

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2014

Public Authority: General Dental Council

Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant requested from the General Dental Council ("GDC") information about the investigation of a complaint that he made about a dentist. The GDC disclosed some information but withheld other information under various exemptions under FOIA. The complainant complained that the GDC had interpreted the scope of his request too narrowly and had withheld information that should have been disclosed to him. The Commissioner made an initial determination as to whether the GDC had correctly interpreted the scope of the request.
2. The Commissioner's decision is that the GDC has correctly interpreted the scope of the complainant's request. He therefore does not require the GDC to take any further steps to ensure compliance with the legislation in relation to its interpretation of the scope of the request. However, he has found that by not responding promptly to the complainant's request, the GDC breached section 10 of FOIA.

Request and response

3. The Commissioner has set out in detail below the history of the correspondence between the complainant and the GDC and its solicitors about his request, up to the conclusion of the internal review.
4. On 1 March 2013 the complainant made a request to the GDC for information that it held in connection with his complaint about a named dentist. He requested:

"any and all records and documents the GDC and/or its staff and subcontracted parties inclusive of lawyers and their staff hold on the subject of or which make reference to the complaint of [name of complainant] against dentist [name of dentist] made to the GDC and any and all records and documents the GDC and/or its staff and subcontracted parties inclusive of lawyers and their staff hold on the subject of or which makes reference to the complaint of by [name of complainant] against dentist [name of dentist] made to the Parliamentary and Health Services Ombudsman, including but not limited to letters, faxes, emails, memoranda of phone conversations, minutes or transcripts of meetings and inquiry sessions, legal submissions and exhibits, advisory papers and associated documents, etc., in the period from 1 September 2011 to the present"

5. The complainant emailed the GDC on 13 March 2013 to explain that he required the information that he had requested as soon as possible and asked when it was anticipated that he would receive it. The GDC responded on 14 March 2013 and confirmed that the complainant would receive it by the deadlines according to FOIA and the Data Protection Act 1998 ("DPA").
6. On 14 March 2013 the complainant emailed the GDC to express his concerns that he receive the information that he had requested prior to a related review by the Professional Standards Authority ("PSA") took place. He explained that the deadline for him to submit information to the PSA would pass prior to the deadline for the GDC to supply him with any of his personal data that he was entitled to receive under the DPA. He went on to explain that he had submitted his request in the expectation of receiving a complete response from the GDC, under FOIA and the DPA, by the date of the FOIA deadline. He asked that the GDC provide him with a phased delivery of documents so that as soon as documents were ready for disclosure, they were sent to him.
7. On 15 March 2013 the GDC confirmed to the complainant that the deadline for it to respond to his FOI request was 3 April 2013. It also noted that he wished to submit information to the PSA and that he wished to receive information from the GDC as it became available. It confirmed that it would take this into account when responding and suggested that he advise the PSA that further information might follow as it became available.
8. On 26 March 2013, the GDC wrote to the complainant to explain that it was not able to answer his request without further clarification. It said that it was unclear as to whether he would like information which specifically related to the complaint that he had made (information about him) or whether he would like information relating to the case

more generally. It also noted that he had asked for "any and all records" of various kinds and asked if he could be more specific in his description of the kind of information he was looking for. It explained that if he was able to narrow the scope of his request and be more specific about what kind of information he was really interested in, it might be able to deal with his request more effectively. The GDC informed him that, under FOIA, the statutory 20 working days to deal with his request did not commence until it received his clarification.

9. On the same day, the complainant responded to the GDC. He explained that he believed that his request was proper and abundantly clear for the GDC to fully comply with it by the deadline. He stated that there had been an extended email exchange with the GDC several weeks previously in which it undertook to send him the requested items in phases in advance of the FOI deadline of 3 April 2013 and that the GDC asked that he inform the PSA of this. He pointed out that at no stage in that email exchange had the GDC indicate that his FOI request was unclear.
10. The complainant went on to state that the GDC had indicated clearly that it would provide all the documents to the FOI deadline rather than the later DPA deadline. From this he believed that it was plain that the GDC had no difficulty understanding that he had requested all records and documents referring to the case in question about which he was the informant. The complainant argued that it was disingenuous to suggest there was now a confusion as to what should be supplied, all the more disingenuous at this late stage. He contended that, given the GDC had been aware weeks previously that he was seeking the informational records for the PSA's consideration of a possible court challenge to the GDC's decision and the PSA action had a statutory deadline which was imminent, the GDC's failure to action his FOIA request must be seen as obstruction.
11. The complainant requested that the GDC confirm by return email that it would comply with its undertaking previously given and supply all that he had requested in accordance with the FOI deadline of 3 April 2013. He said that in the absence of the GDC's confirmation of this he would have no choice but to inform the ICO, the PSA and other correspondents of its refusal to comply with the statutory requirements.
12. On 27 March 2013 the complainant sent the following email to the GDC:

