

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 2 November 2023

**Public Authority:** Professional Standards Authority for Health and Social Care

**Address:** 16-18 New Bridge Street  
London  
EC4V 6AG

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of a PSA review and any documentation/information used to produce its review of a Medical Practitioners Tribunal Service (MPTS) Tribunal regarding a named individual held between specified dates. The PSA provided some of the information it held but refused to provide anything further, citing section 36 of FOIA – prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that the PSA has correctly withheld the requested information and the public interest favours withholding the requested information.
3. The Commissioner does not require further steps.

## Background

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4. The PSA's website explains the following:

"Each statutory **regulator** has a 'fitness to practise' process for handling complaints about health and care professionals. The most serious cases are referred to formal hearings in front of fitness to practise committees.

We review every final decision made by all those fitness to practise committees. If we decide the decisions do not protect the public properly we can refer them to Court to be considered by a judge." <sup>1</sup>

## Request and response

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5. The complainant made the following request for information under the FOIA (apparently on 16 June 2023):

"I wish to make a Freedom of Information Request (FOI) for a copy of the PSA review and any documentation/information used to produce the review of the MPTS [Medical Practitioners Tribunal Service] tribunal, [redacted name], held between [redacted dates]."

The Commissioner does not have the date of receipt of the original request and it is not mentioned in either the PSA's response or review.

6. The PSA responded on 18 July 2023 and provided a link to its decision-making process and remit and an attached copy of a determination from MPTS that it held which is in the public domain. It refused to provide its specific decision-making regarding this case (other than the 'Recommendation' and the 'Director's review comments'), citing section 36 of FOIA.
7. On 21 July 2023 the complainant made an internal review request where they expressed concern at an exemption being cited.
8. The PSA provided an internal review on 12 September 2023 in which it maintained its original position – that the information was exempt under section 36(2) of FOIA, apart from its recommendation which the PSA

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<sup>1</sup> [Decisions about health and care practitioners \(professionalstandards.org.uk\)](https://professionalstandards.org.uk)

had decided, on balance, should be provided in the interests of transparency.

## Scope of the case

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9. The complainant contacted the Commissioner on 17 September 2023 to complain about the way their request for information had been handled because an exemption had been cited for some information. The complainant has told the Commissioner that they had written to the Chief Executive twice to disagree with the citing of section 36 and the contention that disclosure was not in the public interest. Having been given an incorrect address, the complainant did not receive the internal review for some time. The complainant does not accept either the refusal to provide the information or what is described as “delay tactics”.
10. The Commissioner considers that the scope of his investigation is to consider the PSA’s citing of section 36(2)(b)(i), (ii) and 36(2)(c) of FOIA.

## Reasons for decision

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### Section 36 – Prejudice to the effective conduct of public affairs

11. Section 36 FOIA says that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

(2)(b) 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, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

12. The PSA has cited section 36(2)(b)(i), (ii) and 36(2)(c) regarding the withheld information which the Commissioner has been provided with. The information that falls within the scope of section 36 relates to a review conducted by its internal legal advisers.

13. The Commissioner is required to consider the qualified person's (QP) opinion as well as the reasoning which informed that opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
14. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person (QP) unless the information is statistical.
15. The QP at the PSA is Alan Clamp who is Chief Executive. The Commissioner is satisfied that they were the appropriate QP to give an opinion. The opinion of the QP was sought in order to respond to the complainant. At that time the QP was shown a copy of PSA's representations and a summary of the nature of the information falling within the scope of the request. The date on the QP opinion form for when the withheld information/submissions was shown to the QP was incorrect but the PSA has confirmed that the dates are the same as the dates the form was signed, July 2023, reviewed in October 2023.
16. In the QP form there were arguments in favour of withholding the information and counter arguments were presented.
17. The Commissioner next needs to establish whether the QP's opinion was reasonable.

### **Is the qualified person's opinion reasonable?**

#### **Section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)**

18. The QP in relation to the exemption at section 36(2)(b) must give an opinion that the release of the requested information would or would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
19. The Commissioner's guidance<sup>2</sup> explains the prejudice in section 36(2)(c) as referring to an adverse effect on a public authority's -

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<sup>2</sup> [Section 36 - Prejudice to the effective conduct of public affairs | ICO](#)

“ability to offer an effective public service or to meet [its] wider objectives or purpose, but the effect does not have to be on [its] authority; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure”.

20. The guidance examines the definition of what is ‘reasonable’ in the context of section 36:

“...if it is an opinion that a reasonable person could hold – then it is reasonable...This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person’s opinion does not become unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person’s position could hold.”

21. In order to determine whether section 36 is engaged the Commissioner must decide whether the QP’s opinion was a reasonable one. In doing so the Commissioner has considered the following factors:

- Whether the prejudice/inhibition relates to the specific subsection that has been cited. If the prejudice or inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request.
- The qualified person’s knowledge of, or involvement in, the issue.

