had been conceded that patients would be given an opt out from the Summary Care record which had not previously been intended:

*"It remains my belief that the legal obligations that required that "op out" (sic) provision apply to the remaining components of the Connecting for Health proposals.'*

## Analysis

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24. The Commissioner has considered below the public authority's application of the section 42 exemption, including its application of the public interest test with regard to the exemption. The full text of the relevant section of the Act is contained in the Legal Annex.

## Exemption

25. 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.”*

26. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. The Information Tribunal has defined legal professional privilege in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* as:

*“...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges 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 litigation.” (para.9)*

27. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
28. After reviewing the documents, the Commissioner is satisfied that the relevant information is subject to legal professional advice privilege because it is clearly legal advice provided by a professional legal adviser to the DoH about the legality of the NHS Database proposals. It has been provided for the sole and dominant purpose of providing legal advice and there is no pending or contemplated prospect of litigation. The Commissioner is therefore satisfied that section 42(1) is engaged.

## Has legal professional privilege been waived by the DoH?

29. As stated in paragraph 16, the complainant argued that although he was aware of the Tribunal decisions in relation to when this privilege could be considered as being waived, he argued that it was possible that the Tribunal had suggested that

partially divulged advice undermined the maintenance of privilege. The complainant suggested that the advice given by counsel was briefly quoted in *the Ministerial Taskforce on the Summary Care Record* (published 6 December 2006). This was refuted by the DoH and there does not appear to be any quotation from legal advice in this Taskforce Report. The verbatim content of the advice has not been disclosed to anybody outside the DoH and this would be the only reason to order its disclosure, given the fact that it was provided under the “advice” branch of legal professional privilege. Even more compelling is the fact that the DoH confirmed that, whatever the arguments concerning partial waiver, this advice was not provided within the context of litigation.

30. The Commissioner’s view remains that, even if partial disclosure has taken place outside litigation, this will not constitute waiver of privilege. In the case of *Foreign & Commonwealth Office versus ICO (EA/2007/0092)* the Tribunal said that outside the context of litigation a party “...is entitled, provided of course he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent...will demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate...” (para 22).
31. As the Commissioner is satisfied section 42(1) is engaged, he has gone on to consider the public interest test below.

## Public Interest

### Public interest factors favouring the release of the information

32. On 1 December 2007 the complainant wrote to the DoH citing the arguments in favour of disclosing the requested information. He stated that the
- *“criteria in favour of disclosure of the advice matches the criteria set out by Parliament for such privilege to be over ridden by the provisions of (sic) Freedom of Information Act*
  - *the client is an executive arm of Government with wide powers of influence over the use and disclosure of sensitive personal data relating to UK citizens,*
  - *the public interest in understanding the legal implications for medical confidentiality and privacy outweighs the public interest in maintaining legal privilege in this case.*
  - *The confidence of the public in the proposed electronic health care records system will be much improved if the legal parameters are transparent.*
  - *Indeed, this matter is complicated further by the fact that medical records sometimes include documents that are themselves also subject to legal privilege. These will be stored on the proposed Connecting for Health CRS system where they may be further accessible. This adds to the public interest to know, with certainty, how (or whether) the Department’s legal advice deals with these problems.*
  - *...similar legal advice has been published by Government. This legal advice is in relation to the Citizens Information Project ...This published*

*counsel's opinion relates to the parallel Data Protection and Privacy Issues that arose in respect of proposals for the establishment of the National Citizens database...*"

33. The Commissioner considers the factors in favour of disclosing the information to be:

- the assumption in the Act in favour of disclosure
- the amount of money involved
- the number of people affected
- the transparency of the public authority's actions
- and any other circumstances that may relate to a particular case

34. Public investment is a significant factor in this scheme. The amount of tax payers' money involved is projected to be approximately 12 billion pounds by the time the Database is completed in 2010.

35. In *Pugh v Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people".

36. As the new Database covers almost the entire population of England it is also clear that the subject matter of the request does affect a significant group of people.

37. The public interest arguments cited by the DoH to refuse disclosure were of a generic nature and did not appear to be specific to this particular piece of legal advice so much as general considerations of whether increased levels of transparency and accountability would be brought about by allowing the public access to the legal advice that underpinned a governmental decision.