"While I maintain that you have been duty bound to adhere to the deadlines for the 1/3/13 request, which was proper and clear, and the GDC's belated request for clarification is transparently obstructive, in order to be helpful I offer a list of

some of the key documents encompassed in my 1/3/13 FOIA request which I expect by April 3:

a. Internal records of the GDC and their prosecution solicitors Blake Laphorn as to when, how and why the named Prosecution 'expert' in this case came to be the Defence 'expert' in this case

b. GDC internal and prosecution team discussions about:

- i. The possibility of investigating witness coaching allegations against the registrant*
- ii. The GDC decision not to allocate this case to the Interim Orders Committee*
- iii. The GDC decisions to omit or drop various charges before and after the Investigating Committee decisions*
- iv. The GDC prosecution initial decision that testimony from Child A was not needed and the subsequent discussions of that decision by the prosecution team*
- v. The GDC prosecution decision not to take witness testimony from Child A's mother*
- vi. GDC discussions about auditing or not auditing the registrant's other patient records for inadequate record-keeping following the Investigating Committee decision to press charges regarding inadequate record-keeping for Patient A."*

13. On 28 March 2013 the GDC's solicitors sent a letter to the complainant by email. They confirmed that they were acting on behalf of the GDC in relation to the complainant's request under FOIA. They stated that:

"On 26 March 2013, the General Dental Council replied requesting further clarification from you about what information you were looking for, in order to respond to your request. You provided clarification via email on 27 March 2013.

You have confirmed that you would like the following information..."

14. The solicitors' letter then quoted paragraphs (a) and (b)(i)-(vi) of the complainant's email of 27 March 2013. They went on to explain that under FOIA the GDC was obliged to provide a response within 20 working days of receipt of his clarification. They calculated that this was by 26 April 2013.

15. On 28 March 2013 the complainant emailed the GDC's solicitors and stated that their "*...communication completely ignores the unjustified delay by the GDC FOI office in seeking the so-called clarification, as evidenced by the fact of an extensive email exchange with the GDC FOI officer from March 13-15.*" In his view, the 20 working days deadline for the GDC to respond should have commenced on 14 March 2013. He went on to explain that in specific circumstances where the GDC was well aware that the information was required to an imminent deadline for an informed decision by the PFA, any delays beyond 3 April 2013 must be seen to be motivated by a desire to obstruct scrutiny.
16. On 4 April 2013 the GDC's solicitors replied to the complainant. They confirmed their understanding that under FOIA a response was due to be provided within 20 working days of the date of clarification of a request being provided. They also confirmed that the GDC would not be in a position to provide a response by 3 April 2013 but would provide one as soon as possible. The solicitors denied that the GDC was trying to obstruct his complaint to the PFA in its handling of the responses to his requests. They suggested that, as the GDC had previously advised, he might wish to explain to the PSA in his correspondence that further information might follow as it became available.
17. Following a further email from the complainant, the GDC's solicitors explained on 4 April 2013 that multiple departments at the GDC and another firm of solicitors, acting on behalf of the GDC, had been involved with his original complaint about the dentist to which his request related. It had necessarily taken time to coordinate between these different departments and organisations in order to consider his original request and to request clarification of it.
18. On the same day the complainant emailed the solicitors to continue to object to what he perceived to be unwarranted delays in responding to him on the part of the GDC.
19. On 26 April 2013 the GDC's solicitors provided a response to the complainant. They stated that "*[o]n 27 March you specified that you were interested in obtaining information under 7 headings.*" The seven headings that were detailed, and in relation to which responses were provided, were the headings identified in paragraphs (a) and (b)(i)-(vi) of the complainant's email of 27 March 2013. Some information was disclosed and other information withheld under sections 21, 31, 40 and 42 of FOIA.
20. On 3 May 2013 the complainant requested an internal review. He explained that he believed that the GDC had acted to obstruct scrutiny of a defective investigation, prosecution and Fitness to Practice hearing process by withholding information contained in documents it possessed

that fell under his original request and also fell under the headings of his request as 'clarified' by him on the GDC's very belated demand for 'clarification'. He complained that he had received summaries of information that was held rather than the documents themselves and questioned the GDC's arguments for the application of exemptions to withheld information. He went on to comment that what little information had been supplied to him had been knowingly delayed by the GDC via a pretext of seeking 'clarification', such 'clarification' having been both unnecessary and requested unreasonably late, with the clear aim of ensuring that the information supplied only be delivered after the PSA deadline for intervention had passed.