22. The Commissioner’s guidance makes it clear that he is primarily concerned with the reasonableness of the substantive opinion and that he is not explicitly required to assess the quality of the reasoning process that lay behind it. It is the content of the opinion or the submission made to support it that is relevant to his assessment of whether the opinion is reasonable.

23. The withheld information was described to the QP and they signed to the opinion that the inhibition “would be likely to” occur regarding section 36(2)(b)(i) but that the inhibition/prejudice “would” occur regarding sections 36(2)(b)(ii) and 36(2)(c).

24. The PSA argued that it needs to be -

“able to function to the best of its ability and makes challenging

decisions it is essential that the s29 team and its panels and advisors can discuss things frankly and freely”.

25. The PSA’s view is that,

“It is equally as important that they [PSA] are able to take notes that accurately record the key points of any meeting can be recorded in an appropriate way without fear of disclosure. The information is often of a sensitive and personal nature.”

The nature of its conversations -

“could cause alarm amongst members of the public or the Regulator as every scenario, even those unlikely have to be considered and challenged - a partial release of information or information without full context and mis reporting could cause a lot of confusion and uncertainty. The s29 process relates to fitness to practise cases against individual registrants who have a right to a fair process and confidentiality where appropriate.”

26. The PSA makes the same argument to the Commissioner regarding all three limbs of section 36 of FOIA: “Without transparent information and honest assessments and discussions the Authority would be unable to make the best decisions for public protection.”

27. The PSA accepts “that public trust and confidence relies on transparency and the public have a right to understand decision making reasons”. This right is considered “when publishing decisions about outcomes and ensure that appropriate information is provided”.

28. The Commissioner accepts that the QP’s opinion is reasonable but does not accept that enough argument has been provided to support the contention that the inhibition/prejudice ‘would’ occur. However, he agrees that the three limbs are engaged at the lower level of inhibition/prejudice.

### **Public interest test**

29. Although he has accepted that the QP’s opinion is reasonable, the Commissioner next needs to establish where the public interest lies in this matter.

### **Public interest factors in favour of disclosing the requested information**

30. Other than “transparency” the PSA does not provide any public interest arguments for the release of the requested information.

31. The complainant argued in their request for a review that -

“In order for the public to have confidence in Regulatory Organisations, a practise of openness and transparency at all levels of organisation should be demonstrated.”

Without the release of the requested information, “reputation and public confidence in the PSA will be seriously damaged”.

32. The complainant further explained to the Commissioner that it is in the public interest to release this information:

“The recent Letby revelations regarding these sort of tactics have highlighted these concerns and it appears that my request is just a continuation of this modus operandi further putting patients at risk. I therefore ask the ICO to ensure the PSA release the review of the MPTS Tribunal Hearing of [redacted name] so that the Public can be confident they are being safeguarded by the regulatory bodies concerned with the NHS.”

The complainant asserts that it is “incorrect” to state that release is not in the public interest, in the light of the Letby case, “it is very much in the public interest to release the review to maintain confidence in the National Health Service complaints process.”

### **Public interest factors in favour of maintaining the exemption**

33. The PSA argues in its internal review that:

“it is in the public interest for PSA staff and advisers to be able to have free and frank conversations between themselves and the regulators in order to reach informed decisions that protect the public.”

34. The PSA confirmed in a phone call with the Commissioner that it was protecting its process by not releasing the requested information.

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

35. The Commissioner both acknowledges and understands that the complainant has strongly-held views in this matter. The Commissioner has had the advantage of having seen the withheld information, whilst the complainant is in the dark as to the content and its extent. Set against this, the complainant has been able to access the very detailed MPTS determination regarding the named doctor. The Commissioner notes that the PSA has published some anonymised case studies on its website where it has appealed the regulator’s final fitness to practise decisions. That is not the case here and the request itself would

inevitably reveal personal information. The PSA did disclose the review's "Recommendation" and "Director's review comments". It is the Commissioner's decision that releasing the PSA's review would not add to the public's understanding in this matter whilst undermining the PSA's ability to offer an effective public service and meet its purpose.

## Other matters

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36. The Commissioner could not include in his investigation the length of time the PSA took to carry out an internal review because it is not a statutory matter under the FOIA. However, the review exceeded the recommended 20 working days. Although it was within the maximum recommended timeframe of 40 days, the delay was due to an error on the part of the PSA and not because it was addressing complex issues, consulting with third parties, or considering substantial amounts of information. The Commissioner expects the PSA to be mindful of his guidance<sup>3</sup> in future.

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<sup>3</sup> [Section 45 – Code of Practice, request handling | ICO](#)



## Right of appeal

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37. 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: 0203 936 8963  
Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**