



Resolution

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February 2024
FOI_6400

The following information was requested on 2 February 2024:

*RE: THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL
PHARMACEUTICAL SERVICES) REGULATIONS 2013 [“THE REGULATIONS”]*

*SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]*

This is a FoIA request.

Please supply me with a copy of the current guidance / advice / legal advice / training materials / checklist / any other information given to the decision maker(s) who is (or are) determining appeals from the Commissioner/s under the above regulations.

Our Response

Thank you for your request for information.

We have interpreted your reference to “appeals from the Commissioner” as “appeals from the Applicant” as no rights exist for the Commissioner to appeal its own decision.

Taking each point in turn:

- The current guidance has been withdrawn from publication because it does not reflect the amended Regulations.
- Legal advice requested is privileged; - This information is exempt under section 42 of the Freedom of Information Act 2000 (FOIA). Please refer to our refusal notice below for a further explanation.
- There has not been any training; - This information is not held.
- There are no checklists provided to decision makers; - This information is not held.

- With regard to any other information, please see refer to Section 3.4 [NHS England » Guidance on the NHS \(pharmaceutical and local pharmaceutical services\) \(amendment\) regulations 2023](#)

You can also view our Primary Care Appeals decisions online here: - [PCA Decisions Archive - NHS Resolution](#) .

Refusal Notice

Section 42 – Legal professional privilege

Section 42(1) of 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. LPP protects the confidentiality of communications between a lawyer and client.

Section 42 is a class-based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.

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.”

There are two categories of LPP – (1) litigation privilege and (2) 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 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.

You have specifically requested the legal advice relating to the regulations. This information falls within the definition of LPP.

Public Interest Test

Section 42 is a qualified exemption and we have therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exemption being maintained.

Public interest arguments in favour of disclosure

We recognise the inherent public interest in transparency inbuilt within the FOIA and also the public's right to know. We also acknowledge that there is some public interest in the public understanding how decisions are made and arrived at.

Public interest arguments in favour of maintaining the exemption

There is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets. There is a strong public interest in a person seeking access to legal advice being able to communicate freely with their legal advisers in confidence, and in being able to receive advice from those legal advisers in confidence.

An important factor which underlies the general rationale for legal professional privilege and its particular application in the case of decisions, is that the rule against disclosure should be known to operate with reasonable certainty in advance, since if its application was uncertain and too readily displaced, it would undermine the very public interest in encouraging full and frank exchanges which the rule is supposed to promote.

Balance of the public interest

The public interest here is in ensuring that NHS Resolution is able to obtain and use legal advice without its position being prejudiced by the disclosure of information. Whilst we recognise that there is a general public interest in understanding how we arrive at decisions on appeal cases, we consider that disclosure would, in this case, undermine our ability to have full and frank exchanges with our legal advisers.

The general public interest inherent in section 42 will generally be 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 and thus erodes the rule of law and the individual rights it guarantees.

Having considered the relevant factors NHS Resolution is satisfied that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure.

As referred to above NHS Resolution also publishes its Primary Care Appeals on our website. Therefore, we believe much of the public interest is met by the publicly available information.

This concludes our response to your request.

If you are not satisfied with the service that you have received in response to your information request, it is open to you to make a complaint and request a formal review of our decisions. If you choose to do this, you should write to [Tinku Mitra](#), Deputy Director of Corporate and Information Governance, Data Protection Officer for NHS Resolution, within 28 days of your receipt of this reply. Reviews of decisions made in relation to information requests are carried out by a person who was not involved in the original decision-making about the request.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a review of the decision. Generally, the Information Commissioner will not make a decision unless you have exhausted the local complaints procedure. The address of the Information Commissioner's Office is:

Wycliffe House
Water Lane
Wilmslow
Cheshire
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