



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2019/0290 P

**Decided without a hearing
On 16 April 2021**

Before

**JUDGE HAZEL OLIVER
DAVE SIVERS
DAVID WILKINSON**

Between

SHEILA SPOONER

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

ROYAL FREE LONDON NHS FOUNDATION TRUST

Second Respondent

DECISION

The appeal is upheld in part.

SUBSTITUTE DECISION NOTICE

1. The Royal Free London NHS Trust was not entitled to rely on exemptions under sections 36 and 43 of the Freedom of Information Act 2000 ("FOIA") in order to withhold information requested by Sheila Spooner. The Tribunal understands that this information has now been disclosed.
2. The Royal Free London NHS Trust is entitled to rely on section 42 FOIA to withhold specific information on the basis of legal professional privilege.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 24 July 2019 (FS50774281, the “Decision Notice”). It concerns information sought from the Royal Free London NHS Foundation Trust (the “Trust”) about the creation of a wholly-owned subsidiary property service company.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 4 April 2018 the appellant made a request for information under the Freedom of Information Act 2000 (“FOIA”) as follows (the “Request”):

“Please supply the following:

- 1) The section of the minutes of the confidential Board meeting held on 24th January 2018, which relates to the exploration of the creation of a wholly owned subsidiary property service company.*
- 2) All papers presented to the confidential Board meeting held on 24th January 2018 which relate to the item on the agenda regarding the exploration of the creation of a wholly owned subsidiary property service company.*
- 3) All other information held which relates to the Trust's exploration of the creation of a wholly owned subsidiary property service company, regardless as to whether that information is dated before or after the confidential Board meeting held on 24th January 2018. I would expect that the Trust would hold recorded information relating to their exploration of the creation of a wholly owned subsidiary property services company, and that this may be located in emails, memoranda, notes of meetings, minutes of meetings, records of decision taken and other records.”*

4. This appeal has a relatively complex history, although the issue that now remains for this Tribunal to decide is a narrow one.

- a. The Trust initially refused the Request under section 36 FOIA. On review it disclosed some information and indicated it had withheld other information under seven different FOIA exemptions.
- b. The appellant initially complained to the Commissioner on 7 August 2018. During the Commissioner’s investigation, the Trust released further information to the appellant. It provided explanations for the withheld information and detailed the exemptions relied on. According to the Decision Notice (paragraphs 17, 21 and 23), the Trust relied on the following sections of FOIA - 36(2) (prejudice to the effective conduct of public affairs), 40(2) (third party personal data), 41 (information provided in confidence), 42(1) (legal professional privilege), 43(2) (prejudice to commercial interests).

- c. The Commissioner decided that the Trust correctly withheld some correspondence as being out of scope of the Request, correctly withheld some correspondence under section 36(2), and correctly withheld some reports and minutes under section 43(2). The Trust had failed to consider email attachments for disclosure and was to issue a response in respect of the attachments which complies with FOIA. The application of section 40(2) was not disputed by the appellant. It appears that the Commissioner made no finding on the application of section 41.
- d. The appellant appealed on 19 August 2019 in relation to the Commissioner's decision on sections 36(2) and 43(2).
- e. The Commissioner's first response accepts that the Decision Notice should be modified. Email correspondence withheld under section 36(2) should be disclosed as the issues were no longer live. Some information in reports and minutes could continue to be withheld under section 43(2), but other information should now be disclosed.
- f. The Trust was joined as a party to the appeal. Its response states that the exemptions in sections 36(2) and 43(2) are no longer relied on due to the passage of time, and further information will be disclosed to the appellant. However, other information is withheld under section 42 (legal professional privilege). The response states that the sole issue remaining between the parties is the application of section 42 to four specific items of information.

The Appeal and Responses

- 5. The remaining live issue for this appeal is whether the Trust can rely on section 42 FOIA to withhold specific information. The Commissioner did not consider this exemption in her decision, and does not have power to do so at this stage in the proceedings (**Information Commissioner v Malnick and ACOBA** [2018] UKUT 72 (AAC)). This is a matter for the Tribunal to decide.
- 6. The information that has been withheld (the "Withheld Information") is the following (paragraph 4 of Trust's first response):
 - a. Advice from Addleshaw Goddard contained in the draft business case dated May 2018.
 - b. Briefings to the Group Services and Investment Committee, dated 21 and 26 June 2018.
 - c. References to legal advice in an update to the Trust Board.
 - d. Emails containing advice from Addleshaw Goddard.
- 7. The Trust's first response explains that it retained Addleshaw Goddard LLP to give advice on the legal considerations and implications of its decision to establish the property company. Privilege has not been waived. There is a weighty public interest inherent in maintaining the confidentiality of privileged legal advice, and any public interest in disclosure is minimal, particularly given the disclosure of large amounts of information previously withheld. The advice remains relevant and has implications for the Trust's ongoing legal position.
- 8. The Commissioner's second response says that the Trust has correctly applied section 42. Some of the Withheld Information falls outside the scope of the Request, as it was not held at