21. The GDC appointed a second firm of solicitors to advise on the internal review. The complainant was provided with the outcome of the internal review on 14 June 2013. It upheld the GDC's previous decision in relation to the application of exemptions, with the exception of some additional information contained in a document which was disclosed to the complainant.
22. In addition, the internal review letter noted the large amount of material that fell within the scope of the clarified request, 12 files of papers. It stated that, in light of the wording of the original request, the GDC had acted sensibly and reasonably in asking him for clarification. It also noted that, whilst seven categories of information were referred to in his email of 27 March 2013, from the wording of his email the complainant may not have considered those seven categories to have covered all of the information he was requesting. However, it went on to say that the GDC's solicitors wrote to him on 28 March 2013 to confirm the details of his request as clarified and that no further clarification was received. The internal review concluded that, in the circumstances, it was reasonable for the GDC to treat the complainant's clarification letter as setting out his request.

Scope of the case

23. The complainant contacted the Commissioner on 1 August 2013 to complain about the way his request for information had been handled, specifically that the GDC had interpreted the scope of his request too narrowly and had withheld information that should have been disclosed to him.
24. This decision concerns whether the GDC was correct to interpret the scope of the complainant's request as limited to information covered by the seven headings contained in his email of 27 March 2013 or whether it should have considered the scope of his request as for all of the

information that it held that fell within the scope of his original request, made on 1 March 2013. It also considers concerns raised by the complainant about delays in the GDC responding to his request.

Reasons for decision

(i) The scope of the complainant's request

25. The complainant contended that the GDC failed to interpret the scope of his request as widely as it should have done. In his view it should have considered the scope of his request as for all of the information that it held that fell within the scope of his original request, made on 1 March 2013, rather than limiting it to the information covered by the seven headings contained in his email of 27 March 2013.

The GDC's arguments

26. The GDC informed the Commissioner that requests for information under FOIA and the DPA were usually handled by the team to which the information request related. As the complainant's request related to a complaint he had made about a particular dentist, his request was referred to the Fitness to Practice Prosecution team. Due to the pressures of the GDC's Fitness to Practice caseload in March 2013, a decision was taken to instruct one of the GDC's external legal providers to assist with processing the complainant's detailed request. The GDC explained that careful thought was given to instructing a firm of solicitors which had expertise in processing FOIA/DPA requests of the kind made by the complainant as opposed to instructing the firm of solicitors that handled the prosecution case in relation to the dentist, out of which the request arose.
27. The GDC went on to explain, having waived legal professional privilege only to the extent necessary to explain the reason for its actions, that following receiving instructions on 22 March 2013, its solicitors advised it to seek to clarify what issues the complainant was interested in, in case the relevant documents were more limited in scope than his initial wide request suggested. The GDC explained that it was keen not to burden the complainant with information that he did not wish to receive or expend public funds in undertaking unnecessary work.
28. The GDC informed the Commissioner that it held, including via the solicitors that handled the prosecution case, a significant amount of:
- (a) potentially relevant information from the investigation of the complaint within the scope of the original request, although it

believed that much of this would be exempt from disclosure under sections 31, 40(2), 41 and 42 of FOIA; and also

(b) personal data specific to the complainant, which would be exempt under section 40(1) of FOIA, but pointed out that the ICO's guidance is that such requests should be treated as a subject access request under the DPA.

29. The GDC stated that whilst some of the information in (b) (above) fell within the scope of the information in category (a), the GDC and its solicitors considered that there was also a distinction between these two categories of information and it was not clear which of these (or both) the complainant wanted. Given the duties under FOIA to advise and assist the complainant, it was considered appropriate to seek to establish further the focus of the request and what information the complainant was interested in.
30. The GDC explained that its decision was in part informed by the ICO's guidance on interpreting a request which states that:

"You should not:

provide the requester with information you think they want rather than what the request asks for;

try to guess the meaning of an ambiguous request, make assumptions, or attempt to work it out from your background knowledge of the requester..."

