

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2017

Public Authority: The General Dental Council
Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the Hudson report and a Professional Standards Association report. The GDC refused to disclose the requested information under section 31(1)(g) with subsection (2)(d) FOIA.
2. The Commissioner's decision is that the GDC has correctly applied section 31(1)(g) with subsection 2(d) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 21 December 2016 the complainant requested information of the following description:
 1. 'Attempts by GDC staff to influence the Investigating Committee during meetings.' Which meetings were these, and concerning which cases?
 2. 'We found that it was not appropriate for GDC staff to interfere in the Investigating Committee's deliberations.' Which cases did GDC staff interfere with?
 3. 'GDC staff pressurising Investigating Committee Chairs to change the reasons set out in the Investigating Committee's decision

documents after meetings had concluded.' Which cases did GDC staff pressurise Investigating Committee Chairs to change the reasons set out in the decision document?

4. 'In the 2013 Investigation Report we noted that following an internal investigation into an allegation about an Investigating Committee decision document being changed' - which case was this?
5. 'The provision of (incorrect) legal advice by GDC staff at Investigating Committee meetings.' What advice was provided incorrectly in which cases?
5. On 21 January 2016 the GDC responded. It confirmed that it did not hold any information relevant to part 1 of the request. It refused to provide the information it held relevant to parts 2-5 of the request as it said this information was exempt from disclosure under section 31(1)(g) with subsection (2)(d) and section 40(2) FOIA.
6. The complainant requested an internal review on 22 and 25 January 2016. The GDC sent the outcome of its internal review on 26 February 2016. It upheld its original position.

Background

7. The Investigating Committee (the IC) is independent of the GDC, it meets in private (parties are not present nor represented) to consider cases on the papers, and to decide whether they should be referred to a Practice Committee Case hearing (the PCC) which is a full public hearing.
8. The IC's decision is agreed between three IC panel members (two dental professionals and one lay member) at the meeting and recorded in a decision sheet. The IC secretary assists in drafting a fully reasoned decision for consideration and approval by the IC, which captures and fully reflects the IC's decision and its reasons for that decision. The IC secretary is a member of GDC staff who works in the IC department, which is a separate department to the GDC's Casework department that assesses cases and sends them to the IC for a decision.
9. There has been public criticism of weaknesses in the IC's procedures by the Professional Standards Authority (PSA) in 2013, following a whistle-

blowing complaint¹, reviewing action taken by the GDC since the 2013 complaint.

10. In 2013 the GDC instructed its own independent review of IC procedures following the PSA's 2013 report, known as the Hudson report or Penningtons Manches report², the terms of reference for, and a summary of the findings, is available on GDC website³.
11. The PSA's report of 21 December 2015 reviewed the action taken by the GDC since 2013 (including the review carried out by Penningtons Manches, and focused more on the GDC's whistle blowing procedures. The GDC has published a response and further updates to the PSA's 2015 report in February (and June) this year⁴.

Scope of the case

12. The complainant contacted the Commissioner on 28 July 2016 to complain about the way her request for information had been handled.
13. The Commissioner has considered whether the GDC was correct to withhold the information under section 31(1)(g) with subsection 2(d) FOIA.

Reasons for decision

14. The GDC has argued that the withheld information is exempt on the basis of section 31(1)(g) which provides that information is exempt if

¹ <http://www.gdc-uk.org/Newsandpublications/Pressreleases/Pages/General-Dental-Council-welcomes-PSA-report.aspx>) and in 2015 (<http://www.gdc-uk.org/Newsandpublications/Pressreleases/Pages/GDC-responds-to-PSA-whistleblowing-report.aspx>)

² <http://www.gdc-uk.org/Newsandpublications/Pressreleases/Pages/GDC-publishes-its-own-report-into-whistleblowing-allegations.aspx>

³ <http://www.gdc-uk.org/Newsandpublications/Pressreleases/Documents/Hudson%20Report%20July%202014.pdf>

