



Scottish Information
Commissioner
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Decision Notice 099/2025

Legal advice from Central Legal Office in relation to successor organisation of Lloyds Pharmacy

Applicant: The Applicant

Authority: Lanarkshire Health Board

Case Ref: 202401227

Summary

The Applicant asked the Authority for a copy of the advice received from the Central Legal Office (CLO) in relation to successor organisations participating as an interested party in Pharmacy Practices Committees (PPCs) or appeals. The Authority withheld the information on the basis that it was legally privileged and that the public interest favoured withholding the information. 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 16 July 2024, the Applicant made a request for information to the Authority. He asked to be provided with a copy of the advice received from the Central Legal Office (CLO) in relation to the named successor organisation of Lloyds Pharmacy UK's participation as an interested party in Pharmacy Practices Committees (PPCs) or appeals where the original respondent was Lloyds Pharmacy UK. He believed the Authority sought this advice from the CLO in

August/September 2023 in relation to a specific application and this advice was also shared and subsequently adopted by NHS Greater Glasgow and Clyde.

2. The Authority responded on 30 July 2024. It confirmed that advice had been received by it from the CLO in relation to representation at PPC hearings, but advised that disclosure of this information was exempt in terms of section 36(1) of FOISA. The Authority explained that it was information in which a claim to confidentiality of communications could be maintained in legal proceedings as the information constituted legal advice between the Authority and its lawyers. In all the circumstances of the case, the Authority concluded that the public interest in disclosing the information was outweighed by that in maintaining the exemption. It considered this was particularly the case due to the fact that a case was ongoing.
3. On the same date, 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 there were any valid reasons to withhold the requested information. He believed that an email from a CLO solicitor confirmed that CLO advice given to PPC's in relation to pharmacy applications is public and must be shared and that it is a requirement to do so. He referred to a previous Scottish Information Commissioner Decision that ruled that information could not be withheld on the basis of an ongoing case (The Applicant had referred to this by its OSIC case number but it was [Decision Notice 154/2024¹](#)). He also considered it was in the public interest to explain how, in the same circumstances and under the same Regulations, Boards can reach opposite decisions regarding interested party status.
4. The Authority notified the Applicant of the outcome of its review on 27 August 2024 upholding its initial response.
5. On 10 September 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 he did not agree section 36(1) applied, as he did not believe the information had remained confidential. Furthermore, he considered that the public interest in disclosure clearly outweighed that in maintaining the exemption. Therefore, the exemption did not apply, and the information could not be withheld under section 36(1).

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 11 October 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 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. The Authority was invited to comment on this application and to answer specific questions. These related to the Authority's reasons for withholding the requested information and why it did not consider the public interest to favour disclosure.

¹ [Decision 154/2024 | Scottish Information Commissioner](#)

9. The Applicant was also provided with the opportunity to provide further comments as to why he considered the withheld information was no longer confidential and why he considered the public interest to lie in disclosure.

Commissioner's analysis and findings

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

Section 36(1) – Confidentiality

11. 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.
12. The Authority confirmed that it was relying on legal advice privilege to withhold the requested information.
13. 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, and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
14. There is a further matter to be considered, before the Commissioner can determine whether, or to the extent to which, section 36(1) is applicable in the circumstances of the case. The information cannot be privileged unless it is also confidential.
15. For the section 36(1) exemption in FOISA to apply, the withheld information must be information in respect of which a claim of confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed. The information must possess the quality of confidence at that time, and so cannot have been made public, either in full or in a summary sufficiently detailed to have the effect of disclosing the advice.
16. Where confidentiality has been lost in respect or part or all of the information under consideration, any privilege associated with that information is lost.

Context and background

17. The Pharmacy Practices Committee (PPC) is a committee of a particular health board with delegated responsibility for considering applications received to join the board's Pharmaceutical List. The Committee is constituted under Schedule 4 of [The National Health Service \(Pharmaceutical Services\) \(Scotland\) Regulations 2009](#)². These Regulations

² [The National Health Service \(Pharmaceutical Services\) \(Scotland\) Regulations 2009](#)

determine the process to be followed when applications are made to NHS Boards to provide NHS pharmaceutical services.

