

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 February 2014

Public Authority: General Medical Council
Address: 3 Hardman Street
Manchester
M3 3AW

Decision (including any steps ordered)

1. The complainant has requested a copy of the review by a named individual into a Doctor's Fitness to Practice case. The General Medical Council (GMC) argued that this information was exempt from disclosure on the basis of section 42 (legal professional privilege) of FOIA.
2. The Commissioner's decision is that the requested information is exempt from disclosure on the basis of section 42 and that in all the circumstances of the case the public interest favours maintaining the exemption.

Request and response

3. On 27 February 2013, the complainant wrote to the GMC and requested information in the following terms:

"I should be grateful if you would forward a copy, preferably by email, of [named individual] review of [named individual's] Fitness to Practice case in light of the evidence presented by [named individual] at his Fitness to Practice hearing. I believe that this review was carried out in 2008".
4. The GMC responded on 22 March 2013. It stated that the information requested was exempt from disclosure under section 42 of FOIA.
5. Following an internal review the GMC wrote to the complainant on 12 July 2013. The review upheld its original position that the information

was exempt under section 42 FOIA. The GMC also explained that the information was also exempt under section 40(2) (personal data of a third party) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 24 October 2013 to complain about the way his request for information had been handled. Specifically the complainant argued that section 42 does not apply as a substantive part of the legal advice is already in the public domain and there is strong public interest in the release of the document.
7. The Commissioner will first consider whether the information is exempt from release under section 42. If he finds this does not apply, he will then go on to consider section 40(2).
8. The Commissioner notes that in the course of this investigation, he has considered all of the arguments made by the complainant, including those not specifically referenced in this notice.

Reasons for decision

Section 42 – legal professional privilege

9. Section 42 of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
10. There are two categories of legal professional privilege: advice privilege and litigation privilege.
11. In this case the category of privilege the GMC is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisors, and any part of the document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The

determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.

12. Having reviewed the legal advice the Commissioner is satisfied that in this case the client was the GMC and the advice was provided by a legal advisor. The subject of the advice concerned a review of a Doctor's Fitness to Practice case. The Commissioner is satisfied that the dominant purpose of the advice was clearly the provision of legal advice and the exemption contained at section 42(1) is engaged.

Public interest test

13. The public interest test is set out in section 2 of FOIA. The test requires the balancing of all the public interest factors in favour of maintaining the exemption against all the public interest factors in favour of disclosing.
14. The information can only be withheld if, in all the circumstance of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
15. As stated in the Commissioner's guidance, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind the legal professional privilege i.e. safeguarding the confidentiality of communications between a lawyer and their client.

Public interest in favour of maintaining the exemption

16. The GMC has argued that the principle of legal professional privilege (LPP) is to safeguard the full and frank exchanges between a legal advisor and their client and it believes this is sufficiently strong to justify withholding the requested information. It further argues that there is a requirement for justification for disclosure to outweigh the clear interest of the exemption under section 42 of FOIA. It explains that it does not believe that such compelling justification exists in this case.

Public interest in favour of disclosing the information

17. The complainant has argued that a substantive part (the conclusion) of the legal advice is already in the public domain. He argues that the LPP has therefore been waived.
18. The complainant also argues that the legal advice has been shared with a third party, namely the Doctor's Counsel. He further argues that this also waives the LPP.

19. He further argues that if no litigation is likely, this may be a factor to take into account in favour of disclosure as there may be no significant harm caused to the holder of the privilege.

Balance of the public interest test

20. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) was clear:

'The fact there is already inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41)

21. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
22. The complainant has argued that part of the legal advice has been disclosed on the internet by the Doctor's Counsel and that the public interest consideration is now in favour of disclosure. The Commissioner has reviewed the legal advice in question and would disagree with this argument. He does not consider the document on the internet contains the full details of the response from the solicitor or describes the full content of the advice given. The Commissioner therefore does not consider the information has been disclosed to the world at large.
23. The Commissioner has also considered the complainant's argument that the advice would be unlikely to be harmful. However, the withheld legal advice includes more details than a simple statement on the Fitness to Practice case. Rather it includes a detailed consideration of various issues concerning the Fitness to Practice case including details of evidence. The Commissioner therefore takes the view that disclosure of the withheld advice would be likely to have a material effect on the GMC's ability to secure free and frank legal advice in the future.
24. The Commissioner has also considered whether the advice is still live. The advice is approximately six years old and the GMC has expressed that normally it would seek new advice rather than rely on previous advice. However it explained that there is potential for some the advice to be relied upon in future cases of a similar nature. The Commissioner

notes that although the advice is not live, this does not provide a strong enough argument for disclosure of the information.

25. The Commissioner considers that there is a very strong public interest in the GMC being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and may even have an impact upon the extent that legal advice is sought which would not be in the public interest.
26. The Commissioner concludes that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. The GMC have correctly applied section 42(1).

Right of appeal

27. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

28. 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.
29. 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

Rachael Cragg
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