

Decision Notice 147/2019

Legal advice

The Applicant

Public authority: Dumfries and Galloway Health Board

Case Ref: 201900192



Scottish Information
Commissioner

Summary

NHS Dumfries and Galloway was asked for information including and pertaining to legal advice.

NHS Dumfries and Galloway advised the information was exempt from disclosure as it was subject to legal professional privilege. Some of the information was disclosed during the Commissioner's investigation.

The Commissioner investigated and found that the information disclosed during the investigation had been wrongly withheld, but that the remaining information (the actual legal advice and request for advice) had been correctly withheld as it was subject to legal professional privilege.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 25 December 2018, the Applicant made a request for information to Dumfries and Galloway Health Board (NHS Dumfries and Galloway). The Applicant requested, with reference to an earlier complaint:
 - (i) the dates on which legal advice was sought and obtained between 4 and 12 June 2017
 - (ii) the identity of who sought and who provided the legal advice
 - (iii) the legal advice sought or given, and
 - (iv) if no advice was sought or obtained, confirmation of that fact.
2. NHS Dumfries and Galloway did not respond.
3. On 26 January 2019, the Applicant wrote to NHS Dumfries and Galloway requesting a review on the basis that it had failed to respond.
4. NHS Dumfries and Galloway notified the Applicant of the outcome of its review on 28 January 2019. NHS Dumfries and Galloway withheld all the information held under section 36(1) of FOISA (Confidentiality).
5. On 1 February 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of NHS Dumfries and Galloway's review because it had refused to provide him with any of the information that he had asked for. He believed no legal advice had been obtained, so there could be no legal professional privilege surrounding legal advice which had not been sought or received.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 27 February 2019, NHS Dumfries and Galloway was notified in writing that the Applicant had made a valid application. NHS Dumfries and Galloway was asked to send the Commissioner the information withheld from the Applicant. NHS Dumfries and Galloway provided the information withheld from the Applicant (including the legal advice, the existence of which the Applicant had questioned) and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Dumfries and Galloway was invited to comment on this application and to answer specific questions relating to its application of section 36(1) of FOISA.
9. NHS Dumfries and Galloway decided to disclose some of the withheld information to the Applicant during the investigation. NHS Dumfries and Galloway provided the Applicant with the information addressing parts (i), (ii) and (iv) of his request while continuing to rely on section 36(1) of FOISA in respect of the information being asked for at point (iii) of the request.
10. The Applicant was also asked for any comments he wished to make, including his views on the public interest of disclosure of the information.
11. Both the Applicant and NHS Dumfries and Galloway provided the Commissioner with their respective submissions.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and NHS Dumfries and Galloway. He is satisfied that no matter of relevance has been overlooked.

Information disclosed during the investigation

13. As noted above, NHS Dumfries and Galloway provided the Applicant with information pertaining to parts (i), (ii) and (iv) of the request during the investigation. In the absence of submissions from NHS Dumfries and Galloway as to why section 36(1) no longer applied to this information, the Commissioner must conclude that NHS Dumfries and Galloway was not entitled to withhold this information.
14. The Commissioner therefore finds that NHS Dumfries and Galloway was not entitled to withhold this information as exempt under section 36(1) of FOISA.
15. The Commissioner will now go on to consider the application of section 36(1) of FOISA to part (iii) of the Applicant's request, which deals with the actual legal advice.

Section 36(1) - Confidentiality

16. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. NHS Dumfries and Galloway withheld the legal advice requested by the Applicant under this exemption.
17. Among the types of communication which fall within this category are those which are subject to legal professional privilege. One aspect of legal professional privilege is litigation privilege, which covers documents created in contemplation of litigation (also known as communications *post litem motam*).
18. Communications *post litem motam* are granted confidentiality to ensure that any person or organisation involved in or contemplating a court action can prepare their case as fully as possible, without the risk that their opponent/s, or prospective opponent/s, will gain access to the material generated by their preparations. The privilege covers communications at the stage when litigation is pending or in contemplation.
19. Whether a particular document was prepared in contemplation of litigation will be a question of fact, the key question generally being whether litigation was actually in contemplation at a particular time.
20. Litigation privilege will apply to documents created by the party to the potential litigation, expert reports prepared on their behalf and legal advice given (and sought) in relation to the potential litigation. However, the communication need not involve a lawyer and the litigation contemplated need never actually happen for the privilege to apply. It will continue to apply after any litigation has been concluded.
21. NHS Dumfries and Galloway argued that the Applicant had submitted a number of complaints against it in relation to treatment received by a third party that he was representing. NHS Dumfries and Galloway stated that the Applicant had previously made reference to legal advice which he had sought, as well as implying that a legal claim would be submitted if compensation was not received from NHS Dumfries and Galloway in respect of the ongoing complaints.
22. NHS Dumfries and Galloway stated that the legal advice and request for legal advice under consideration at point (iii) of the Applicant's request related to a complaint and a potential legal claim (which was later submitted in March 2018). However, at the time of advice being sought and provided, there was already one legal claim being processed from the Applicant in relation to a specified matter; therefore, it was felt appropriate that all communication with the Applicant should be considered from a legal point of view and, where appropriate, legal advice sought.
23. From the information supplied by NHS Dumfries and Galloway and the Applicant, the Commissioner accepts that the legal advice, and the request for legal advice, were prepared in contemplation of litigation.
24. Information cannot be privileged unless it is also confidential. For the section 36(1) exemption to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed. For this to be the case, the information must possess the quality of confidence at that time, i.e. at least up to the point at which the authority carries out a review of its response to the information request and communicates the outcome to the requester.

