

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2015

Public Authority: Torbay and South Devon NHS Foundation Trust
(formerly 'Torbay Hospital')

Address: Hengrave House
Torbay Hospital
Lowes Bridge
Torquay
TQ2 7AA

Decision (including any steps ordered)

1. The complainant has requested records relating to a complaint he has against Torbay Hospital, now called Torbay and South Devon NHS Foundation Trust ('the Trust') following reorganisation. The Trust is withholding the information that it holds because it says it is exempt from disclosure under section 42(1) of the FOIA (legal professional privilege).
2. The Commissioner's decision is that the Trust has correctly applied section 42(1) to the information it is withholding and that the public interest favours maintaining the exemption.
3. He does not require the Trust to take any steps.

Request and response

4. On 29 April, the complainant wrote to Torbay Hospital, as it was then called, and requested information in the following terms:

"Litigation Department full records referring to our complaint dated 06/04/2014 (copy enclosed), to include copies of all emails, fax's, letter's, phone call log's etc (any communication)"

5. The Trust responded on 19 May. It said that the requested information was exempt from disclosure under section 40 of the FOIA (personal

data) but that, in any case, it had already provided the information to the complainant as part of a service complaint he had against the Trust, and which was (and remains) ongoing. This service complaint concerns the Trust's care of the complainant's child, and its treatment of both the complainant and the child's mother.

6. Following an internal review, the Trust wrote to the complainant on 16 June. It revised its position and said that the requested information – which it identified as a litigation file – is exempt from disclosure under section 42 because it attracts litigation privilege.

Scope of the case

7. The complainant contacted the Commissioner on 22 June to complain about the way his request for information had been handled. He was concerned about the Trust's contradictory responses and its final application of section 42 to the information that is in dispute.
8. The Commissioner has focussed his investigation on these matters.

Reasons for decision

9. The Trust has told the Commissioner that it initially considered that the information in question – a litigation file – was the complainant's personal data and therefore not subject to the FOIA. It says that, as part of the complainant's service complaint, it had treated a similar request as a Subject Access Request (SAR) and handled this under the Data Protection Act. It released some information, withheld some (including the information now in question) and said it did not hold other information. However, the Trust has acknowledged that in separate correspondence to the complainant it had indicated that the litigation file was not personal information. As a result, the complainant submitted the present request for this information under the FOIA.
10. The Commissioner notes that in its internal review, the Trust acknowledged to the complainant that its handling of his request was confusing and, correctly, apologised for this. The Trust has confirmed to the Commissioner that the information is, nevertheless, also exempt from disclosure under the FOIA.
11. Section 42(1) of the FOIA says that information is exempt if it is subject to legal professional privilege (LPP). This exemption is subject to the public interest test. The public interest test requires the public interest in favour of maintaining the exemption to be weighed against the public

interest in disclosing the information. The information can only be withheld if the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.

12. The purpose of legal professional privilege is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to make sure communications between a lawyer and their client remain confidential.
13. There are two forms of legal professional privilege: advice privilege and litigation privilege. Advice privilege applies where there is no litigation contemplated or in progress. It protects confidential communications between a lawyer and their client, and the communications have to be made for the dominant purpose of obtaining or providing legal advice. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about pending or contemplated legal proceedings. The Trust has confirmed to the Commissioner that it is relying on litigation privilege in this case.
14. The Commissioner's published guidance says:

"Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation."
15. The Commissioner's guidance goes on to say: *"Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports."*
16. The Trust says that one part of the litigation file comprises correspondence between it and the complainant. It considers that this information is not within the scope of the complaint because the complainant has already seen this information as a result of the separate SAR. The second part of the file comprises correspondence between it and its Litigation Department. It says that the section 42 exemption applies to this part.

17. The Trust says that the matter of the complainant's service complaint had been referred to the Litigation Department because it considered that litigation was not merely a possibility, but was anticipated. It says that at the time of the request there was a real likelihood of litigation for the following reasons:
- In correspondence from the complainant to the Trust dated 6 April 2014, the complainant refers to instructing a solicitor and paying for legal advice. The Trust says it would be unnecessary for any complainant to instruct a solicitor if their intention was only to pursue a complaint. Similarly, it says it is also unlikely that a solicitor would help to pursue a complaint unless litigation was contemplated as it would not normally be commercially viable for them to do so.
 - In the same correspondence, the Trust says the complainant lists a series of points that he seeks to have resolved through his complaint – this includes a request for financial compensation of £300,000. The Trust says that financial compensation of this level is outside the remit of its usual complaints process and would only be awarded as a result of litigation claim. It says this is further evidence that litigation was contemplated.
18. The Trust has told the Commissioner that it is satisfied that the dominant purpose of the disputed information is to obtain advice to assist in the litigation. It includes correspondence between the Trust and its in-house Litigation Department and between that Department and the NHS Litigation Authority.
19. It says that the NHS Litigation Authority is an external body that is instructed regarding litigation brought against the NHS nationally. The NHS Litigation Authority is staffed by qualified solicitors, paralegals and legal advisors who all have various degrees of legal training. The Trust argues that the information in question attracts litigation privilege because it concerns communications between the Trust and its professional legal advisors for the purpose of assisting in preparing an anticipated claim.
20. The Trust has confirmed that these communications have not been made available to the public or a third person and that their privileged (confidential) status has not been lost.
21. The Commissioner has seen the information in question and is satisfied that it is as the Trust has described. Having also considered the wider circumstances of the matter he considers that the information does

attract litigation privilege and is therefore exempt from disclosure under section 42.

22. As discussed at paragraph 11, section 42 is subject to the public interest test and the Commissioner has next considered the balance of the public interest. To form a conclusion, the Commissioner has taken into account the general public interest in an open and transparent Trust, and the public interest in maintaining LPP, as well as any factors that apply to the specific information in question here.

Arguments for disclosing the information

23. Having considered the Commissioner's guidance, the Trust considers that the only argument for disclosing the requested information would be to demonstrate transparency, which is the premise of the Act. It also noted the large amount of compensation that the complainant has requested - £300, 000. The Commissioner assumes the Trust is suggesting that there is a wider interest in knowing how public money is used.

Arguments for maintaining the exemption

24. The Trust argues that openness in all communications between a client and lawyer needs to be safeguarded. Access to full and frank legal advice is fundamental to administering justice.
25. It also argues that the complainant's service complaint is still ongoing and that he has been consistent in demonstrating that he wishes to be financially compensated for what he considers to be a number of failings by the Trust.

Balance of the public interest

26. The Trust says it has reviewed whether the public at large – rather than the complainant only – would have an interest in the release of the requested information and considers it would not. It cites the Information Tribunal decision in Szucs¹ that notes that while information may be of considerable interest to the complainant and her close relatives and friends, it does not follow that disclosure is of wider public interest.

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i570/20110816%20%20Decision%20%20EA20110072.pdf>

27. The Commissioner has considered all the Trust's arguments (none were provided by the complainant). He gives significant weight to the in-built public interest in withholding information to which legal professional privilege applies. Added to that, the other factor identified: that the legal advice was 'live' at the time of the request, carries significant weight in itself.
28. He considers that there is an overwhelming case in favour of maintaining the exemption. He agrees with the Trust that the public interest factors in favour of disclosure are not so compelling that they outweigh the public interest in maintaining the exemption in the circumstances of this case.

Right of appeal

29. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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
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