

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 July 2015

Public Authority: The Parliamentary and Health Service Ombudsman

Address: Millbank Tower
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested the details of all doctors used as clinical advisers by the Parliamentary and Health Service Ombudsman (PHSO) including their GMC (General Medical Council) registration numbers. The PHSO provided an anonymised list of the doctors' specialities and qualification but withheld the remaining information under section 40(2) – personal information. During the Commissioner's investigation the PHSO also applied section 38 – endangerment to health and safety and also refused the request under section 14(1) on the grounds that it believed the request was vexatious.
2. The Commissioner's decision is that the PHSO is entitled to rely on section 14(1) to refuse the request.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 31 January 2014, the complainant wrote to the PHSO and requested information in the following terms:

"I wish to make a freedom of information request to receive the registered name and GMC numbers for any and all doctors used as clinical advisers by the health and Parliamentary Ombudsman."

5. On 11 February 2014 he extended his request to include:
“... details of their medical qualifications and what sort of clinical advisor they are (Psychiatry, GP, etc)”
6. The PHSO responded on 26 February 2014. It provided an anonymised list of the specialities and qualifications of the doctors but refused to provide their names or GMC numbers on the grounds that the information was exempt under section 40(2). Section 40(2) provides that the personal data of someone other than the requester is exempt if its disclosure would breach the principles of the Data Protection Act (DPA).
7. Following an internal review the PHSO wrote to the complainant on 23 April 2014. It maintained its original position that the information was exempt under section 40(2).
8. During the Commissioner's investigation the PHSO wrote to the complainant 10 June 2015 informing him that on a further review of the request it now believed the request was vexatious under section 14(1) of FOIA and that the information itself was also exempt under section 38. Section 38 applies to information the disclosure of which would endanger the health and safety of any individual. It also provided the Commissioner with a submission in support of its application of sections 14(1) and 38.

Scope of the case

9. The complainant contacted the Commissioner on 8 April 2014 to complain about the way his request for information had been handled. At that time his request had only been refused under section 40(2). The complainant argued that under GMC guidelines doctors are required to provide their name and GMC registration number to anyone who asks for them. He also provided a link to a contact for an external clinical adviser to PHSO in which the appointed adviser was required to confirm they were aware that their identity may be disclosed to the parties to any investigation on which they provided advice.
10. The complainant has received a partial response to his request. However there remains the issue of his right of access to the names of the doctors, their GMC numbers and this information then needs to be reconciled with the list of specialities which those doctors practise.
11. The Commissioner considers that the matter to be decided is whether the PHSO is entitled to refuse the request on the basis that it is

vexatious and, if not, whether the remaining information is exempt under either section 38 or section 40(2).

Reasons for decision

Section 14(1) Vexatious

12. The first matter to be decided is whether the request is vexatious. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
13. If a request is vexatious there would not be any need for the PHSO to consider whether actual information itself is exempt under sections 38 and 40(2).
14. The key issue in determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In this case the Commissioner considers the main issue is the distress caused by the request. In reaching his decision the Commissioner will weigh the level of distress caused by the request against the purpose and value of the request. As well as looking at the request itself it is appropriate to consider the context and history of the request. This includes looking at both the issue to which the request relates and the nature of the contact he has had with the PHSO in pursuit of that issue.
15. The PHSO only claimed the request was vexatious at a late stage in the Commissioner's investigation. It has been established at Tribunal that a public authority is free to claim any ground for refusing a request, including section 14(1) and that the Commissioner is under an obligation to consider such late claims. However the Commissioner will only consider the circumstances that existed at the time the public authority complied with the request ie the 26 February 2014, this was within the statutory period of twenty working days for complying with a request.
16. The late claim does not in itself undermine its application of section 14(1). The Commissioner notes that when applying the exemption in respect of third party personal data, section 40(2), one of the concerns raised was the distress that could be caused to the clinical advisers if their details were released. Furthermore the Commissioner recognises that some public authorities may be reluctant to classify a request as vexatious if there are alternative approaches which could include answering the request in part and taking the opportunity to explain to an applicant why the remaining information would be exempt by claiming an exemption.