25. The Applicant accepted that legal advice is usually confidential, as long as it is kept confidential. However, the Applicant raised the matter of other (different) legal advice having been disclosed to the person he was representing on a previous occasion. He argued that, because previous legal advice had been disclosed, the current legal advice had lost its nature of confidentiality.
26. NHS Dumfries and Galloway submitted that, although associated legal advice had previously been disclosed (by way of a subject access request made by the person whom the Applicant was representing), the legal advice under consideration in this case was different advice. It noted that it remained confidential, given that it had not been disclosed either to the Applicant or to the person he was representing, and had not been put into the public domain. NHS Dumfries and Galloway emphasised that the legal advice had been sought and provided in relation to a confidential complaint.
27. The Commissioner is obliged to consider solely the specific legal advice (and request for legal advice) under consideration in this particular case. He cannot take into account disclosure of other, different, legal advice on a previous occasion. The Commissioner accepts NHS Dumfries and Galloway's submission that the content of the legal advice *under consideration here* and the advice sought has not been disclosed in such a way as to result in the loss of the quality of confidence. He accepts that the withheld information has not been made public, either in full or in summary.
28. The Commissioner is therefore satisfied that the information withheld by NHS Dumfries and Galloway was prepared in contemplation of litigation and is information to which a claim of confidentiality of communications could be maintained in legal proceedings. It therefore falls within the scope of section 36(1) of FOISA.
29. Given that the Commissioner is satisfied that the information falls to be considered as litigation privileged, he is not required to consider whether the information would also attract protection by virtue of legal advice privilege.
30. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 36(1), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest test submissions from NHS Dumfries and Galloway

31. NHS Dumfries and Galloway argued that disclosure of the information would only be of benefit to the Applicant and the person he was representing, but could potentially be detrimental to NHS Dumfries and Galloway as the information contained reference to a confidential complaint that had been made to NHS Dumfries and Galloway by a third party represented by the Applicant, which subsequently became a formal legal claim.
32. NHS Dumfries and Galloway stated that, although it did not apply section 38 (Personal information) of FOISA, if the Commissioner did not accept the application of section 36(1) there would be "potential financial and further legal implications" for NHS Dumfries and Galloway in releasing the information requested because it would "potentially breach the data protection regulations, due to third party information being contained throughout the evidence".
33. NHS Dumfries and Galloway therefore submitted that the information would only be of interest to the Applicant and the third party in question.

The public interest test submissions from the Applicant

34. The Applicant submitted that it was in the public interest for the information to be disclosed because he was of the view that NHS Dumfries and Galloway may have lied about having received the legal advice. He stated that it was in the public interest to override confidentiality about *whether the further legal advice had actually been sought and received* on the matter in question between the dates specified.
35. The Applicant argued that disclosure could lead to potential evidence arising in respect of a separate case he had ongoing against another public body. He argued that supplying the information requested could help to establish the facts about whether NHS Dumfries and Galloway had lied or were telling the truth about having sought the legal advice.
36. The submissions made by the Applicant in relation to the public interest were made before he received the information that was disclosed to him during the Commissioner's investigation. His arguments therefore related to his suspicions that NHS Dumfries and Galloway had not in fact sought or received any further legal advice. After he had received the additional disclosed information, which made it clear that legal advice had been sought and received, the Applicant elected to continue with his application to the Commissioner.

The Commissioner's conclusions

37. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC164 (QB)*¹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
38. The Commissioner acknowledges that there will be occasions where the significant in-built public interest in favour of withholding legally privileged communications may be outweighed by the public interest in disclosing the information. For example, disclosure may be appropriate where (the list is not exhaustive):
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material discloses an apparently irresponsible and willful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
39. Having examined the withheld information, the Commissioner cannot see that any of the above categories would apply. He does accept that the information would be of interest to the Applicant and to the person he is representing. But he does not see that there is a wider public interest in the information being disclosed in the circumstances of this case. In reaching this conclusion the Commissioner notes that the information is personal to the individual whom the Applicant is representing. The Commissioner also notes that a lot of the Applicant's public interest arguments focus on his mistaken belief that NHS Dumfries and

¹ [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))
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Galloway had not actually sought any legal advice and his belief that his freedom of information request would bring that point to the fore.

40. The Commissioner must also take account of the important public interest in legal professional privilege itself and the public interest in allowing public authorities to obtain confidential legal advice in contemplation of litigation.
41. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour withholding the information. There is a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client, and he believes, particularly given that the Applicant's ongoing litigation is still a live issue, that this outweighs the public interest in disclosing the information under consideration here.
42. In all the circumstances of this case, therefore, the Commissioner concludes that the public interest in disclosing the information was outweighed by that in maintaining the exemption in section 36(1). Consequently, he finds that NHS Dumfries and Galloway was entitled to withhold the legal advice, and request for legal advice, under that exemption.

Decision

The Commissioner finds that Dumfries and Galloway Health Board (NHS Dumfries and Galloway) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that NHS Dumfries and Galloway were entitled to withhold the legal advice, and request for advice, under section 36(1) of FOISA.

However, the Commissioner finds that NHS Dumfries and Galloway was not entitled to withhold the information which it disclosed during the investigation under section 36(1) of FOISA and therefore failed to comply with Part 1.

Given that this information has now been disclosed, the Commissioner does not require NHS Dumfries and Galloway to take any action in respect of this failure in response to the Applicant's application.

Appeal

Should either the Applicant or NHS Dumfries and Galloway wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

2 October 2019

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- ...

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