31. The GDC contended that the clarification provided by the complainant in his reply of 27 March 2013 directed his request from information that was about 'him' and more on information which was tied to how the GDC progressed the investigation into his complaint about the dentist.
32. The GDC then referred the Commissioner to its solicitors' letter of 28 March 2013 to the complainant which made clear that his request had been treated as being clarified to encompass the seven headings contained in his email of 27 March 2013. These seven headings were copied into its solicitors' letter and was referred to as "*...the following information...you have confirmed that you would like..*". The GDC pointed to the fact that this was also referred to in its solicitors' email to the complainant of 5 April 2013.
33. In addition, the GDC argued that, in his subsequent correspondence with its solicitors, the complainant complained about the timescale in which clarification had been sought but did not complain about the actual clarification/limitation of the scope of the request prior to the substantive response being sent to him on 26 April 2013. It said that

had he made it clear at the time that he was dissatisfied with its solicitors' analysis of the scope of his request, they would have taken this into account in formulating the substantive response. Based on these facts, the GDC argued that it was entitled to treat the complainant's request as only being for the list of key documents contained in his email of 27 March 2013.

The complainant's arguments

34. In support of his position, the complainant explained that when he made his original wide request the GDC indicated it would be working on his request and would be using best endeavours to make the deadline for delivery of the documents in time for his appeal to the PSA. He pointed out that in its initial communications, the GDC made no reference to needing the request 'clarified'. They only asked for clarification weeks later and very close to the PSA appeal deadline.
35. The complainant went on to explain that he believed that he was coerced by the GDC's long manipulative delay to be expedient in his communications with them and to offer them some concrete elements from his FOIA request in the hope of receiving at least some of the documents he sought before the PSA appeal deadline. He informed the Commissioner that he did not protest about the GDC's recapitulation of the 'clarification' because it was evident from the long delay before the so-called clarification was requested that the GDC FOIA office was operating in bad faith. In the complainant's view, it was obvious that if he did not comply with the so-called 'clarification' request, which was clearly a request to narrow what he sought, then the GDC would have had a readymade pretext to delay delivery until too late for the PSA appeal.
36. The complainant believed that his communications with the GDC indicated the false expectation engendered in him by the GDC's initial reassurances. He believed that this needed to be taken account of in relation to the issue of the coerced narrowing of ambit of his request which occurred several weeks later.

The Commissioner's decision

37. The Commissioner notes that the complainant has indicated that he was aware that the GDC had sought to narrow the scope of his request in its solicitors' letter of 28 March 2013 and that he did not challenge this prior to receiving its response of 26 April 2013. He explained that the reason for this was that he felt coerced into accepting this position in order to try to obtain relevant information from the GDC prior to his PSA hearing. Whilst the Commissioner is aware of his reasons for doing so, he believes that the complainant, by not challenging the GDC's

interpretation of the scope of his request when the opportunity was available for him, allowed the GDC to respond to the request in accordance with the scope set out in its solicitors' letter of 28 March 2013.

38. In the circumstances, the Commissioner believes that it would not be appropriate to determine that the GDC should have responded to a possibly wider interpretation of the complainant's request, even though the scope of his request may have been interpreted in a way that was narrower than he may have initially intended. The Commissioner has therefore determined that the GDC was entitled to respond to the complainant in accordance with the scope of the request that was set out in its solicitors' letter of 28 March 2013. He consequently does not require the GDC to take any further steps in relation to its interpretation of the scope of the complainant's request to ensure compliance with the Act.

(ii) Section 10 – Time for compliance with the request

39. The complainant also raised concerns about what he perceived to be delays by the GDC in responding to his request.

40. Section 10(1) of FOIA provides that when responding to a request:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