the date of the Request (4 April 2018) and was created more than 20 working days after receipt. The public interest in maintaining the exemption outweighs the public interest in disclosure. There is a strong built-in public interest in withholding information covered by legal privilege. This can be outweighed by a clear, compelling and specific justification for disclosure. The legal advice remains live as it concerns the Trust's ongoing legal position and disclosure might significantly prejudice the Trust's position, e.g. if it were involved in legal proceedings concerning the subsidiary company. The Trust has committed to disclose significant volumes of material, and is only withholding a small portion of the information requested. Disclosure of the legally privileged material would not materially inform public debate or promote transparency.

9. The appellant made submissions on 7 February 2020. She makes three points in relation to section 42. She says legal privilege is limited, and does not cover advice on financial matters or operational or strategic issues. She says that privilege may have been waived or lost because of earlier disclosures. She also says that the public interest is in favour of disclosure, and gives a detailed explanation about the reasons behind her Request.

10. The Trust has submitted a supplementary response in reply to the appellant's submissions. It says that legal privilege applies because this was advice from legal professionals in a relevant legal context. Privilege has not been waived, the appellant has not provided any evidence of this, and the correct test is whether there has been disclosure to the world at large. It accepts that there is some public interest in disclosure, in terms of general transparency and accountability, and specifically in terms of the use of the property company. However, this interest is not significant. The appellant's concerns are supposition and refer to generic concerns about NHS funding and the use of subsidiary companies. The public interest is considerably reduced in light of the large volume of information that is no longer deemed exempt.

Applicable law

11. The relevant provisions of FOIA are as follows.

1 *General right of access to information held by public authorities.*

- (1) *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.*

.....

2 *Effect of the exemptions in Part II.*

.....

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....
42 Legal professional privilege.

- (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.*

12. Legal professional privilege protects the confidentiality of legal communications. It has two parts – legal advice privilege, and litigation privilege. Legal advice privilege concerns confidential communications between lawyer and client. It applies to communications between a client and their legal adviser, acting in a professional capacity, for the dominant purpose of seeking or giving legal advice or assistance in a relevant legal context (***Three Rivers District Council v Governor and Company of the Bank of England (no 6)*** [2004] UKHL 48). Legal advice privilege also extends to wider communication of privileged advice, such as internally to a client’s Board of Directors (***Civil Aviation Authority v R Jet2.com Ltd*** [2020] EWCA Civ 35).

13. Section 42 FOIA is subject to the public interest test, meaning if information falls within this exemption it can be withheld if, “*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*” (section 2(2)). It has been accepted in numerous cases that there is a strong public interest built into legal privilege, based on the interest in public authorities being able to receive frank legal advice in order to assist them to make appropriate decisions. This was confirmed by the High Court in ***DBERR v O’Brien and IC*** [2009] EWHC 164 (QB) – “*The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.*” (Wyn Williams J at para 53).

Issues and evidence

14. The issue the Tribunal has to decide is whether the Withheld Information is exempt from disclosure under section 42 FOIA because:

- a. it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings; and
- b. the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

15. The Commissioner has also changed her position from her original decision. It is no longer in dispute that the exemptions in sections 36(2) and 43(2) FOIA should not be applied to withhold information in response to the Request. As there is currently a Decision Notice which says these exemptions could be applied, the Tribunal will issue a Substitute Decision Notice on this point.

16. There are two further issues raised by the appellant in her submissions, which are not issues for the Tribunal to decide.

17. Firstly, the appellant questions whether the Trust is relying on section 41 FOIA to withhold some information. She is correct that this is one of the exemptions cited by the Trust to the Commissioner, but the Commissioner made no decision on this point. The Trust's position in this appeal is that they are now releasing all information that is within the scope of the Request, except for the material covered by section 42. The Trust has made no submissions about the application of section 41 and have not stated that they are still relying on section 41. We therefore find that the Trust is not (and should not be) relying on section 41 to withhold any information in this case.