⁴ <http://www.gdc-uk.org/Newsandpublications/Pressreleases/Pages/GDC-publishes-its-improvement-plan-following-whistleblowing-report.aspx>

- its disclosure would or would be likely to prejudice the exercise by any public authority the functions set out in 31(2) of FOIA.
15. The purposes that the GDC has argued would be likely to be prejudiced if the information was disclosed are the following within section 31(2)(d) which refers to 'the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on'.
 16. As with any prejudice based exemption, a public authority may choose to argue for the application of regulation 31(1)(g) on one of two possible limbs – the first requires that prejudice 'would' occur, the second that prejudice 'would be likely' to occur.
 17. The GDC has stated that they believe the likelihood of prejudice arising through disclosure is one that is likely to occur, rather than one that would occur. While this limb places a weaker evidential burden on the GDC to discharge, it still requires the GDC to be able to demonstrate that there is a real and significant risk of the prejudice occurring.
 18. The Commissioner has first considered whether the GDC is formally tasked with "ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on".
 19. The GDC explained that it is the UK-wide statutory regulator of just over 100,000 'dental professionals', consisting of approximately 40,000 dentists and 60,000 dental care professionals (i.e. dental nurses, clinical dental technicians, dental hygienists, dental technicians, dental therapists and orthodontic therapists). In line with the Dentist Act 1984, which defines the GDC's role and powers, it registers qualified dental professionals, sets and enforces standards of dental practice and conducts, protects the public from illegal practice, assures the quality of dental education and investigates complaints.
 20. In this case the Commissioner is satisfied that the GDC has been formally tasked with ascertaining a person's fitness or competence in relation to any profession or other activity which he is authorised to carry on and that this function was specifically designed to fulfil this purpose.
 21. The Commissioner has therefore gone on to consider how disclosure would be likely to prejudice this function.

22. The GDC is of the view that disclosing the private and confidential IC decision notices requested would have an impact on patient protection as it would be likely to prejudice the GDC's ability to carry out its regulatory functions set out above.
23. The GDC reiterated that the IC, which meets in private, does not decide whether the fitness to practise allegations against a dental professional are proven; it only decides whether there is a 'real prospect' of proving the allegation at a final PCC hearing, which considers the case anew. As such, the GDC considers it would be unfair (a breach of natural justice) to publicise complaints (IC cases) which have not been fully tested and substantiated through oral testimony and cross-examination of witnesses in a public hearing.
24. The GDC said that if it were to disclose the cases falling within the scope of the Hudson report it is likely that dental professionals, their families, and complainants would be unhappy that IC case names and personal information about specific registrants were being placed in the public domain. It believes that it would undermine its working relationship with these parties making them more reluctant to engage with the GDC fitness to practise complaints procedure in the future. This would be likely in turn to impact on the efficiency and effectiveness of that process, making it more difficult for the GDC's fitness to practise process to consider complaints and progress cases to a conclusion.
25. The Commissioner considers that the GDC is formally tasked with ascertaining a person's fitness or competence in relation to "...any profession or other activity which he is...authorised to carry on". Its ability to fulfil this function effectively is dependent upon the parties involved willingness to voluntarily supply and openly share information to assist with an IC investigation. In this case the relevant investigations concluded in July 2013. Whilst the Commissioner considers that the GDC has powers to compulsorily obtain information for an IC investigation, it is a well-established principle that such a process is far more effective if parties openly volunteer as much information as possible relevant to the investigation.
26. In this case the Commissioner is however aware that some of the cases relevant to the scope of this request were referred to a final PCC hearing. The Commissioner therefore asked the GDC to provide further detail as to why it considered the prejudice claimed would be likely to occur to the cases that did ultimately go to a public hearing.
27. The GDC explained that there were 55 cases considered by the IC during the time frames that fell within the sample conducted by

Penningtons Manches (to set this number in context, in 2015 974 cases were considered by the IC.) Of these 55, in 15 cases the IC decided the matter should be considered by the PCC. Of those 15 registrants, one registrant appears on the register as having been erased or 'struck off'. Another is currently suspended, 3 other registrants are no longer registered as dental professionals. 10 of the 15 registrants are still on the register and there are no current conditions or warnings against their name and any previous actions taken by the PCC are not available on its website.