18. Each Board has a pharmaceutical list with the names and addresses of the premises within the Board's area which provide pharmaceutical services. When an application is received to be included in the pharmaceutical list, the Board gives written notice to any person whose name is included in the pharmaceutical list or the provisional pharmaceutical list and whose interest may, in the opinion of the Board, be significantly affected if the application is granted – designated an interested party. These people may then make representation to the Board. If the Board decides to hear oral representations, it will give notice of the meeting to anyone from whom it received representations.
19. There is also an appeals process that entitles interested parties and applicants to appeal against the decisions made by PPCs and those appeals are determined by the [National Appeal Panel](#)³ (NAP).
20. The Applicant's request concerns circumstances that arose when the owners of Lloyds Pharmacy sold its remaining high street stores. At that time, it was designated an interested party in ongoing PPC processes in a number of Board areas. The question of concern was what the status of the successor organisation(s) to Lloyds Pharmacy should be with regard to those ongoing PPC processes, and whether the companies taking over from Lloyds Pharmacy could take its place as an interested party in the PPC processes.

The Authority's submissions

21. The Authority confirmed that it considered the withheld information to be subject to legal advice privilege.
22. It explained that advice was sought from the CLO of NHS National Services Scotland (NSS). It commented that the CLO offer a comprehensive service to the NHS in Scotland, including NHS health boards, providing advice, guidance and representation across key areas. It stated that this included providing advice at Pharmacy Practices Committee hearings and that in this case legal advice was sought on the administration of the hearing and that the advice was provided in the CLO's professional capacity as legal adviser.
23. The Authority provided the Commissioner with the names and designations of the parties involved, to evidence that the information related to communications with a legal adviser.
24. The Authority contended that the information had been given in confidence and, in its opinion, remained confidential.
25. The Authority submitted that while information following the provision of legal advice was provided to the PPC, i.e. the outcome of the advice – the actual discussions and content of the advice were not made available.
26. It confirmed that the email communication that comprised the withheld information had not been shared with anyone else, including anyone in other health boards. The advice gathered was used to draft a letter to an organisation which had wished to be considered an interested party at a PPC – this letter was also shared within the papers for the PPC.
27. The Authority stated that a copy of the letter was also provided to another health board.

³ [National Appeal Panel – Scotland's Health on the Web](#)

28. The Authority confirmed that it held no related phone notes from any of the telephone conversations.
29. Regarding the email from another CLO solicitor which the Applicant mentioned in his request for review, the Authority considered that it was not its place to comment on what had been said to another board. Its position remained unchanged in that the advice was confidential and had not been shared with the public.

The Applicant's submissions

30. The Applicant, in his application, stated that he did not consider that the information had remained confidential and so he did not, therefore, think that the exemption could apply. He believed that the information had been shared with members of the Board's PPC and interested parties in the hearing related to a particular application. He was also of the view that the information had been shared with another health board's PPC (PPC members and interested parties to a particular application).
31. The Applicant explained that he had been in contact with an employee of the other Board, who had provided him with a comprehensive summary of their interpretation of the information being sought by this request.
32. The Applicant, in his comments to the Commissioner made reference to the [Commissioner's guidance on section 36\(1\)](#)⁴, paragraph 19:
"Where the whole of the advice or a comprehensive summary of the advice has been disclosed the advice will no longer be confidential"
33. He considered it to be untenable to suggest that the information had remained confidential. The Applicant did not consider the information could be claimed to be confidential and therefore it could not be withheld on that basis.
34. The Applicant made reference in his Application to the Commissioner and request for review to the Authority, to an email from another solicitor at the CLO, that he believed indicated that there was a requirement for CLO legal advice provided to NHS Board PPCs to be given in public.

