

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

### **Decision notice**

**Date:** 13 May 2024

**Public Authority:** NHS Devon Integrated Care Board

**Address:** Aperture House  
Pynes Hill  
Rydon Lane  
Exeter  
Devon  
EX2 5AZ

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

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1. The complainant has requested copies of all communications with Bevan Brittan solicitors over a six month period. NHS Devon Integrated Care Board ('the ICB') relied on section 42 of FOIA (legal professional privilege) to withhold the information.
2. The Commissioner's decision is that the ICB has correctly relied on section 42 of FOIA to withhold the information.
3. The Commissioner does not require further steps to be taken.

#### **Request and response**

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4. On 14 November 2023, the complainant wrote to the ICB and requested information in the following terms:  

“under FOI we request all communications between Devon ICB/NHS and Bevan Brittan from the 01/06/2023 to the 14/11/2023.”
5. The ICB responded on 28 November 2023. It stated that it was refusing the request under section 42 of FOIA.

6. The complainant expressed dissatisfaction with the response on 3 December 2023 and requested an internal review. The ICB acknowledged the request but did not provide an internal review response.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 28 January 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to establish whether the ICB is entitled to withhold the requested information under section 42 of FOIA

## **Reasons for decision**

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### **Section 42 – legal professional privilege**

9. Section 42 of FOIA states that a public authority may refuse to disclose information which is subject to legal professional privilege (LPP).
10. There are two types of LPP – litigation privilege and advice privilege. The ICB has claimed that the withheld information is subject to advice privilege, as it is a confidential communication between client (the ICB) and a legal adviser, made for the dominant purpose of seeking and giving legal advice.
11. The ICB has explained that Bevan Brittan's role in this matter has been that of professional legal advisors regarding the ICB's obligations to fund continuing healthcare (NHS funded care) for an individual including reassessment of eligibility, and that all correspondence between the firm and the ICB have been for the purposes of issuing that advice. The ICB therefore considers that all such correspondence directly between the two organisations attracted and continues to attract legal advice privilege.
12. The ICB appeared reluctant to provide the Commissioner with a copy of the withheld information. The Commissioner reminds the ICB that if he considers that he should see the withheld information in a complaint case then the public authority should provide it. However, from the submission provided by the ICB, and given the circumstances leading to the request being made, the Commissioner didn't consider viewing the withheld information was necessary to make a decision. He is satisfied that the withheld information will comprise communications between

client and legal adviser for the dominant purpose of seeking and giving legal advice. It falls within the definition of advice privilege and is therefore subject to LPP. Accordingly, the Commissioner finds that the exemption is engaged in respect of the withheld information.

13. Section 42 is a class-based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.

### **Public interest test**

#### **Considerations favouring disclosure**

14. The ICB has recognised that it is in the public interest to promote transparency. It has stated that there is also public interest in allowing the public to understand the actions of public bodies.
15. The complainant has argued that there is public interest in understanding why the ICB has sought legal advice and why it is spending money on engaging legal services unnecessarily when it is in financial difficulties.

#### **Considerations favouring withholding the information**

16. The ICB has explained that there is strongly established case law and guidance in favour of upholding the legal advice exemption where applicable for a number of reasons, including that disclosure would prejudice the ICB's ability to seek legal advice freely in the future.
17. The ICB explained that it has taken into account the fact that the complainant has alleged that there is a public interest in understanding why legal advice was sought in this case, as in the complainant's view, the ICB has financial pressures which mean that its spending should be under greater scrutiny. The ICB is of the view that it was entirely appropriate and reasonable to seek advice in the matter, given the complexity and the history surrounding the request. It also stated that the complainant's allegation about financial pressures is unfounded.
18. The ICB has explained that, in order to understand the reasons for seeking advice in this case, significant background information would also need to be provided in order to make a fair judgment. The ICB added that, as the matter relates to an individual, and their care needs, the background information would include sensitive personal data, and would breach the principles of the UK GDPR if released alongside the advice.

19. The ICB added that it also considers it relevant that the material requested relates to one specific matter, and therefore is not indicative of the wider decision making in terms of the seeking of legal advice.

### **Balancing the Public Interest Test**

20. The Commissioner recognises the public interest in promoting accountability and transparency, particularly around the actions of public bodies. He also recognises the importance of maintaining openness in communications between client and lawyer to ensure full and frank legal advice.
21. The Commissioner notes that the circumstances surrounding the request and requirement for legal advice relates to an individual's care needs and any disclosure would also have implications on their personal information being shared.
22. The general public interest inherent in section 42 will generally be extremely strong owing to the importance of the principle behind LPP: safeguarding confidential communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately. This erodes the rule of law and the individual rights it guarantees.
23. The Commissioner accepts that there will always be a public interest in transparency, accountability and in the public having access to information to enable them to understand more clearly why particular decisions have been made and certain processes followed.
24. The Commissioner has attached appropriate weight to the public interest in disclosure as set out above. However, he does not consider that they are strong enough to outweigh or override the substantial public interest in protecting the principle of LPP in this particular case.
25. Having considered the relevant factors the Commissioner is satisfied that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure. He considers that the limited public benefits in disclosure would not offset the resulting detriment to the ICB's ability to obtain legal advice.
26. The Commissioner's decision, therefore, is that the ICB is entitled to withhold the requested information under section 42 of FOIA.

## **Other Matters**

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27. The Commissioner notes that the ICB failed to carry out an internal review within 40 working days. The Section 45 Code of Practice advises all public authorities to carry out internal reviews in a timely manner and within 20 working days. A total of 40 working days is permitted in particularly complex cases only.
28. The ICB is reminded of the requirements of the Code and of the importance of carrying out internal reviews in a timely manner and in accordance with the timeframes specified in the Code.

## **Right of appeal**

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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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

**Keeley Christine**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**