17. The PHSO has argued that the request is vexatious because of the motive behind the request and that it had the effect of harassing and distressing PHSO staff. Taken on its own the request appears quite reasonable. It simply asks for the details of the doctors who provide clinical advice, including their GMC numbers and qualifications. This relates to the quality of advice they may offer decisions makers and so the quality of the PHSO's decisions. The request itself does not use offensive or abusive language or contain threats. However the PHSO has argued that when seen within the context of the other dealings the complainant has had with the PHSO the request should be considered vexatious. It is therefore necessary to consider these other interactions and the background to the request.
18. The complainant had made a complaint to the Office of Qualifications and Examinations Regulation, known as Ofqual, and was not satisfied with the outcome to that complaint. He therefore complained to the PHSO about Ofqual. The PHSO initially rejected the complaint but on review and after, what the PHSO describe as, a complex investigation, the complainant's request was partly upheld in June 2013. As part of that investigation the PHSO sought the input of a clinical adviser in respect of a medical condition affecting the complainant. That advice has been provided to the complainant. The complainant was unhappy with that outcome of that investigation and asked for the decision to be reviewed. The review was concluded in December 2013 and upheld the PHSO's original decision. Throughout this period the PHSO has claimed that the complainant was in frequent contact with the PHSO and the frequency escalated when decisions were reached that were unfavourable to him. The PHSO has stated that there are over 2000 items of correspondence or contact notes saved on the case file relating to the complainant's complaint and that there are many other pieces of correspondence relating to various information requests he has made. Even if a number of these contacts were made after this particular request was made, the Commissioner accepts that this represents a very significant amount of correspondence or other communications.
19. On a number of occasions the complainant threatened to commit suicide and blamed the PHSO for his decision to do so.
20. The Commissioner has been provided with extracts of the some of the email and telephone communications the PHSO received. A number of these were received after the request was responded to on 26 February 2014. The Commissioner has disregarded this evidence.
21. The extracts of communications made before or during the handling of the request have been studied. It is not necessary to set out their content in any detail. The extracts are, with one exception, from correspondence received either shortly after the PHSO's decisions of

June 2013, or following its review of that decision in December 2013. In those communications the complainant is concerned about the medical advice received during the investigation, he challenges whether it is ethical for such advice to be offered without any direct contact between the doctor and himself and queries the competence of the doctor. To be clear, although the advice was disclosed, the identity of the doctor was not. A number of these communications make it clear that the complainant intends to complain to the GMC about the conduct of that doctor.

22. Other communications target specific individuals within the PHSO who he accuses being responsible for his stated decision to commit suicide and express the hope that following his death they will be held responsible for his death. Some of the communications contain profane language.
23. Within the context set out above the Commissioner accepts that the complainant's request is an attempt to discover the identity of the doctor who provided medical advice as part of the investigation into his complaint against Ofqual. Furthermore the PHSO would have grounds for fearing the doctor in question could become the focus of further communications of a distressing nature similar to that discussed above. The Commissioner considers that it is not so much the threat to make a complaint about the doctor to the GMC that is of concern. The Commissioner anticipates that such complaints would be objectively investigated and where there was no case to answer, the doctor would be absolved. The Commissioner notes that the PHSO has argued that even though this may be the case, due to the very nature of their role, doctors providing it with advice are more likely to attract complaints and that any complaint process can be stressful and disruptive to the professional life of the doctor concerned.
24. The Commissioner has published guidance on section 14(1) which list a number of factors which may indicate that a request is vexatious. The PHSO has identified which of those indicators it believes are met by the request.
25. The first indicator concerns the tone of the language used in the communications. If it goes beyond the level of criticism that a public authority or its staff should reasonably expect this would suggest the request is vexatious. Although the PHSO accepts the tone of actual request is neutral the other communications which form part of the complainant's campaign to challenge the PHSO's decision do contain offensive language. He also blames staff for his imminent suicide.
26. If a request itself, or where the request read in conjunction with related correspondence, reveals the applicant harbours a personal grudge

against individuals this is indicative of a vexatious request. The PHSO has argued that the complainant has focussed on the clinical adviser and the advice they provided as being the reason his complaints were not upheld in full. The extracts from his communications also show a pattern of targeting specific individuals within the PHSO for the injustice he feels he has suffered.

27. Another indicator of a vexatious request is where it demonstrates unreasonable persistence. This can be where a request seeks to re-open an issue which has been comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny. The PHSO argues that ultimately the complainant is attempting to re-open his complaint against Ofqual and makes the point that he had been focussing on the clinical adviser in that complaint since June 2013.
28. Requests which contain unfounded allegations may also be vexatious. The PHSO concedes that the actual request does not contain any allegations. However it relies on the related correspondence in which the complainant alleges that PHSO has ruined his life.
29. Intransigence is another indicator of a vexatious request. The PHSO has simply stated that there is evidence of intransigence on the case file but has not provided the Commissioner with that evidence. Therefore the Commissioner will not consider this argument further.
30. PHSO also argues that the complainant has made frequent and overlapping requests. It argues that the complainant has requested the clinical adviser's name on several occasions.
31. The PHSO argued that the request could be seen as a deliberate attempt to cause annoyance. This is based on the complainant's stated aim to report the doctor to the GMC, which, the PHSO argues, would disrupt the ability of that doctor to practise despite the fact that it has advised the complainant that the GMC is not the appropriate place to complain about advice received in relation to an investigation.
32. If there is no obvious intent to obtain information a request may be vexatious. The PHSO considers that this indicator is partly met and that although the complainant certainly desires the name of the clinical adviser his real concern flows from a disagreement with the PHSO's decision.
33. The final ground presented by the PSHO is that the request is vexatious because it is futile. A request may be considered futile if it relates to an issue at hand which individually affects the requestor and has already been conclusively resolved by the authority or subjected to some form of independent investigation. The PHSO maintains that it has already

carried out a thorough initial investigation of the complainant's concerns about Ofqual and then went onto to conduct a review of that decision.

