

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 July 2016

Public Authority: Professional Standards Authority
Address: 157 – 197 Buckingham Palace Road
London
SW1W 9SP

Decision (including any steps ordered)

1. The complainant has requested information relating to the re-accreditation of the Society of Homeopaths to the Accredited Register.
2. The Commissioner's decision is that the Professional Standards Authority (PSA) has correctly applied section 36(2) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 9 October 2015, the complainant wrote to the PSA and requested information in the following terms:

"Under the Freedom of Information Act 2000 please provide all information held concerning the re-accreditation of the Society of Homeopaths to the Accredited Register.

Please interpret my request in the broadest possible terms. If you have any doubt as to whether any information falls within the scope of my request please assume it does and include it in your response."

5. The PSA responded on 6 November 2015 and provided some information under the Data Protection Act as it was the complainant's personal data.

6. Following further correspondence PSA provided more information, but withheld some information citing section 36(2) of the FOIA as its basis for doing so.
7. Following an internal review the PSA wrote to the complainant on 7 January 2016 and maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 6 February 2016 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the PSA has correctly applied section 36(2) of the FOIA to the withheld information.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

10. Section 36 states that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:
 - (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
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs
11. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure.
12. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link

between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.

13. The Commissioner's guidance states:

*"Section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion. We recognise that public authorities will tend to develop a general approach to, or policy on, releasing certain types of information, but this must not limit the qualified person's discretion. An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified person should consider the facts in each case, weigh the relevant factors and ignore irrelevant factors in order to reach their opinion."*¹

14. With regard to section 36(2)(c), the legislation does not define what is meant by the use of the term 'otherwise'. The prejudice must though be different to the prejudice covered by other exemptions in section 36(2). The Information Rights Tribunal in *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068, 4 February 2008)² found that the exemption may apply in circumstances where disclosure would harm an authority's ability to offer an effective public service or meet its wider objectives due to the disruption caused by placing information in the public domain.

The opinion of the qualified person

15. In determining whether PSA 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

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https://ico.org.uk/media/fororganisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

- Ascertain when the opinion was given
 - Establish that the opinion was given by the qualified person; and
 - Consider whether the opinion was reasonable
16. The PSA has informed the Commissioner that the qualified person is the PSA Chief Executive and has provided a copy of a signed and dated statement endorsing the use of the exemptions. The Commissioner is satisfied that the Chief Executive meets the definition of a qualified person set out in section 36(5) of the FOIA.
 17. The PSA has confirmed that the qualified person had access to all the information relating to the request. The arguments for and against applying the exemption were also considered by the qualified person. The qualified person's opinion was given on 19 October 2015.
 18. The PSA further stated that the qualified person has in depth knowledge of the accreditation scheme and was a member of the panel which reaccredited the Society of Homeopaths and therefore has detailed knowledge of the information requested and potential consequences of disclosure.
 19. The Commissioner is satisfied that the qualified person would understand the nature of the matter and would have a good knowledge of the information requested. The Commissioner has next gone on to consider whether the qualified person's opinion was reasonable.
 20. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion.
 21. The PSA further stated the qualified person has closely evaluated all of the information and has reached the reasonable conclusion that this 'would' inhibit the free and frank provision of advice and the exchange of views for the purposes of deliberation and that it 'would' prejudice the effective conduct of public affairs. After reaching this decision the qualified person, as well as the relevant team members closely considered the arguments for and against releasing the information and reached the conclusion that the public interest in transparency is, in this case, outweighed by the public interest in the Accreditation programme being successfully maintained for the purposes of public protection.
 22. Having considered the PSA's submissions the Commissioner is satisfied that the qualified person's opinion is a reasonable one.
 23. The PSA is relying on section 36(2)(b)(i) and (ii) and section 36(2)(c), namely that disclosing the withheld information would, or would be likely

to inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation, and would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs. The qualified person in this case has said that disclosing the information *would* prejudice the PSA's ability to effectively conduct its public affairs.

