



Decision Notice 228/2024

Correspondence regarding Healthcare Environmental Services

Authority: NHS National Services Scotland (formally the Common Services Agency for the Scottish Health Service)

Case Ref: 202400290

Summary

The Applicant asked the Authority for all correspondence over a specified period between the Authority (and others) and Central Legal Office regarding Healthcare Environmental Services. The Authority advised that the information was exempt from disclosure as it was subject to legal professional privilege and the public interest favoured withholding it. The Commissioner investigated and found that the Authority had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 20 December 2023, the Applicant made the following request for information to the Authority:
 - 1) *Please provide all correspondence between NHS Scotland and Central Legal Office (CLO) regarding Healthcare Environmental Services (HES) between April 2018 and April 2020*
 - 2) *Please provide all correspondence between [a named individual] and CLO regarding HES for the same date range.*

- 3) *Please provide all correspondence between a named individual and CLO regarding HES for the same date range.*
- 4) *Please provide all correspondence between Scottish Government and CLO regarding HES for the same date range.*
- 5) *Please provide all correspondence between UK Government and CLO regarding HES for the same date range.*
2. On 21 December 2023, the Authority sought clarification of the Applicant's request in relation to his reference to "NHS Scotland". On the same day, the Applicant responded to clarify that he meant NHS Scotland health boards and hospital staff, including "Chief Executive and senior officials".
3. The Authority responded on 22 January 2024. For parts 1, 2 and 3 of the request, the Authority informed the Applicant that it was withholding the information requested on the basis that it was subject to legal advice privilege and, therefore, exempt under section 36(1) of FOISA and that the public interest in maintaining the exemption outweighed that in disclosure. For parts 4 and 5 of the request, the Authority issued the Applicant with a notice, in terms of section 17 of FOISA, that it did not hold the information requested.
4. On 23 January 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not consider that he had received a suitable response to any of his questions.
5. The Authority notified the Applicant of the outcome of its review on 20 February 2024, upholding its original decision.
6. On 22 February 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because it had refused to provide the information requested and it was in the public interest for it to be disclosed.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 26 March 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These focused on the Authority's reasons for withholding the information requested and why it did not consider the public interest favoured disclosure.
10. The Applicant was also provided with an opportunity to provide further comments on why he considered the public interest favoured disclosure of the withheld information.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

FOISA or EIRs?

12. Having considered the withheld material and submissions on this point from the Authority, the Commissioner accepts the decision of the Authority to deal with the request under FOISA rather than under the Environmental Information (Scotland) Regulations 2004 (the EIRs). He would also note that he can see no detriment to the Applicant by considering his request under FOISA rather than the EIRs, nor has the Applicant made mention of any reason why he considered that his request should be dealt with under the EIRs.

Section 36(1) – Confidentiality

13. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies.
14. The Authority confirmed that the withheld information was subject to legal advice privilege.
15. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given. For the exemption to apply to this particular type of communication, certain conditions must be fulfilled:
 - (i) the information must relate to communications with a professional legal adviser, such as a solicitor or advocate
 - (ii) the legal adviser must be acting in their professional capacity
 - (iii) the communications must occur in the context of the legal adviser's professional relationship with their client.
16. There is a further matter to be considered, however, before the Commissioner can determine whether, or the extent to which, the section 36(1) exemption in FOISA is applicable in the circumstances of this case. The information cannot be privileged unless it is also confidential.
17. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. In other words, the claim must have been capable of being sustained at the time the exemption is claimed.
18. A claim of confidentiality cannot be maintained where, prior to a public authority's consideration of an information request or conducting a review, information has been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice. Where the confidentiality has been lost in respect of part or all of the information under consideration, any privilege associated with that information is also effectively lost.

The Authority's submissions

19. By way of background, the Authority provided the following information:

- HES previously provided clinical waste services in Scotland. HES held a national contract with NHS Scotland to collect and dispose of clinical waste from all Scottish hospitals, GP surgeries, dental practices and pharmacies
 - The national contract for clinical waste was managed by the Authority for all NHS Scotland health boards. When HES was unable to continue providing clinical waste services in December 2018, the Authority had to procure services and implement contingency plans to store, collect and treat clinical waste held at Scottish hospitals, GP surgeries, dental practices and pharmacies
 - The named individual in part 2 of the request was the Sustainability Manager within the Authority's Procurement, Commissioning and Facilities Directorate, who worked alongside the named individual in part 3 of the request on contingency planning and implementation for clinical waste management.
 - The named individual in part 3 of the request was the Associate Director for Planning, Performance and Service Delivery within the Authority's Strategy, Performance and Service Transformation Directorate, who was asked by the Authority's Chief Executive to manage the contingency planning and implementation for clinical waste management on behalf of all NHS Scotland health boards after HES ceased trading
20. The Authority explained that it had received extensive legal advice from CLO in relation to the contingency plans referred to above. CLO is a directorate within the Authority that supplies legal services to the Authority.
21. The Authority submitted that the withheld information meets all of the conditions set out above (in paragraph 15):
- (i) it relates to communications between its employees and in-house solicitors
 - (ii) the in-house solicitors were acting in their professional capacity as legal advisers
 - (iii) the communications occurred in the context of (CLO) solicitors' professional relationship with other Authority employees
22. The Authority confirmed that the information contained within the correspondence sought is confidential. All correspondence with staff at the Authority, including the named individuals in parts 2 and 3 of the request, was legal advice obtained in relation to the legal implications of decisions made about contingency arrangements and the impact of any actions taken by HES in light of those arrangements.
23. The Authority confirmed that all email correspondence between CLO and anyone at the Authority or NHS Scotland health boards amounted to legal advice. This was both in the form of "advice notes" and, due to the nature and pace of the action required to deal with the clinical waste issues arising from HES ceasing trading, day-to-day email correspondence.
24. The Authority explained that, in the main, these events were coordinated by the named individuals in parts 2 and 3 of the request, who continually corresponded with CLO for "real time" legal advice.
25. While the majority of the legal advice related to contingency arrangements, the Authority noted that there was also extensive correspondence in contemplation of litigation with HES.
26. Given the nature of the issues faced and the very significant risk to public health related to the disposal of clinical waste, the Authority explained that various matters were often dealt

