

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 November 2017

**Public Authority:** General Optical Council  
**Address:** 10 Old Bailey  
London  
EC4M 7NG

#### Decision (including any steps ordered)

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1. The complainant has requested communication exchanges between the General Optical Council (GOC) and its Stakeholder Group about the formulation of a particular code. GOC's position is that the requested information is exempt from release under section 36(2)(b) and (c) of the FOIA as it considers that disclosing it would inhibit the free and frank provision of advice and views, or would otherwise prejudice the effective conduct of public affairs.
2. The Commissioner's decision is that:
  - Sections 36(2)(b)(i) and (ii) are engaged but that the public interest favours disclosing the requested information.
  - Section 36(2)(c) is not engaged.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
  - Release the requested information to the complainant, with personal data redacted in line with section 40(2) of the FOIA, as appropriate.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 27 October 2016, the complainant wrote to GOC and requested information in the following terms:

*"I am requesting copies of the exchanges of communication between the GOC and its Stakeholder Group relating to the formulation of the Voluntary Code. The time-period is the time-period over which this communication took place."*

6. In correspondence dated 16 November 2016, GOC indicated that the requested information was exempt from disclosure under section 36(2)(b) and (c) of the FOIA and that it was seeking the opinion of a qualified person. On 15 December 2016, GOC provided a response to the request confirming its reliance on section 36(2)(b) and (c) and that it considered that the public interest favoured maintaining the exemptions.
7. GOC provided an internal review on 21 February 2017. It upheld its position and addressed the complainant's concerns about a particular policy.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 4 July 2017 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on GOC's application of section 36(2)(b) and (c) to the complainant's request and the balance of the public interest.

## **Reasons for decision**

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10. GOC has provided the Commissioner with a background to the complaint, which it considers has a bearing on the public interest arguments that the complainant has put forward.
11. GOC has explained that, as the regulator for UK optometrists and dispensing opticians, it has a clearly defined public protection remit. For

it to be effective it needs the trust and engagement of both the public and its stakeholders.

12. GOC says that the complainant has been in communication with it for a prolonged period regarding the issue of contact lens substitution, at a senior level. The Commissioner understands that 'contact lens (or brand) substitution' refers to issues associated with the practice of buying contact lenses online, particularly in cases where a customer's current contact lens is substituted with a contact lens that is different from a customer's specification. GOC says it has tried to actively engage with the complainant regarding the issue of contact lens substitution and, in March 2016, met him to discuss the matter at length. To date, the complainant remains dissatisfied with the responses GOC has provided.
13. The issue of brand substitution was discussed at length by a Stakeholder Working Group and Steering Group, when drafting a proposed Voluntary Code for online contact lens suppliers. After discussion within the group, the proposed Voluntary Code was opened up to public consultation.
14. GOC has told the Commissioner that the complainant told it that he was unable to engage with the Group during discussions about substitution. GOC has noted that the consultation was open to all without restriction and that the complainant did provide a lengthy submission to the consultation in October 2015. The outcome of the consultation was subsequently published on GOC's website in order to be transparent and forthcoming about the debate and concerns raised.
15. GOC considers it is pertinent that, although the complainant considers that he was not involved in the Working Group, he did attempt to influence the decision of the Group by engaging a lawyer to write an open letter to the Group members stating all legal options would remain open if the Group's decision was one that was at odds with the complainant's opinion, and not in the interest of a business that he owns.
16. When the consultation outcome was published, GOC says that the complainant complained that too much information had been published and the responses to the consultation (which were published verbatim) would damage his business. GOC says that the complainant has repeatedly asked for a public apology for the publication of a response to the consultation that he did not agree with.
17. Following the consultation, a decision was taken that there was no evidence to suggest any risk with brand substitution and, as such, the requester's business interests were not damaged or impeded. This information; that is, that there was no evidence to support risks

associated with brand substitution, was communicated online to the public via GOC's website. The Commissioner understands that the decision was subsequently taken to withdraw the proposed Voluntary Code.

### **Section 36 – prejudice to the effective conduct of public affairs**

18. GOC's position is that the information it holds that falls within the scope of the complainant's request, to which it has applied section 36, is the minutes from a series of Stakeholder Working Group meetings that took place during 2015.
19. Section 36(2)(b) says that information is exempt information if disclosure would, or would be likely to, inhibit (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) says that information is exempt information if disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
20. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
21. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
22. To determine, first, whether GOC correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
23. From the information GOC has provided to her, the Commissioner notes that the qualified person was GOC's then Chief Executive/Registrar, Samantha Peters.