24. 'Would prejudice' means that it is more likely than not (that is, a more than 50% chance) that prejudice would occur. 'Would be likely' is a lower standard; it means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.
25. The PSA explained that as this is an ongoing process, without the trust of the organisations involved it would be unable to fulfil its statutory functions in relation to accreditation. The Accreditation team have received feedback from a number of registers that are involved in the accreditation process or considering applying, that they would be unwilling to provide information that they consider to be sensitive as part of the application process if they believed that it would be released into the public domain. The BACP (another accredited register) has advised the PSA that they would consider it to be a 'breach of confidentiality', highlighting the wider impact on the programme.
26. It further confirmed that this conclusion had been reached after considering responses received from other accredited registers, which they stated they would not have applied for the scheme and disclosed the information had they believed it would be disclosed under the FOI, and indications from other organisation that they would not provide full and frank information in future should it be released.
27. The PSA has applied all three exemptions provided by section 36(2) to all the withheld information. However having considered the arguments put forward by PSA, the Commissioner considers that most relate more to section 36(2)(c). Having said that he is satisfied that all the withheld information is covered by the various exemptions within section 36(2) and so hasn't queried this further with the PSA. He is satisfied that disclosure of the information requested would prejudice PSA's ability to fulfil its statutory function, and consequently it would not be able to effectively conduct its public affairs. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn

heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)³.

28. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
29. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would be likely to prejudice the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

30. The PSA has explained that it believes the following public interest arguments favour disclosure:
 - The public needs to be confident in the PSA's actions, processes, decision making and to have confidence in the Accreditation Register (AR) scheme.
 - It is in the public interest for the PSA to be transparent about its processes
 - The public may benefit from having access to information about the effectiveness of the organisations operations and its standards.
 - Publishing the application after the process is complete may help to support learning for others.

³ EA/2006/0011; EA/2006/0013

Public interest arguments in favour of withholding the requested information

31. The PSA has presented the following arguments in favour of maintaining the exemption:

- There is an underlying fear within applicant organisations that sensitive or confidential information provided to it will be disclosed to third parties in response to an FOIA application. By releasing the renewal application for the Society of Homeopaths (SoH), PSA may prevent future full and frank disclosure of the necessary information that it needs to consider when determining whether accreditation should be awarded in future.
- As the scheme is voluntary PSA cannot compel organisations to apply or to give us all the information we request. The organisations could exist without being accredited by the PSA. It is in the public interest to establish a successful accreditation scheme to help raise standards and improve public protection. Some organisations have already indicated that if PSA publishes the requested information it will lead to a reduction in applications.
- PSA has already published the panel summary sheet and background notes with the rationale for considering that the SoH meets a particular standard. It ensures that the key facts upon which the panel's judgment has been made are put into the public domain, yet at the same time ensuring that sensitive or confidential information is not disclosed. Therefore the disclosure of the draft reapplications is not necessary to provide the public with information about the decision and the decision process.
- Disclosure could prejudice and damage SoH's commercial interests. Disclosure could give privileged information to a third party who could then use it freely. Disclosure of the application portfolio to other organisations in the field could lead to plagiarised applications and other organisations not going through the same rigorous processes that SoH have, to ensure that they meet the standards for reaccreditation. Further consequences of this would be that when others learned of SoH's experience our applications could diminish.
- Parliament initiated the AR scheme to provide a list of accredited organisations for the benefit of the public. This is why PSA have high standards of accreditation and various ways to assess organisations. If organisations fail to provide free and frank information it will be unable to effectively do this, meaning it is unable to help protect the public in the way parliament intended.

- Putting full renewal applications in the public domain will allow other organisations to copy their approach frustrating that part of the PSA assessment.
- Accreditation will evidence public protection and gauge professional standards, so the number of accredited voluntary registers will directly correlate with the public interest. There is currently estimated to be 150-200 organisations who could apply for accreditation which would greatly enhance public protection.
- Release would increase the costs in terms of impact assessments and may have a detrimental effect on small and medium sized bodies.
- Applications are an on-going process and are subject to vast and numerous changes as the application progresses. This follows from advice given by the accreditation team or by enacting changes in order to fulfil accreditation standards. Disclosure of the information at any stage prior to the final version which is submitted to the panel may show an incorrect/outdated version of the organisation to the one it will finally aim to re accredit. This could have reputational risks. It would certainly prevent free and frank discussion as organisations would be afraid to submit things to the team for discussion.

Complainant's arguments for disclosure

32. The PSA's refusal to disclose seems to rest on the following:

- that disclosure would be detrimental to the success of the scheme for the reason that it would 'inhibit these communications [with applicants] and inhibit other organisations from entering into communication with the Authority'; and
- that successful operation is a matter of public and parliamentary concern.

33. In respect of the first reason, organisations are free to decide whether or not they wish to apply — there is no statutory obligation to be accredited by the PSA, but there may be advantages (and disadvantages) to doing so. As argued in the request for an internal review, any applicant would have to assume a likelihood of disclosure by the PSA in line with the general presumption of disclosure of any public authority under FOIA (and indeed as accepted in the outcome of the internal review). This is emphasised by the fact that nothing in documentation of the PSA's scheme or in the application form advises the organisation that any of the documents are protected from disclosure or will be treated as confidential. Additionally, the PSA do not

appear to have made inquiries of the SoH as to their views on disclosure, which must surely also be a relevant consideration.