41. The Commissioner was informed by the GDC that when requests were received in its FOI inbox they were usually passed to the FOI representative in the relevant GDC team who would be responsible for managing a response. In this case the FOI request was received on 1 March 2013 and forwarded the same day to the Director of Regulation, who the complainant had recently been in contact with about the handling of his case. The Director copied the query to the then Head of the relevant legal team that day.
42. The GDC explained that the Head of the relevant legal team was unable to deal with the request during the week commencing 4 March 2013 due to the work required that week to prepare for a large prosecution case. The DPA deadline was identified as 10 April 2013 and it was noted that some of the information required would fall to be collated by other teams within the organisation.
43. The GDC stated that it could not totally clear about what exactly happened next as none of the lawyers involved still worked at the GDC, however it appeared that between the week commencing 11 March 2013 and 22 March 2013 (10 working days), steps were taken to contact the

other teams in relation to the information they held. Documents and information began to be collated and internal emails were exchanged to confirm who was going to be in a position to manage what was obviously going to be a complicated and time consuming task, mindful of the particular sensitivities in relation to information in fitness to practise cases. The GDC further informed the Commissioner that internal communication took place as to the options of, exceptionally, outsourcing the case as opposed to dealing with it internally, bearing in mind the need to respond in time, the volume of paperwork and pressures in the Fitness to Practise Legal team and others. This ultimately led to a decision to instruct a firm of solicitors, agree a budget and fee for the work, instruct them, and to package up the documentation.

44. The GDC confirmed that the solicitors who investigated the Fitness to Practise case, resulting from the complainant's complaint about the dentist, (who were different to those instructed to deal with data protection and freedom of information issues) had 9 lever arch files of case papers and correspondence relating to the investigation. This was in addition to about 3 reams of internal GDC paperwork, making a total of 12 lever arch files of documentation as a minimum which might have been encompassed by the original request. At first sight, depending on the specific detail of the request, the GDC believed that much of this information could have been covered by exemptions relating to legal advice privilege (section 42), personal data of the complainant and/or third parties (section 40(1) and (2)), prejudice to law enforcement functions (section 31) and duties of confidentiality owed to third parties (section 41).
45. The GDC explained that it believed that it was not apparent from the original request whether the complainant was asking for his personal data, all of the case papers, or information on specific issues relating to the handling of this matter. It therefore asked the complainant for clarification of the request. Once the request was clarified a (manual) search of all of the documents (i.e. the equivalent of over 12 lever arch files) still needed to be carried out. Although this search could then be much more focussed, so conducted more efficiently, it was still necessary to identify documentation within the scope of the clarified request and, once identified consider whether any exemptions should be applied, for what reasons. Without any clarification every piece of information would have been subject to a line-by-line review for disclosure and/or application of exemptions
46. The GDC suggested that, in the circumstances that it had outlined in relation to this request, the time taken to respond was not unreasonable.

47. The Commissioner has issued guidance on the application of section 10 entitled "*Time limits for compliance under the Freedom of Information Act (Section 10)*". The guidance states that:

"21. The obligation to respond promptly means that an authority should comply with a request as soon as is reasonably practicable.

22. Whilst this is linked to the obligation to respond within 20 working days, it should be treated as a separate requirement.

23. An authority will therefore need to both respond promptly and within 20 working days in order to comply with section 10(1).

24. Authorities should regard the 20 working day limit as a 'long stop', in other words the latest possible date on which they may issue a response."

48. The Commissioner notes the explanation provided by the GDC in relation to the handling of the complainant's request. However, from that explanation, it appears that, after the request was initially received on 1 March 2013, no action was taken in relation to providing a response until 11 March 2013, at the earliest. The Commissioner appreciates that the person who was given the initial responsibility for dealing with the request may have had other significant work pressures at that time. In these circumstances, it would have been appropriate for the handling of the request to be passed to another member of staff who was in a position to deal with it in a timely manner.
49. In light of the above, the Commissioner has determined that the GDC did not comply with the complainant's request promptly and, consequently, that it breached section 10(1) of FOIA.

Other matters

50. The Commissioner notes that the complainant has contended that the GDC acted in bad faith and deliberately delayed providing a response to his request in order to obstruct his appeal to the PSA. This is not a matter on which the Commissioner is able to make a determination under section 50 of the Act. Whilst the Commissioner notes that he has found that the GDC breached section 10(1) of FOIA, by not providing a response as promptly as it should have done, he has not seen evidence which would lead him to believe that the GDC deliberately delayed its response to the complainant in order to obstruct his appeal to the PSA.

51. The Commissioner also notes that this request concerns information regarding a complaint made to the GDC about a named dentist. The complaint resulted in a public disciplinary hearing in respect of the issues raised as part of which the name of the dentist was made public. Had this not been the case, it is a situation in which it might have been appropriate for the GDC, in responding to the request, to have neither confirmed nor denied whether any information was held under section 40(5) (personal information) of FOIA.

Right of appeal

52. 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

53. 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.
54. 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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