24. Ms Peters' opinion was sought on 12 December 2016 and she was provided with GOC's correspondence with the complainant about his FOI request and wider concerns, Stakeholder Working Group minutes and email correspondence from members of the Stakeholder Working Group and Steering Group. GOC has told the Commissioner that Ms Peters also discussed the matter with its Director of Strategy, Compliance Manager and Compliance Officer. GOC has provided the Commissioner with copies of the written material and a copy of Ms Peters' opinion, which the Commissioner has reviewed as part of her considerations.
25. Ms Peters' opinion was that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were engaged.
26. The Commissioner is satisfied that the opinion was that of the appropriate qualified person for GOC. She has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
27. With regard to section 36(2)(b)(i), Ms Peters' view was that prejudice would be likely to occur if the requested information was disclosed as stakeholders would be less likely to engage with GOC on this and other issues. With regard to sections 36(2)(b)(ii) and 36(2)(c), Ms Peters' view was that prejudice would occur because, to enable the continued success of GOC and the optical centre as a whole, discussions must take place in a secure environment to facilitate free and frank discussion. She considered that releasing the requested information would make stakeholders less likely to engage.
28. As a prejudice-based exemption, section 36(2) necessitates that a decision is made about whether there 'would' be a harmful effect as a result of disclosure or whether it 'would be likely' that the harmful effect would occur; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.
29. With regard to section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice for the purposes of deliberation.

30. Section 36(2)(c), on the other hand, refers to the prejudice that would be likely otherwise to apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with any other exemption, as in this case, the prejudice envisaged must be different to that covered by the other exemption.
31. With regard to the above point, the Commissioner notes that the qualified person's position is that the effective conduct of public affairs would be prejudiced because the free and frank provision of advice would be inhibited. No separate and different prejudice has been identified. Consequently, the Commissioner does not consider section 36(2)(c) to be engaged as the arguments relied upon by Ms Peters appear to relate only to section 36(2)(b)(i) and 36(2)(b)(ii).
32. The Commissioner is satisfied that the qualified person's opinion that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged is a reasonable opinion to hold. The opinion given addresses the relevant issues and expresses a reasoned view on the likely impact of disclosure. She has therefore concluded that the withheld information does engage these particular exemptions in this case.
33. The Commissioner has noted that, in its wider submission to the Commissioner, GOC has told her that the Stakeholder Working and Steering Groups comprised of external members from the optical professions as well as a patient representative. At the time of their formation, members of the Groups were informed that discussions within the Group would remain confidential. Members of the Group were required to sign an undertaking that GOC information presented to the Group during the meetings must not be shared outside of the Group. Because of this, GOC considers that it would not be unreasonable for members to believe that this would also apply to information they shared within the Group during these discussions.

### **Public interest test**

34. Section 36(2)(b)(i) and section 36(2)(b)(ii) are qualified exemptions so the public interest test set out in section 2(2)(b) of the FOIA must be applied. The requested information, though exempt, can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
35. With regard to section 36(2)(b)(i), the Commissioner notes that it was the qualified person's opinion that disclosure of the withheld information '*would be likely*' to have the effects set out in sections 36(2)(b)(i), as opposed to that it '*would*' have those effects. In her view this means that there is a real and significant chance of the prejudice occurring, even though the probability may be less than fifty per cent. The

Commissioner has taken this into account in assessing the public interest arguments in favour of maintaining the exemption.

36. With regard to section 36(2)(b)(ii), the Commissioner notes that it was the qualified person's opinion that disclosure of the withheld information '*would*' have the effects set out in sections 36(2)(b)(ii), as opposed to that it '*would be likely to*' have those effects. '*Would prejudice*' means that it is more likely than not (ie a more than 50% chance) that prejudice would occur.
37. Following the Information Tribunal's decision in (EA/2006/0011 & EA/2006/0013), it is the Commissioner's opinion that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely inhibition on the free and frank provision of advice, the free and frank exchanges of views for the purposes of deliberation and the likely prejudice to the effective conduct of public affairs.
38. GOC considered the following factors for disclosure:
  - Disclosing the requested information may increase the quality of the advice it receives for its stakeholders.
  - The content of its deliberation may be enhanced if there was the expectation that related information would be made public.
39. The Commissioner considers there is also a general argument for disclosure on the grounds that it demonstrates transparency and accountability on behalf of the public authority concerned. She has noted, from the information GOC has provided to her, that one or two of the members of the Stakeholder Group appear to consider this argument is valid in this case.
40. GOC considered the following factors against disclosure:
  - Discussions about substitution have been transparent, as evidenced by the public consultation, publication of the verbatim responses and outcome of the consultation.
  - It is important that free and frank discussions can be held in private in order for GOC to make appropriate decisions in the interests of protecting the public – which remains its priority. GOC considers that releasing the withheld information would significantly damage stakeholder trust in GOC and would make stakeholders less likely to engage with it in its public protection function. GOC argues that this would therefore prejudice the effective conduct of public affairs.

