

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2020

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

Decision (including any steps ordered)

1. The applicant has requested information relating to guidance published by the General Medical Council (GMC).
2. The Commissioner's decision is that GMC has correctly applied section 42 of the FOIA 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 8 October 2019 the applicant made the following request for information:

"the legal advice received by the GMC regarding access to medical documentation/Subject Access Requests for medical records when used for the purposes of seeking assisted suicide abroad (which the GMC's policies regarding the subject seem to be based upon)."
5. The GMC responded on 4 November 2019 and refused to provide the requested information citing section 42 (Legal Professional Privilege) of the FOIA as its basis for doing so. Having carried out an internal review, on 15 January 2020, the GMC maintained its position.

Background

6. Section 35 of the Medical Act 1983 gives the GMC:

'the power to provide, in such manner as the Council think fit, advice for members of the medical profession on –

 - (a) standards of professional conduct;*
 - (b) standards of professional performance; or*
 - (c) medical ethics.'*
7. Advice of the type envisaged above exists in relation to situations where patients seek views or information from a doctor about assistance to die. ('The advice.'). It follows therefore that the GMC must assess complaints made against doctors acting against that advice. There is [guidance](#) for the Investigation Committee and Case Examiners on how to consider allegations stemming from such complaints. ('The guidance.'). This guidance also shapes how doctors carry out their medical practice.
8. In March 2017, the applicant emailed the GMC's standards team and asked for clarification regarding the guidance. The GMC responded, noting that *'we have had legal advice ('The legal advice') to the effect that a doctor's compliance with a subject access request – even if they knew the reason for that request – would be too far removed from the act of suicide to constitute encouragement or assistance.'*
9. The applicant published an article in the British Journal of General Practice 2017 quoting the response above.
10. On 17 November 2017, the applicant made his first request for the legal advice. The GMC responded on 13 December 2017 applying Section 42(1) of the FOIA. The decision was not appealed to the GMC.
11. On 8 October 2019 the applicant again requested the legal advice. He noted that two things had changed which meant that he should be provided with the legal advice. The two things were:
 - a. I have since interviewed numerous participants who have experience of seeking medical documentation for these purposes. There are fundamental differences between the GMC's advice to doctors and what these people report the Information Commissioner's Office advice is (after having a Subject Access Request refused by doctors and then seeking to appeal).*

b. The Bawa-Garba case highlighted that whilst legal advice to the GMC is legally privileged, exceptional regulatory importance can render the advice requestable and shareable.

12. The GMC responded on 4 November 2019 again refusing and applying Section 42(1) of FOIA. This was upheld on appeal dated 15 January 2020.

Scope of the case

13. The applicant contacted the Commissioner on 28 January 2020 to complain about the way his request for information had been handled. In his correspondence he explained

"I requested a copy of the legal advice received by the GMC on which it bases its guidance when a patient requests medical documentation from a doctor for the explicit purposes of using it within an application for an assisted death abroad (Found at: https://www.gmc-uk.org/-/media/documents/DC4317_Guidance_for_FTP_decision_makers_on_assisting_suicide_51026940.pdf) Their advice is exceptional because it goes beyond what is stated in the CPS guidelines for prosecutors - to state that providing medical records is an act deemed 'too distant' to be construed as assistance (something that the CPS guidelines do not state (found at: <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide#a01>))

This legal advice is crucial for the entire regulatory framework involving access to medical documentation. It is within an exceptional public interest to see this advice for clarification. No other piece of advice is given regarding the Suicide Act 1961 and the CPS guidelines for prosecution apart from this GMC advice. Crucially, it cannot cause further harm because the advice has already been acted upon and put into the public domain/professional practice."

14. The Commissioner considers the scope of this case to be to determine if the GMC has correctly applied section 42 to the withheld information.

Reasons for decision

Section 42 – legal professional privilege

15. 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.

16. There are two categories of legal professional privilege: advice privilege and litigation privilege.
17. 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 advisers, and any part of the document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
18. 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 will not attract privilege.
19. 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.
20. The GMC explained the legal advice was obtained as part of the process of forming its guidance on how to consider allegations stemming from complaints relating to situations where patients had sought views or information from a doctor about assistance to die.
21. It went on to provide details of its adviser, a barrister and stated that the legal advice was requested by and for the GMC who was the client of the barrister.
22. The document is headed 'advice' and in paragraph one, the barrister is clear that his advice has been sought on how competing legal views should be reconciled.
23. The barrister was providing this legal advice in his professional capacity. Were he not, he would have had no reason to note his professional standing and the Chambers to which he is attached within the legal advice.
24. The GMC noted that the applicant advanced an argument that the legal advice '*has been disclosed (and shared with the world both via my journal article and via the GMC guidance). It has also been acted upon in daily care... the relevant piece of advice has therefore lost legal privilege and should be accessible to the public.*'
25. The GMC contended that the brief summary provided to the applicant did not lead to a loss of privilege. Furthermore, it noted that paragraph 39 of the Commissioner's guidance on the public interest test states:

'... Where part of some legal advice has been disclosed, leading to misrepresentation or a misleading picture being presented to the public, there may be a public interest in disclosing the full advice.'