18. Secondly, the appellant complains about the Trust's response in relation to email attachments. The Decision Notice required the Trust to provide the appellant with a response in relation to these attachments. The appellant is not happy with this response, and has asked whether the Tribunal can use its discretion to deal with this matter. As this is a separate response, we confirm that this Tribunal is unable to deal with this issue as part of the current appeal. The Tribunal agrees with the Commissioner that these attachments should have been treated by the Trust as within the scope of the Request in the first place. The Tribunal also expresses some surprise that the Trust may now be relying on vexatiousness in order to withhold this information (as indicated in the appellant's submission of 7 February 2020), in circumstances where the Trust initially failed to comply with its obligations and this appeal has been partially upheld. However, we make no findings on this issue.

19. In evidence we had:

- a. An agreed open bundle of open documents (which includes all of the submissions from both parties).
- b. A closed bundle of documents containing the Withheld Information.

Discussion and Conclusions

20. In accordance with section 58 FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

21. The Commissioner submits that some of the Withheld Information is outside the scope of the Request, as it was not held at the date of the Request and was created more than 20 working days after the Request was made. We agree. The following items are outside the scope of the Request:

- a. Advice from Addleshaw Goddard contained in the draft business case dated 4 May 2018.
- b. Briefings to the Group Services and Investment Committee, dated 21 and 26 June 2018.

22. This leaves the following items within scope – references to legal advice in an update to the Trust Board, and various emails containing advice from Addleshaw Goddard. We have seen these items in the closed bundle.

23. ***Does the Withheld Information consist of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings?*** We find that it

does. The information clearly consists of legal advice provided to the Trust by its professional legal advisers, or a communication of that advice internally.

24. The appellant makes the point that advice about financial matters or operation or strategic issues would not be covered by legal advice privilege. This may be correct if the advisers were purely providing strategic or business advice with no legal context. However, having viewed the closed material, this was clearly advice from legal professionals in a relevant legal context.

25. The appellant also makes the point that privilege may have been waived or lost because of earlier disclosures. Although it is correct that legal advice privilege can be waived in some circumstances, the Trust denies that this has occurred and we have no evidence of any waiver of privilege having happened in this case.

26. ***Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** Section 42 is subject to the public interest test, meaning this information can be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

27. In relation to the public interest in the exemption, there is a strong in-built interest in upholding legal professional privilege. As noted in the ***DBERR*** case, this commands significant weight. In this case, having viewed the Withheld Information, we also find that disclosure to the world at large could cause significant prejudice to the Trust. This is legal advice which relates to an ongoing legal/contractual relationship with other parties. There is a public interest in public authorities being able to obtain frank legal advice without fear that this will be disclosed in a way that will damage its legal position. In this case, there is a significant public interest in ensuring the Trust's ongoing position is not damaged by disclosure of legal advice which remains live.

28. In relation to the public interest in disclosure, we agree that there is a general interest in openness and transparency. We have also considered the appellant's detailed submissions about the public interests in disclosure in this case. These relate to the function of the property company, its tax status, and its implications both for the Trust and for the wider NHS. The appellant raises serious concerns about the use of subsidiary companies by the NHS which are of clear public interest. However, having viewed the Withheld Information, we do not consider that disclosure of this small amount of legal advice would further these interests in any significant way. The appellant has already been provided with the vast majority of the information she had requested (subject to the issues about email attachments noted above).

29. We therefore find that the public interest in maintaining the exemption does outweigh the public interest in disclosing the information. The public interest in maintaining the confidentiality of legally privileged advice is generally a strong one, and is enhanced in this case by the fact the advice remains relevant to an ongoing legal relationship. Although the public interest in the general issues raised by the appellant is a strong one, the information withheld under section 42 does not further these interests significantly. Disclosure would add little, if anything, to the public understanding of the issues raised by the appellant, but would potentially cause significant prejudice to the Trust and damage the public interest in maintaining legal privilege.

30. We therefore find that the Trust is entitled to rely on the exemption under section 42 FOIA to withhold the Withheld Information which is within the scope of the Request.

31. We also find that the Trust was not entitled to rely on exemptions under sections 36 and 43 FOIA in order to withhold other information within the scope of the Request. The Tribunal understands that this information has now been disclosed to the appellant.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 27 April 2021

Promulgation: 28 April 2021