- With regard to the consultation, GOC notes that the final decision was that the Voluntary Code was discontinued and that decision has been published.
  - Releasing the information risks confusing the public on the issue of substitution.
41. In a submission to the Commissioner dated 20 September 2017, the complainant presented the following arguments for disclosure:
- The need for a Voluntary Code was predicated on the belief that 'brand substitution' of soft spherical contact lenses, whilst not illegal, carried public health risks unless the transaction was approved in advance by an optician. The complainant considers there has never been any evidence to justify this.
  - A consequence of the Voluntary Code, had it been implemented, would have been to put out of business a particular company that makes unbranded daily disposable contact lenses.
  - The public should know whether the Stakeholder Group (whose members include the Association of Contact Lens Manufacturers and particular retailers) advised GOC that there is no risk to the public by brand substitution and, if the Group did advise GOC to this effect, why GOC continued to proceed with the Voluntary Code.

### **Balance of the public interest**

42. As above, the position of GOC's qualified person is that, with regard to section 36(2)(b)(i), disclosure would be likely to inhibit the free and frank provision of advice and that, with regard to section 36(2)(b)(ii), disclosure would inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner is satisfied that these are reasonable opinions to hold and that these exemptions are engaged.
43. The Commissioner has gone on to consider the severity, extent and frequency of that inhibition in forming her own assessment of whether the public interest test dictates disclosure.
44. GOC's public interest arguments against disclosing the requested information centre on disclosure diminishing stakeholders' ability to discuss matters freely and in private – the so called 'chilling effect' – and that disclosure would diminish stakeholders' trust in GOC and make them less likely to engage with it.
45. The Commissioner has noted that the Stakeholder Group meetings, to which the withheld information is associated, had taken place during the



previous year – 2015 - at the time of the request in October 2016. The Group had been convened to discuss the merits of a Voluntary Code concerned with retailing particular contact lenses online. A Draft Voluntary Code was prepared and published but the decision was subsequently taken to withdraw the proposed Code.

46. As discussed in her published guidance on section 36<sup>1</sup>, chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
47. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
48. The Commissioner does not find GOC's public interest arguments for withholding the information compelling. It seems to her that, at the time of the request, the business of the Voluntary Code was no longer current. Releasing the requested information during 2015, or while deliberations about whether or not to confirm the Voluntary Code were ongoing, *may* have inhibited those involved in the discussions. However, the deliberations in this case were concluded at the time of the request and, in the Commissioner's view, the content of the information in question is not, in the scheme of things, especially sensitive. She is therefore not persuaded that the specific Stakeholder Group in question could now be inhibited if the information was to be released.
49. Nor has the Commissioner been persuaded, by the information that GOC has provided to her, that free and frank exchange of views and provision of advice would, or would be likely to be inhibited in the future if the requested information was to be released. The qualified person has stated that inhibition would, or would be likely to, occur and that disclosure would make stakeholders less likely to engage with it. But

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

the qualified person has not provided any more information or evidence to support this opinion.

50. The Commissioner has noted, in GOC's submission, its description of the history between it and its Working Group and the complainant. However, she does not consider that this is robust evidence that stakeholders would be less likely to engage with it in the future if the requested information was to be released.
51. The Commissioner has, however, also noted that the public interest arguments for disclosure that the complainant has put forward are limited to the interest he has in its release, and not any wider public interest there may be in the information. In the Commissioner's view, the requested information has little wider public interest, particularly since the Voluntary Code was withdrawn and no individual or business was therefore affected by it.
52. That said, because she finds there is no compelling public interest reason for withholding the information, she finds that the general public interest in public authorities being transparent and accountable is of sufficient weight to tip the balance in favour of disclosure on this occasion.

## Right of appeal

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53. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. 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** .....

**Pamela Clements**  
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