28. It went on that once a case is referred to a PCC by the IC the case will then be referred to a solicitor who will prosecute it on behalf of the GDC. As part of that process there is further evidence gathering, formal interviewing of witnesses and further clinical advice is obtained (where the case is a clinical matter). Then the charges are reviewed again and finalised. Some charges maybe dropped and never published. In addition, if, after GDC solicitors have gathered further evidence, it does not think that if the facts are proved they would amount to the dental professional's fitness to practise currently being impaired, the case may be referred back to the IC. The IC can then consider their original conclusions in the light of the new evidence and whether they would still want the case considered by the PCC or whether they would want to issue a warning or close the case.
29. It explained that the focus of the IC differs importantly from that of the PCC. The IC considers whether there is a reasonable prospect of charges being found proven whereas the PCC considers whether the allegations are proved and whether the dental professional's fitness to practise is currently impaired. The burden of proof and the questions asked of the evidence are different for each and it would not, for example, rely on the clinical advice report provided to the IC in order to prosecute the case at the PCC. It does not follow, therefore, that the consideration or the charges in the IC decision sheet will be exactly the same information to appear subsequently in a PCC determination. Nor would it therefore be fair to assume that the parties involved could or would expect that protection of this information would diminish if their case was subsequently heard by the PCC.
30. The GDC said that this is especially so given the PCC cases themselves were concluded some time ago and the IC considerations completed a significant amount of time before that. Furthermore the PCC conclusions have been removed from the GDC's on-line register.
31. Finally, it referred to the context of this request, the information was considered as part of an investigation by the GDC and the Professional

Standards Authority. The registrants do not know that their cases were part of the sample considered by Penningtons Manches and it is reasonable to conclude that disclosing a small sample of the cases involved risks exposing the registrants concerned to unwelcome attention from anyone wishing to revisit and reopen those issues which in turn would undermine the voluntary sharing of information in the future given the majority of those registrants (where their case did go to a PCC hearing) are still practicing.

32. The Commissioner accepts that disclosure would be likely to result in the prejudicial effects to the GDC's purposes described at sections 31(2)(d) of FOIA. This is due to the context of the FOIA request, the fact that the registrants were not aware that their cases were part of the review sample and because there is currently no information in the public domain (even relating to the cases that did go to a PCC hearing). As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Arguments in favour of disclosing the information

33. There is a public interest in the openness and transparency of IC decision making which weighs in favour of releasing the information.

Arguments in favour of maintaining the exemption

34. There is a strong public interest in an effective regulator, able to effectively and efficiently regulate the dental sector. The Commissioner does also consider that there is a strong public interest in not disclosing information which would be likely to impede the GDC's ability to carry out its functions effectively. Therefore, disclosing information relating to IC investigations would be likely to frustrate the voluntary flow of information between the GDC and the professionals it regulates which would not be in the public interest.

Balance of the public interest

35. The Commissioner considers that there is a strong public interest in the GDC operating openly and being accountable in its effectiveness in carrying out its statutory functions. The Commissioner understands

that the complainant has private interests in the withheld information; however this cannot be confused with the wider public interest.

36. As referenced above, the Commissioner does consider that there is a strong public interest in not disclosing information which would be likely to impede the GDC's ability to carry out its functions effectively. Therefore disclosing information which would be likely to frustrate the voluntary flow of information would not be in the public interest. Particularly given the context of this request in that the registrants are not aware that their cases were used in the review sample and that there is no information currently in the public domain relating to the 55 sample cases (even in relation to the 15 cases which were referred to a PCC public hearing).
37. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(1)(g) with subsection (2)(d) FOIA was correctly applied in this case to the withheld information. The Commissioner has not therefore gone on to consider the application of any of the other exemptions any further.

Right of appeal

38. 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

39. 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.
40. 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

Gemma Garvey
Senior Case Officer

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