

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

### **Decision notice**

**Date:** 13 September 2018

**Public Authority:** University Hospitals Coventry & Warwickshire  
NHS Trust (the Trust)

**Address:** University Hospital  
Clifford Bridge Road  
Coventry  
CV2 2DX

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

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1. The complainant has requested all communications to and from a named doctor between June 10th 2015 and Sept 30th 2015 relating to the death of a named individual. The Trust provided the complainant with some information but withheld the majority of the requested information under section 42 FOIA.
2. The Commissioner's decision is that section 42 FOIA was applied correctly to the withheld information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 9 December 2016 the complainant requested information of the following description:  
  
"I would like to request using the Freedom of Information act all communications to and from [named doctor] between June 10th 2015 and Sept 30th 2015 concerning the death of [named individual]."
5. On 11 January 2017 the Trust responded, it said that it did not hold any information falling within the scope of the request over and above what it had already provided to the complainant.
6. On 17 February 2017 the complainant requested an internal review.

7. The internal review was carried out on 12 May 2018, the Trust indicated that there was further information held and that the exemptions contained at section 41 and 42 FOIA applied to this information.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 14 August 2017 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the Trust confirmed that it had provided the complainant with all information held falling within the scope of the request apart from one email and some further correspondence it considered to be exempt from disclosure under section 42 FOIA. The Trust provided the complainant with the email that had not previously been provided and to which it does not consider section 42 FOIA applies.
10. The Commissioner has considered whether the Trust was correct to apply section 42 FOIA to the withheld information.

## **Reasons for decision**

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### **Section 42**

11. Section 42(1) FOIA 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. 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.
12. The Trust has confirmed that in this case it is relying upon advice privilege.
13. Advice 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. 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.

14. The Trust confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
  - a) confidential;
  - b) made between a client and professional legal adviser acting in their professional capacity; and
  - c) made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
15. In this case the information being withheld is emails from the Trust Solicitor (employed by the Trust as the Head of the Legal Department) to colleagues in the organisation in reference to the particular case to which this FOIA request relates and who were involved in the case, detailing many of the pertinent issues. The Trust Solicitor was advising and providing a professional legal opinion, and maintains the fundamental right to engage in confidential communications with the client. For clarity it explained that the Trust Solicitor is the legal adviser to the Trust, and the Trust is the client in this context.
16. Upon viewing the withheld information, the Commissioner considers that it is confidential as it has not been made publicly available and is between the Trust Solicitor and Trust staff involved in the case to which the FOIA request relates. The information reflects legal advice relating to the case.
17. Upon considering the information withheld under section 42 FOIA and the submissions provided by the Trust, the Commissioner considers that the section 42 exemption was correctly engaged.
18. 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 in all the circumstances of this case.
19. 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..."*

*"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."*

20. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted 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 disclosure*

21. The Trust did not provide any public interest arguments in favour of disclosure.

*Public interest arguments in favour of maintaining the exemption*

22. It is in the public interest that the Trust is able to converse freely and frankly with its legal adviser to obtain appropriate legal advice, to help ensure complete fairness in legal proceedings.
23. There was an inquest into the death of the patient in this case to whom the request refers to and the facts of the case remain in the public domain which is the information that was released by the Coroner as part of the inquest. Furthermore, a simple search on the internet using the name of the deceased and the Trust name has shown the story with photographs in the local press.

*Balance of the public interest*

24. The Commissioner considers that there is a strong public interest in promoting openness, transparency and to further public understanding in relation inquests into a patient death.
25. The Commissioner does also consider that there is a very strong public interest in the Trust being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain.
26. It is recognised that the concept of Legal Professional Privilege (LPP) reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients and there is a public

interest in safeguarding openness in communications between a client and their lawyer to ensure access to full and frank legal advice.

27. On balance therefore, given the information already in the public domain, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption as there is a strong public interest in maintaining legal professional privilege and allowing a public authority to be able to seek and obtain legal advice in such circumstances. Section 42(1) was therefore correctly applied in this case.

## Right of appeal

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28. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

29. 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.
30. 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**.....

**Gemma Garvey**  
**Senior Case Officer**

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