

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

### **Decision notice**

**Date:** 25 February 2015

**Public Authority:** South London and Maudsley NHS Foundation Trust

**Address:** Maudsley Hospital  
Denmark Hill  
London  
SE5 8AZ

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

---

1. The complainant has requested information in relation to a complaint he made to the Information Commissioner's Office (ICO) relating to a previous request he had made to South London and Maudsley NHS Foundation Trust. The Trust provided the complainant with some information but withheld some information under section 42 FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 42 FOIA in this case.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

---

4. On 1 October 2014 the complainant requested information of the following description:  
  
"I request copies of any and all information including communications, emails, memoranda or opinions pertaining to the Freedom of Information Act request at <https://www.whatdotheyknow.com/request/r...> and its associated ICO Complaint Reference - FS50514652."
5. On 29 October 2014 the Trust responded. It refused to disclose the information it held under section 42 FOIA.

6. The complainant requested an internal review. The Trust sent the outcome of its internal review on 26 November 2014. It upheld its original position.

## **Scope of the case**

---

7. The complainant contacted the Commissioner on 1 December 2014 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the Trust provided the complainant with some information which it considered was not covered by the exemption it had applied.
9. The Commissioner has considered whether the Trust correctly applied section 42 FOIA to the withheld information.

## **Reasons for decision**

---

### **Section 42**

32. 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.
33. 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.
34. The Trust has confirmed that in this case that it is relying upon advice privilege.
35. 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.
36. 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.
38. 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.
39. 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.
40. 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."*

41. 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 disclosing the requested information**

42. The Trust explained that there is a public interest in public organisations being accountable for the quality of their decision-making. It said that 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 enhance accountability.

### **Public interest arguments in favour of maintaining the exemption**

43. The Trust argued that public bodies, like many other organisations require legal advice to support their decision making process. It is in the public interest that decisions taken by the Trust are informed or based on confidential legal advice and it should be able to freely and frankly deliberate on the advice received. In this case it said that the Trust needed to seek legal advice to ensure correct application of the exemptions on the document relevant to the scope of the complainant's previous request.
44. It said that the previous request was for documents that related to the investigation of a serious incident and contained sensitive information that could compromise security arrangements in a medium secure mental health facility as well as other similar facilities across the country, which could put the health, safety and wellbeing of patients and staff in such facilities at significant risk. In addition, it said that the document contained sensitive confidential mental health related information of a small group of high profile mental health patients, who could be identified despite anonymisation of their personal details. It said that the Trust needed reliable and complete legal advice in relation to the disclosure of such sensitive information.
45. It is the view of the Trust that there is a strong public interest in maintaining the legal privilege exemption in this instance to safeguard openness in all communications between the Trust and its legal advisors.
46. The Trust explained that it has published quite extensive information in relation to this serious incident, which clearly demonstrated how this incident occurred, key findings, recommendations, arising actions alongside progress on the actions identified directly or via requests for information to regulators such as Monitor and the CQC.

### **Balance of the public interest**

47. The Commissioner considers that public interest in public organisations being accountable for the quality of their decision-making and that it is based upon sound legal advice.
48. In this case the Trust has explained that it needed to obtain legal advice in relation to a previous FOIA request made by the complainant as the request was for particularly sensitive information. The Trust wanted to

obtain this advice to ensure any decisions it made relating to this information were legally sound and in accordance with the FOIA.

49. The Commissioner has viewed the legal advice and considers it is fairly recent information as it was obtained within the last 12 months.
50. There is a strong weight built in favour of maintaining section 42 FOIA (*Bellamy v ICO (No 1)* [EA/2005/0023]), and this would require a significant public interest in the disclosure of the information in order to override that privilege. There must be some clear, compelling and specific public interest justification for disclosure which must outweigh the strong public interest in protecting communications which are intended to be confidential.
51. The Commissioner considers 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. The Commissioner considers that disclosure may have a negative impact upon the Trust's willingness to seek appropriate advice in the future. This in turn may have a negative impact upon the quality of decisions made by the Trust which would not be in the public interest.
52. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 42 was therefore correctly applied in this case.

## Right of appeal

---

60. 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)

61. 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.
62. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**