The Commissioner's view

35. The Commissioner has considered the content of the information and the circumstances in which it was created and is satisfied that the information falling within the scope of the request was legal advice given to a client (the Authority) by a solicitor (from the CLO) acting in their professional capacity.
36. As mentioned above, in order for the information to be privileged it must also be confidential. In terms of whether confidentiality has been lost, the Commissioner has considered all of the submissions from both the Applicant and the Authority.
37. The Authority shared a copy of a letter, to the successor pharmacy involved in its PPC case informing the company of its decision about whether it could be an interested party in the ongoing process, with another NHS Board. It is also in the public domain, having been shared with the PPC and all of the parties to that case. The Authority confirmed it had telephone conversation(s) with another health board, about the matter of successor organisations to Lloyds (of which there were no records), about the matter of successor

⁴ [BriefingSection36Confidentiality_2023.pdf](#)

organisations and interested party status. The Applicant considered that the Authority had shared the legal advice with this Board and that as such it was no longer privileged.

38. The Commissioner has considered the content of the letter to the successor pharmacy and does not consider that it shares the legal advice, but rather the outcome of the legal advice and the subsequent decision of the Authority.
39. The Commissioner has also considered information shared with him by the Applicant and again his view is that these discuss the outcome of the legal advice, that is the decision of the Authority regarding the participation of the successor organisation in the PPC process.
40. In the Commissioner's view there is a distinction between the legal discussion within the withheld information, and the decision that was reached as a result on the course of action to be taken by the Authority. The sharing of this decision and the regulations that support it, is not, in the Commissioner's view, the same as sharing the legal advice.
41. Having considered the information being withheld under this exemption, along with the submissions from both the Applicant and the Authority, the Commissioner is satisfied that the information is subject to legal advice privilege. He does not consider that the actual legal advice itself has been shared, and so confidentiality has not been lost.
42. In any case, were it to have been the situation that the substance of the legal advice had been shared by the Authority with the PPC and/or another health board for a limited, specified purpose, the Commissioner would not consider that such disclosure would have led to a loss of confidentiality in that information.
43. Given that the Commissioner is content that the actual legal advice itself has not been shared, he is satisfied that the withheld information is exempt from disclosure in terms of section 36(1) of FOISA.
44. The Commissioner has looked at the email chain provided by the Applicant which he believed meant that advice from the CLO to the PPC should be made public. The discussion appeared to be in relation to an appeal to the NAP against a decision of a PPC, made in line with paragraph 5 in Part I in Schedule 4 of The National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009. The email appeared to contain advice to the PPC on what the NAP decision meant, and what action it needed to take in regard to this.
45. The email mentions that the author is content for his email to be circulated to all of the parties to satisfy the requirement that legal advice (in that context) is given in public. The Commissioner understands the reference to 'all parties' to mean all parties to the appeal.
46. The Commissioner does not consider this to imply that all legal advice related to the PPC process has to be placed in the public domain, nor has he seen any evidence that this is required by any other legislation. As such, the Commissioner can find no reason to override the exemption in section 36(1) of FOISA.
47. 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 Commissioner must therefore 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 - section 36(1)

The authority's submissions about the public interest

48. The Authority stated that it appreciated that the Applicant had an interest in obtaining copies of the legal advice. It noted that this was due to the circumstances surrounding appeal hearings taking place involving Lloyds Pharmacy Plc and the takeover by other companies, and what looked like differences of opinion between boards on how PPC hearings should be run.
49. The Authority also agreed that there were times when information should be made public to ensure transparency and scrutiny of decision making.
50. Against this, the Authority submitted that it had to consider its own position where it should be able to take advice from its legal advisers without the prospect of the information being made public. Its view was that if it were to happen, discussions would be curtailed and less frank, which would not be in the best interests of, in this case, the administration of the PPC hearing. The Authority's view was that it was important that these decisions are taken based on strong, free and frank discussions when obtaining legal advice.
51. The Authority considered that, on balance, the public interest favoured withholding the advice.