34. The Commissioner does not accept all the PHSO's points. Regarding its argument that the complainant was demonstrating an unreasonable persistence the Commissioner recognises that the complainant genuinely believes that the outcome of his complaint to the PHSO was wrong and the medical advice it received was flawed. The PHSO has informed the Commissioner that at the time of his request, as well as intending to complain to the GMC about that advice, the complainant was also seeking a judicial review of the PHSO's investigation. The complainant was therefore still exploring what legitimate avenues for challenging the PHSO's decision existed. Although the judicial review ultimately failed, at the time of the request, there were still legitimate means of addressing his concerns available which the complainant was entitled to pursue. Therefore the Commissioner only places limited weight on this argument. He does however accept that the complainant had exhausted the PHSO's internal procedures.
35. In his communications the complainant said that the PHSO had ruined his life. The PHSO regard this as an unfounded allegation. The Commissioner considers that rather than being an allegation, it is more in the nature of an exaggerated expression of the complainant's dissatisfaction with the PHSO's finding.
36. The PHSO has also claimed that the request is one of a number of overlapping requests for this information. Unfortunately the PHSO has not provided details of those other requests. In any event the Commissioner recognises that there are grounds for the complainant believing he is entitled to this information. He has drawn the Commissioner's attention to the GMC's guidelines which say a doctor should provide both their name and GMC number on request. The complainant has also provided a copy of a blank contract for an external adviser from 2012. This contains a provision making the adviser aware that their name could be disclosed as a result of their involvement in an investigation. If someone, not unreasonably, believes that they are entitled to information, but their request for it is refused, it is understandable if this leads to further request for that information being made. It is within this context that any repeated request for this information has to be seen. Therefore the Commissioner does not give any weight to this ground.
37. For completeness, if the complainant did have an indisputable right to the names of doctors and their GMC numbers as he believes, this would have a significant bearing on the case. When considering the pattern of request making account would have to be taken of the PHSO's refusal to provide such information and the frustrations that this could cause.

However as part of his investigation the Commissioner initially considered whether the actual information was exempt under section 40(2) ie whether disclosing the information would breach the DPA. He considers the situation is not as clear cut as the complainant believes. Although it has not proved necessary to making a finding on the application of section 40(2), through his investigations he recognises the arguments presented by the PHSO in respect of that exemption are not without some merit.

38. The Commissioner does not place any great weight on the PHSO's arguments that the request is a deliberate attempt to cause annoyance or that there is no obvious attempt to obtain information. He is satisfied that the complainant was seeking information which he believed would ultimately assist him in challenging the outcome of the PHSO's investigation into Ofqual.
39. However the Commissioner does accept that the request needs to be seen in the context of the complainant's other communications with the PHSO. As such it is part of an attempt to identify the clinical adviser who provided advice as part of the investigation into his complaint against Ofqual. Further, it can be seen as part of an attempt to challenge the PHSO's decision in respect of that investigation. As discussed above, the Commissioner accepts that there were still routes available through which the complainant could pursue his concerns. The Commissioner is satisfied though that the request was, at least in part, an attempt to put pressure on the PHSO to reconsider the matter even though his complaint had exhausted the PHSO's own complaints procedures.

The strongest ground for arguing the request is vexatious though relates to the tone and language of the communications of which the request forms a part. Seen in this context the request would have raised genuine and understandable concern that providing the information could have led to the clinical adviser in the Ofqual investigation becoming the focus of the complainant's dissatisfaction. Based on the other communications, there was a real possibility that this could have manifested itself as accusations that this doctor was responsible for the complainant contemplating suicide. Therefore the Commissioner accepts that the receipt of the request could have caused distress to the doctor in question, the other doctors whose information was also caught by the request, as well as other staff within the PHSO who would have to manage that request. Although the Commissioner recognises the complainant feels very strongly that the outcome of the PHSO's investigation was flawed this does not justify the distress caused. The Commissioner finds that the request was vexatious and that the PHSO is entitled to refuse it under section 14(1).

Right of appeal

40. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

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