

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested the GMC to disclose any legal opinions, reasonings or internal investigations in relation to the Medical Practitioners Tribunal Service's (MPTS) practice of publishing information about forthcoming tribunal hearings prior to allegations being tested. The GMC confirmed that it does not hold this information but holds other legal advice concerning its practice to publish information after a hearing has taken place. The complainant proceeded to request a copy of this legal advice, to which the GMC responded and cited section 42 of FOIA.
2. The Commissioner's decision is that the GMC is entitled to rely on section 42 of FOIA. He has however recorded a breach of section 10 of FOIA, as the GMC failed to respond to the complainant's first request within 20 working days of receipt.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 10 July 2021, the complainant wrote to GMC and requested information in the following terms:

"Please can you provide legal opinions, reasonings or internal investigations in relation to the MPTS publishing prior to a hearing untested allegations of MPTS employers, the GMC. i.e. MPTS publishing in significant detail `...information about forthcoming tribunal hearings on its website, both in a list of current and upcoming MPTS hearings and via a website notice.""
5. As the complainant received no response, they chased the GMC on 11 August, 10 September and 30 October 2021. He also requested the GMC to carry out an internal review.
6. The GMC responded on 11 November 2021. It confirmed that it does not hold the requested information. The GMC explained that it does however hold legal advice about what it can and should publish after a hearing has taken place.
7. The complainant contacted the GMC on 11 November 2021 and requested a copy of the legal advice referred to.
8. As the complainant received no response, they chased the GMC on 26 November 2021.
9. The GMC responded on 29 November 2021. It refused to disclose the legal advice citing section 42 of FOIA.
10. The complainant requested an internal review on 30 November 2021.
11. The GMC carried out an internal review and notified the complainant of its findings on 16 December 2021. It upheld the application of section 42 of FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 3 January 2022 to complain about the way their request for information had been handled. They disagree with the GMC's application of section 42 of FOIA and the GMC's decision to treat their request for this legal advice as a separate request under the legislation. The complainant felt it was a continuation of their first request and the GMC was not therefore entitled to a further 20 working days to respond. The complainant also raised concerns over the delays they incurred.

13. The Commissioner considers the scope of his investigation to be to determine whether or not the GMC is entitled to rely on section 42 of FOIA. He will also consider how both requests were handled and whether they were handled in accordance with the provisions of FOIA.

Reasons for decision

Section 42 – legal professional privilege (LPP)

14. Section 42(1) states that: "Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."
15. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry EA/2005/0023*, the FTT described LPP as [9]: "a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."
16. LPP protects an individual's ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved to make sure communications between a lawyer and their client remained confidential.
17. Section 42 is a class based exemption. The requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information. However, this exemption is subject to the public interest test.
18. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but, in both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

19. The Commissioner has not requested sight of the withheld information in this case. He is satisfied from the internal review response that the withheld information is described by the GMC as external legal advice provided by Counsel. It is therefore a confidential communication between client (the GMC) and professional legal adviser (Counsel) for the sole and dominant purpose of obtaining legal advice. The GMC has explained that it is legal advice in relation to its practice of publishing the outcome of hearings after they have taken place. The Commissioner is satisfied that the withheld information falls within the definition of legal advice privilege and is therefore subject to LPP.
20. Section 42 is a qualified exemption. It is therefore subject to the public interest test. The Commissioner must consider in all the circumstances of the case whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

21. The GMC confirmed that it considered the arguments for and against disclosure and reached the view that the public interest falls in favour of maintaining the exemption. It argued that there is an in-built public interest in maintaining the exemption in respect of legal advice given the relationship between a legal adviser and their client.
22. The GMC confirmed that it did not consider the arguments for the public disclosure of the full advice on this issue are sufficient to outweigh the public interest in maintaining the exemption. It also stated that it is also clear that the legal advice in question does not specifically relate to the original question and information request posed or the issues this touched on.
23. The Commissioner recognises the public interest in transparency, accountability and in members of the public gaining access to information to enable them to understand more clearly why particular decisions are made, why certain processes are followed, why information is published in relation to doctors prior to and after hearings and on what legal advice this may or may not be based on.
24. However, it is noted in this case that the withheld information does not fall within the parameters of the complainant's initial request. The Commissioner therefore questions how useful the withheld information would be to the complainant and his overarching concerns in respect of the publication of information prior to a hearing. There also needs to be strong public interest grounds to justify disclosing information that attracts LPP. The Commissioner cannot identify any in this particular case and nor has any been raised by the GMC or the complainant. He notes the complainant's concerns over the disclosure of information prior

to a hearing, especially about untested allegations, and how this affects doctors. But the Commissioner does not consider these concerns alone are compelling enough or of such public interest to warrant overriding the long standing principle and importance of LPP.

25. The Commissioner considers the public interest rests in maintaining and protecting the ability of public bodies to seek and receive high quality legal advice when they consider it appropriate to do so – without worrying that that advice will be disclosed into the public domain.
26. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

Procedural matters

27. The Commissioner notes that the GMC failed to respond to the complainant's first request within 20 working days of receipt. The complainant had to chase the GMC several times in order to obtain a response. This is unacceptable and the GMC were clearly in breach of section 10 of FOIA.
28. The Commissioner considers the GMC was correct to consider the complainant's request for a copy of the legal advice referred to in the GMC's initial refusal notice of 11 November 2021 as a new and separate information request. This legal advice did not fall within the scope of the complainant's first request, which was clearly worded for any legal opinions, reasonings or investigations in relation to the MPTS publishing *prior* to a hearing 'untested allegations...'. The legal advice the GMC holds is in relation to the practice of publishing outcomes *after* the hearings have taken place. It was therefore entitled to treat it as a new request and allow itself the statutory 20 working days permitted by section 10 of FOIA to respond. The GMC responded on 29 November 2021; well within time.

Right of appeal

29. 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

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

30. 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.
31. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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