with as part of the same correspondence (including contingency arrangements and potential court action). The Authority submitted that it was therefore very difficult to separate out advice which solely related to legal privilege from advice given in contemplation of litigation.

27. The Authority confirmed that correspondence between CLO and the Authority remained confidential, at no stage had it entered the public domain or lost its privileged nature and it had never been shared beyond those who received the advice.

The Applicant's submissions

28. The Applicant submitted that the information requested should be disclosed, and he did not understand why the Authority had withheld it.
29. The Applicant explained that he believed the Authority held key information regarding the discontinued criminal prosecution relating to HES, which should be disclosed.

The Commissioner's view

30. Given the nature and volume of the withheld information, the Commissioner recognises that it is difficult to separate out information subject to litigation privilege from that subject to legal advice privilege.
31. Having considered the withheld information, the Commissioner is satisfied that it meets the conditions for legal advice privilege to apply.
32. The Commissioner is also satisfied that the confidentiality of the legal advice has not been lost or waived through being shared with limited relevant employees within the Authority.
33. The Commissioner therefore considers that the information in question remained confidential at the time the Authority dealt with the Applicant's information request and requirement for review (and that it remains so now).
34. The exemption in section 36(1) is a qualified exemption, which means that it is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest test – section 36(1)

The Authority's submissions

35. The Authority recognised that there is always a clear public interest in public authorities acting in an open and transparent manner while using public funds in providing services.
36. On the other hand, the Authority noted that there will always be a strong inherent public interest in maintaining the right to confidentiality of communications between a legal adviser and their client.
37. If the Authority were to disclose the information requested, it considered there would be a reluctance from the Authority itself and NHS Scotland health boards to engage with CLO to request legal advice.
38. The Authority also noted that were several live court proceedings involving the liquidators of HES and various NHS Scotland health boards. The Authority submitted that this underlined the importance of ongoing legal professional privilege.
39. The Authority therefore concluded that, on balance, the public interest lay in favour of maintaining the exemption in section 36(1) of FOISA.

The Applicant's submissions

40. The Applicant submitted that disclosure of the information requested was critical not only for his own interests, but also for those of the wider public.
41. The Applicant explained that the discontinued criminal prosecution against HES involved significant costs and that it was in the public interest for the withheld information to be disclosed.

The Commissioner's view

42. The Commissioner acknowledges the public interest in the transparency and accountability expected of all authorities and that disclosure of the information requested would go some way towards satisfying that interest.
43. However, the Commissioner also acknowledges that there is a strong inherent public interest, recognised by the courts, in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds.
44. 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 \[2009\] EWHC 164 \(QB\)](#)¹. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
45. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling 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 wilful disregard of advice
 - the passage of time is so great that disclosure cannot cause harm.
46. While the Commissioner accepts, having examined the withheld information, that the contents of the advice would be of interest to the Applicant and to the general public, he does not consider that any of the above categories would apply.
47. The Commissioner must 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.
48. The Commissioner accepts that there is a strong public interest in a Scottish public authority being able to receive full, unhindered legal advice. Without such comprehensive advice being available to the Authority, its ability to come to fully informed decisions would be restricted, which would not be in the public interest.

¹ [Department for Business Enterprise & Regulatory Reform v O'Brien & Anor \[2009\] EWHC 164 \(QB\) \(10 February 2009\) \(bailii.org\)](#)

49. The Commissioner recognises that the Applicant raised that significant costs were involved in the discontinued criminal prosecution relating to HES. However, neither the Authority nor CLO were involved in those proceedings (details of which were publicly reported at the time).
50. The Commissioner is unable to explain fully all his reasoning here without revealing the content of the withheld information. However, having considered the withheld information, the Commissioner is satisfied that the public interest arguments advanced by the Applicant are of limited relevance to the information in question.
51. Having considered the public interest arguments advanced on both sides, and the withheld information, the Commissioner is not satisfied that the public interest in disclosure of this information is sufficiently compelling to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
52. On balance, the Commissioner considers that greater weight should be afforded to the arguments which would favour maintaining the exemption. Consequently, the Commissioner is satisfied that the Authority correctly withheld, under section 36(1) of FOISA, the information requested.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority 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.

Euan McCulloch
Head of Enforcement

14 October 2024