

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 October 2021

**Public Authority:** East Kent Hospitals University NHS Foundation Trust

**Address:** Kent and Canterbury Hospital  
Ethelbert Road  
Canterbury  
CT1 3NG

### Decision (including any steps ordered)

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1. The complainant has requested information, including legal advice sought and received by East Kent Hospitals University NHS Foundation Trust ("the Trust") in relation to allegations made against the complainant. The Trust confirmed all information had previously been provided with the exception of legal advice which was being withheld under section 42(1) of the FOIA.
2. The Commissioner's decision is that the information withheld by the Trust is subject to legal professional privilege and engages the section 42(1) exemption. The Commissioner finds that the public interest favours maintaining the exemption and withholding the information.

### Request and response

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3. On 20 October 2020 the complainant made a request to the Trust in the following terms:  
  
*"Can you please supply all the information and a copy of the independent legal opinion given to the Trust in relation to the allegations made against me."*
4. The Trust responded on 11 November 2020. The Trust referred to an earlier response dated 19 October 2020 in which it had explained to the complainant the information it had provided to a planned Extraordinary

meeting of the Trust's Council who were investigating an alleged breach of the code of conduct. In the Trust's response of 11 November it confirmed to the complainant that it had provided him with all of the information referred to in its October response and there was therefore nothing further to add. The Trust went on to state that any correspondence between itself and Trust solicitors with regard to the investigation would be legally privileged and exempt under section 42 of the FOIA.

5. The complainant requested an internal review on 11 November 2020 stating that section 42 could not be relied upon unless there was litigation expected.
6. On 12 November 2020 the Trust provided the outcome of its internal review. It upheld its position that it had already provided all relevant documents to the complainant before the information request and that any correspondence with solicitors was legally privileged.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 11 November 2020 to complain about the way their request for information had been handled. The Commissioner accepted the case for investigation on 22 December 2020 once all relevant information had been provided.
8. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly withheld the legal advice held in scope of the request on the basis of section 42(1) of the FOIA.

### **Reasons for decision**

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#### **Section 42(1) – legal professional privilege**

9. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
10. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI (EA/2005/0023)* ("Bellamy") as:

*"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges*

*between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation.”*

11. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
12. Communications made between adviser and client in a relevant legal context will, therefore, attract privilege.

*The withheld information*

13. The Trust has provided the Commissioner with copies of the withheld information. This all relates to legal advice requested and obtained from the Trust’s solicitors on the subject of a formal process relating to the complainant.
14. Having viewed the information the Commissioner notes that it consists of several emails and attachments. The emails ask for advice on attached draft letters and also contain legal advice on statements.
15. It is clear that these communications consist of legal advice needed in order to investigate issues and that the advice was asked for and provided by a solicitor in their professional capacity as a lawyer. The solicitors themselves have made it clear that where advice was provided to the Trust it was provided subject to legal privilege with no waiver.
16. The Trust and the solicitors are satisfied that the legal advice remains privileged.
17. Having considered the Trust’s submissions and referred to the withheld information the Commissioner is satisfied that the exemption at section 42(1) of the FOIA is engaged. Since it is a qualified exemption, she has considered the balance of the public interest.

*Public interest in disclosure*

18. The complainant considers that it is essential he is able to see all information that has been used by the Trust in this matter in order to be able to defend himself against any allegations.
19. The Trust argues that there is no wider public interest in this information and the interest in the information is limited to the complainant. The Trust has considered the general public interest in transparency and furthering public debate and acknowledges that these are relevant to any information request but does not consider these to carry any significant weight in this case.

*Public interest in maintaining the exemption*

20. The Trust argues that there must be some clear, compelling and specific justification for disclosure in order to outweigh the obvious interest in protecting communications between legal advisers and their clients.
21. The Trust also emphasised the concept of legal professional privilege and the importance of maintaining the frankness of communications between lawyers and clients. The Trust argued this serves the wider administration of justice for all. The Trust also highlighted that the advice was recent and remained live at the time of the request.

*Balance of the public interest arguments*

22. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all 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 and thus erodes the rule of law and the individual rights it guarantees.
23. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate.
24. The Commissioner does though recognise that there is a strong public interest in transparency and accountability and disclosing any information will increase transparency around public authorities actions. That being said, the Commissioner is not convinced there are any wider public interest arguments in favour of disclosure – it is clear this information is of great significance to the complainant given the

personal nature of the issue. However, the Commissioner is not clear as to how disclosing the legal advice would contribute to meeting any wider public interest in the information.

25. The Commissioner is also mindful that the Trust has, prior to this request, disclosed other relevant information to the complainant and it has stated it is only the information attracting legal professional privilege that remains withheld from the complainant.
26. Whilst the Commissioner is sympathetic to the complainant's concerns and recognises why the matter is of personal concern, for the reasons set out above she does not consider that this alone is sufficient to override the need to preserve the principle of legal privilege.
27. The Commissioner has concluded that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

## Right of appeal

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28. 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)

29. 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.
30. 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 .....**

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