The Applicant's submissions about the public interest

52. The Applicant considered that the Authority had failed to show why there would be greater public interest in withholding the information.
53. He believed the public, applicants and interested parties had a right to know how a change in legal advice led to a situation where, in the same circumstances, under the same regulations, there could be two contradictory outcomes. It was the Applicant's view that there had to be transparency and honesty as to what the changed legal advice was and how that had led to a difference in interested party status for successor organisations in different NHS Board areas.
54. The Applicant contended that if enforcing an obligation of confidence would cover up wrongdoing, allow the public to be misled, or unjustifiably inhibit scrutiny of matters of genuine public concern then the public interest in maintaining confidences would be outweighed by that in disclosure of the information.
55. He considered that there was clearly a question of conflict here as the CLO issued advice and then changed that advice, which resulted in PPCs adopting contradictory positions in relation to interested party status, which in turn has impacted upon the provision of adequate pharmaceutical services in neighbourhoods and communities.
56. The Applicant believed that maintaining the exemption would unjustifiably inhibit public scrutiny of matters of genuine public concern and that the public have a right to know why an organisation can be assigned interested party status, in contravention of the regulations, and object to the award of a pharmacy contract that was overwhelmingly supported by a public consultation, GP services, the local community council, MSP and local councillor. Particularly so when other Boards did not assign interested party status in exactly the same circumstances.

The Commissioner's consideration of the public interest

57. The Commissioner has considered carefully the representations made by both the Applicant and the Authority when assessing and balancing the public interest in this case. He has also fully considered the information that has been withheld.
58. As the Commissioner has noted in several previous decisions, the courts have long recognised the strong public interest in maintaining the right of 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 in 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 \(QB\)](#)⁵. Generally the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
59. 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 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 apparent irresponsible and wilful disregard of advice
 - The passage of time is so great that disclosure cannot cause harm.
- It goes without saying that the public interest needs to be considered seriously in the circumstances of each individual case.
60. The Commissioner notes the Applicant's view that there is a clear public interest in the apparent disparity in how boards have dealt with the issue of interested parties in relation to successor organisations to Lloyds Pharmacy in the PPC process. Specifically, where these processes had already begun at the time of the takeover, after having received (apparently differing) advice from the CLO. The Commissioner appreciates the importance of the PPC process to all of the parties involved as well as the wider community.
61. However, this request was made to one Authority, in relation to how it handled the particular set of circumstances in relation to a specific case in its PPC process. The particulars of any other cases before any other Board's PPC, or any legal advice that may have been provided in those other contexts, are not the subject of the Applicant's request.
62. With this in mind, the Commissioner must consider the scope for disclosure of the withheld information in this case making a genuine difference to the Applicant's legitimate concerns, and whether any other possible judicial scrutiny of the apparent disparity in advice would be inhibited by this advice not being in the public domain as a result of disclosure under FOISA.
63. Having considered the withheld information, the Commissioner does not accept that any of the circumstances described above in paragraph 59 apply, or that there are any other reasons which would support a compelling public interest in disclosure. The Commissioner

⁵ [Department for Business Enterprise & Regulatory Reform v O'Brien & Anor \[2009\] EWHC 164 \(QB\) \(10 February 2009\)](#)

is not responsible for “marking the CLO’s homework” and he does not consider any of these, or similar, circumstances can necessarily be said to be present, simply because different advice appears to have been given in two apparently similar cases.

64. 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 without concern that this will be placed in the public domain.
65. He 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.
66. Having considered the substance of the withheld information, together with submission made by the Applicant, the Commissioner is not satisfied that the public interest in disclosure of the withheld information is significant enough to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
67. On balance, after careful consideration, the Commissioner is satisfied that greater weight should be afforded to the public interest in maintaining the exemption in this case. Consequently, the Commissioner is satisfied that the Authority correctly withheld all of the information falling within scope of the Applicant’s request under section 36(1).

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) 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

28 April 2025