38. The arguments in relation to transparency were considered by the Information Tribunal at paragraph 29 in the case of the *Mersey Tunnel Users Association versus the ICO and Merseytravel (EA/2007/0052)*. It 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..."

39. It is clear that the DoH sought legal opinion with regard to the legality of the NHS Database in response to a request by the British Medical Association (BMA). This fact is in the public arena. The BMA wrote to the complainant on 31 January 2007:

*"The BMA received a response from Lord Warner on 20<sup>th</sup> December 2006, who confirmed that legal views had been obtained by the Department of Health.*

*However, on account of your [the complainant's] correspondence, Lord Warner sought a further legal opinion to ensure complete clarity. The BMA has been advised that, "Officials have received reassurance from counsel that the planned process for uploading data to the Summary Care Record is lawful".*

40. This letter, whilst underlining the BMA's position at the time - that it had been assured of the legality of the NHS Database - also stressed the fact that patients would be offered the option of having no clinical data uploaded onto the 'Spine'. Although events since the request for information have raised issues regarding the technical practicalities of implementing matters, such as the removal of patient information from the Database, the Commissioner has not considered the history of these issues as he can only consider matters at the time of the request.
41. The issue is whether the disclosure of the legal advice in question would add to or enhance understanding of the issues at stake, considering how this relates to information already in the public domain at the time of the request. The Commissioner finds that disclosure of the advice would enable the public to further understand, debate and challenge the reasoning behind the DoH's public statements.
42. There is no suggestion that any harm would result from disclosing the legal advice given to the DoH, other than the potential future harm to NHS patients if legal opinion cannot be presented without fear of imminent disclosure.

#### **Public interest factors favouring withholding the information**

43. The Commissioner has considered the following factors in relation to the public interest in withholding the information:
  - the inbuilt weight of the concept of legal professional privilege.
  - the likelihood and severity of harm arising by disclosure.
  - whether the advice is recent; live or protects advice relating to the rights of individuals.
  - other circumstances relating to this particular case.
44. The Commissioner recognises that there is a strong and inbuilt public interest in protecting the concept of legal professional privilege. The concept has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice provided is based upon a full exchange of information pertinent to the case. Eroding the principle of legal professional privilege could therefore harm the ability of parties to provide or receive legal advice on a full and frank basis. This in turn could damage the parties' ability to effectively determine their legal opinions, or to defend or seek legal restitution against other parties in accordance with their rights. In the case of *Bellamy versus the ICO and the DTI (EA/2007/0043)*:

*"...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...*

45. The conclusion reached by the Commissioner and the MOD in that case was that the public interest in favour of disclosure would have to be “exceptional” where legal professional privilege is engaged. However, the Tribunal did not require “exceptional” factors in favour of disclosure, “...*just as or more weighty than those in favour of maintaining the exemption*”. The Commissioner has considered these comments in the context of this case.
46. Similarly the time-honoured principles of the relationship between a client and their legal adviser not being jeopardised by the possibility of disclosure was cited by the DoH as sufficient reason to withhold the legal information requested. The DoH stated that a “frank and fully-informed analysis of risk [was] a precursor to undertaking a particular course of action”. The conclusion reached was that in order that an accurate understanding of the legal concerns could be fully assessed the principle of legal privilege needed to be protected as it was in the interests of the NHS and of patients that legal advice should not be constrained by the possibility of disclosure.
47. However, it is important to remember that these factors are balanced against the public interest factors in favour of disclosing the legal advice which was the subject of the requested information.
48. The Commissioner believes that Parliament did not intend this exemption to be used as an absolute exemption. Indeed the Tribunal’s decision in the case of the *Mersey Tunnel Users Association versus ICO & Mersey Travel (EA/2007/0052)* underlined this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel, in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice concerned issues which affected a substantial number of people. It stated that:

*“We find, listing just the more important factors, that considering the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority’s actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining it...”*
49. Despite the somewhat generic response from the DoH, the principle of legal privilege is one that should be overturned only for compelling reasons. The whole debate surrounding the creation of the NHS ‘Spine’ is controversial in that it has attracted great public discussion and potentially affects almost every citizen in England.
50. It could not be argued that the passage of time is a factor which favours disclosure; the legal advice is relatively recent. When older legal professional privilege is involved disclosure is likely to reduce any potential harm to the privilege holder, and as it is no longer relevant to the decision-making process

underpins the argument in favour of disclosure. The Commissioner accepts this principle but considers that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes and have current or future significance. The Commissioner recognises that these decision-making processes would be likely to be affected by disclosure.