34. It is the complainant's understanding that the sections of the Act cited relate to *internal* discussions within the public body and not to communications with third parties as the PSA have applied it. If disclosure had been made, the PSA would not be inhibited from providing free and frank advice to any organisation and would similarly not be inhibited from holding free and frank exchanges of views for the purposes of deliberation. The PSA, therefore, is not impeded by disclosure.
35. Additionally, and in terms of the second assertion by the PSA, operation of the scheme may well be a matter of public and parliamentary concern, but that doesn't necessarily mean that its continuation — or even just the accreditation of particular organisations — is in the public or Parliament's interest. The PSA's responsibility is to accredit organisations that can provide evidence — to the satisfaction of the PSA — that they meet the Standards as a means of offering a measure of protection to the public. Those Standards require that an accredited organisation 'in carrying out its voluntary register functions it is fair, effective, proportionate and transparent so that it is respected and trusted.' [Standard 7d]
36. Organisations have been — and no doubt will continue to be — accredited on this basis, but the responsibility to provide that evidence lies with the applicant organisation. If an organisation is unwilling for whatever reason to provide information required by the PSA so they can make a decision, that organisation, rightly, should not be accredited. However, individual cases of organisations that do not demonstrate that they meet the Standards do not diminish the standing of those that do and this does not diminish the success of the Accredited Register scheme as a scheme to protect the public.
37. The functions of the PSA given in s.25I of the National Health Service Reform and Health Care Professions Act 2002 relate to accredited registers but not to organisations that have not met the standards for accreditation. Such an organisation cannot, therefore, be a legitimate concern of the PSA if it is unwilling for whatever reason to provide information that the PSA requires to ascertain whether or not it meets the Standards. The success of the scheme lies in the success of the regulation of those registers that achieve accreditation, not on the numbers of registers accredited nor in those that are unwilling to be transparent about their application. The complainant believes that the way in which the PSA considered the success of the scheme was a consideration that was irrelevant, rendering the refusal unsustainable.

Balance of the public interest

38. The public interest test is separate from the qualified person's opinion. Befitting the status of the qualified person, however, his or her opinion should be afforded some weight when exercising this test. That being said, the Commissioner must form his own view on the severity, extent and frequency of the prejudicial or inhibitive effects being claimed when determining whether the public interest favours disclosure.
39. In forming a view on the balance of the public interest, the Commissioner has taken into account the general public interest in the openness and transparency of the PSA as well as the public interest factors that apply in relation to the specific information in question.
40. The Commissioner accepts that there will always be some public interest in there being transparency in the ways public authorities conduct their business.
41. It is clear the complainant has some concerns over the accreditation of the SoH. The particular reasons that explain why an applicant wants access to information may not though always carry much weight in the terms of the wider public interest in the information. This will particularly be the case where the information relates to a very narrow set of interests.
42. The Commissioner has also reviewed the withheld information, with the objective of deciding what would emerge through disclosure and the value of the information to the public. The withheld information consists of two 'query sheets', an annual review matrix and a risk assessment matrix.
43. The complainant is erroneous in his belief that section 36(2)(b) relates to *internal* discussions within the public body and not to communications with third parties.
44. The Commissioner is not however swayed by PSA's arguments relating to potential commercial damage as it has not provided any evidence of this.
45. Despite the fact that the scheme is voluntary the Commissioner considers that accreditation schemes of this type serve the public by setting the standards that can be expected. A member of the public considering treatment is likely to be reassured that the organisation/individual is part of an accredited scheme.
46. In order to reach a determination on where the balance of the public interest lies, the Commissioner has had regard the timing of the request

and the extent to which disclosure would stimulate and assist public debate.

47. The PSA has explained that the accreditation process is an on-going process and disclosure of the information prior to the final version which is submitted to the panel may show incorrect or outdated information of the organisation to the one it finally re-accredits.
48. The Commissioner has accepted that the release of the information would have a prejudicial effect on PSA's ability to conduct its public affairs. This will particularly be the case when the accreditation process is on-going.
49. The Commissioner also accepts that organisations applying for the scheme would be less forthright in their discussions if they believed that this information could be disclosed.
50. On balance, the Commissioner has found that the benefit of disclosure is not sufficient to justify disclosure in the face of the prejudice the Commissioner has decided would occur, and therefore in all the circumstances of the case, the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

51. 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

52. 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.
53. 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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