51. What might be considered 'recent' is a matter of interpretation. The Mersey Tunnel advice was 10 years old and confidently pronounced "not recent" however in *Kessler v ICO and HMRC (EA/2007/0043)* the advice was 6 years old and described as "still relatively recent". Whether advice is considered 'recent' will very much depend on the specific circumstances. For instance in some cases advice can remain relevant to live decision making for a lengthy period of time, whilst in others it may be less relevant where legislation and case law have changed rapidly.
52. The Commissioner is minded that the advice given to the DoH in this case was less than a year old when requested by the complainant and the construction of the NHS Database was still in its infancy. As much of the information being transferred to that database will not have been transferred until 2010 (and will clearly be on-going) the advice is very much 'live' with regard to the issues surrounding its inception and development, and therefore possible legal challenge.

## Conclusion

53. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case, the legality of the introduction of a national database which will contain the details of in excess of 50 million people and has given rise to public concerns regarding the use and security of that Database. Disclosure of the legal advice may therefore assist the public's understanding of the legality of the introduction of this database by the DoH. He has therefore placed significant weight on the fact that the subject matter of the withheld information affects a significant proportion of people.
54. There is also no doubt that this issue is a matter of public importance as it relates to the privacy and confidentiality of the medical records of every individual citizen. There has been a degree of public anxiety over the uses to which their personal data will be put and who has access to that data which is difficult to quantify. There is also an issue regarding the anonymised use of medical data for research purposes. In the case of the NHS Database the information at issue is sensitive personal data which is given added legal protection by the Data Protection Act 1998. There have been questions raised prior to the implementation of the NHS Database regarding consent, explicit or otherwise, and confidentiality. The Database is likely to be controversial for the foreseeable future and concerns may well continue for some time.
55. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids public understanding and participation in debates on issues of public importance – especially, as in this case, where matters raise questions regarding personal data and the possible uses of such a database.

56. In the Commissioner's opinion, in line with the Tribunal's findings in the Mersey Tunnel case, it is not necessary to identify 'exceptional' public interest factors in order to outweigh any inherent public interest in maintaining the exemption contained at section 42.
57. However, the Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court case of *DBERR v Dermot O'Brien* who said:

*"Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight"* (para 53).

Justice Williams indicated though that section 42 should not accordingly become an absolute exemption "by the back door". Public interest favouring disclosure would need to be of "equal weight at the very least..." (para 53)

58. In considering where the public interest lies the Commissioner has taken into account the sensitivity and significance of the advice provided which, in his view, leads him to conclude that the inbuilt weight of legal professional privilege in relation to this information is very strong. Furthermore, the Commissioner has attached a significant weight to the fact that the legal advice affects the majority of the population of England. Disclosure of the advice would enable the public to further understand, challenge and debate the reasoning behind the DoH's public statements and position on the issues. The Commissioner has also noted that the advice remains 'live' in terms of the issues to which it relates and therefore at the time of the request the potential for harm to the privilege holder was significant. Taking all these factors into account: the proportion of people it affects; the 'live' nature of the advice; its sensitivity and significance and the possible harm resulting from the release of the information itself, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 42.

## The Decision

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59. The Commissioner's decision is that the public authority correctly applied section 42(1) and therefore dealt with the request for information in accordance with the Act.

## Steps Required

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60. The Commissioner requires no steps to be taken.

### **Other matters**

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61. Part VI of the section 45 'Code of Practice' makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his 'Good Practice No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that, in this case, it took 72 working days for an internal review to be completed, despite the publication of his guidance on the matter.

### **Right of Appeal**

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62. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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 27<sup>th</sup> day of July 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

**Legal Annex**

## Section 42

**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.