26. For this advice to make sense, it must be accepted that public reference to some part of a document of legal advice does not mean that privilege is automatically lost to the document of legal advice overall.
27. The GMC further contend that while it is accepted that the legal advice informs its advice to doctors and its guidance to decisionmakers, both of which are public, along with its response to the applicants initial email, the GMC does not accept that the legal advice has been disclosed, shared with the world or that privilege has been lost in relation to it.
28. It further stated the legal advice has not previously been published to the world at large or shared beyond a limited number of relevant GMC employees. It is not quoted in either correspondence with the applicant or in the advice or guidance. Correspondence with the applicant does not explain the full reasoning for the legal advice, context in which it was given, supply the nuance of the legal advice or summarise all its elements. The brief summary to the applicant in reference to the legal advice provided to the applicant could not explain over five pages of legal text.
29. The GMC also stated that it is not the legal advice which is '*acted upon in daily care,*' but rather the advice to doctors (and guidance to decisionmakers).
30. It then went on to refer to paragraph 33 of the Commissioner's guidance¹ on LPP which states:

"If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its LPP protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege."

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

31. The legal advice was obtained as part of the process of forming the guidance on how to consider allegations stemming from complaints relating to situations where patients had sought views or information from a doctor about assistance to die.
32. Having reviewed the withheld information the Commissioner is satisfied that in this case the client was the GMC and the advice was provided by a legal adviser. The Commissioner is also satisfied that the dominant purpose of the advice was clearly the provision of legal advice.
33. Furthermore, the Commissioner is satisfied that, despite the small amount of information already in the public domain, legal advice privilege remains as the advice itself has not been disclosed. The exemption contained at section 42(1) is therefore engaged.
34. Section 42(1) of the FOIA is a qualified exemption. The Commissioner is therefore required to consider the public interest in disclosing the information.

Public interest test

35. 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.
36. 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.
37. 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 disclosing the information

38. In his submissions to the Commissioner, the applicant stated:

"the legal advice regarding providing access to medical records as being 'too distant an act to constitute assistance' has been disclosed (and shared with the world both via my journal article and via the GMC guidance). It has also been acted upon in daily care. In the very least, the relevant piece of advice has therefore lost legal privilege and should be accessible to the public even if it involves the redaction of other parts of the advice (I would still seek the surrounding contextual text)."

39. The applicant has also argued that the GMC guidance goes beyond what the Department of Public Prosecutions/Crown Prosecution Service has published or stated. He further argues it is not the GMC's role to adjudicate on what is and what is not liable for prosecution but regulate doctors to work within it. This guidance provides an interpretation about what is and what is not liable for prosecution based on the legal advice received. This has profound legislative consequences.

Public interest in favour of maintaining the exemption

40. The GMC noted the applicant's argument in paragraph 38 above and in its submission to the Commissioner explained that there was no indication to the GMC as to how, if at all, its guidance goes beyond what the DPP/CPS have published or stated. Therefore it was unable to specifically comment on that point. However, it stated that is not clear how disclosure of the full legal advice would assist in reconciling any DPP/CPS advice with its own. Consequently, it did not consider this would constitute a public interest argument in favour of disclosure of the advice.
41. In general terms, the GMC accept that it is not its role to '*adjudicate on what is and what is not liable for prosecution*' and no fair reading of the guidance document can be construed as containing any aspirations to perform such a role.
42. It did not accept that the document, fairly read, '*provides an interpretation about what is and what is not liable for prosecution.*' The GMC highlighted paragraphs 2-4 clearly set out that what is liable for prosecution is a matter of evidence and the public interest. It is reasonable for members of the public to rely on advice to doctors and guidance to decisionmakers from the GMC in relation to the standards doctors should uphold, what its statutory functions are and how they are performed. It is not reasonable to rely on this advice and guidance for an understanding of matters of criminal prosecution.
43. The purpose of the GMC's guidance for the Investigation Committee and case examiners in these circumstances is to assist decision makers to consider whether allegations of encouraging or assisting suicide raise a question as to a doctor's fitness to practise. It is not the GMC's role to determine whether a criminal offence has been committed. The tests and considerations applied in considering a doctor's fitness to practise do not always correlate to those applied in criminal law.'
44. The GMC referred to the Commissioner's guidance with regard to how to apply the public interest test by referencing *Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/0145)* and *Bellamy v Information Commissioner & the Secretary of State for Trade*

and Industry (EA/2005/0023, 4 April 2006) in paragraph 53 of the LPP exemption guidance which notes:

'There is a strong element of public interest built into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.'

45. As such, the burden of proof rests on the complainant to demonstrate that the public interest is in favour of disclosure and the evidence relied upon must be sufficiently strong enough to overturn the one inbuilt within the privilege.
46. As alluded to above, written at paragraph 52 of the guidance on LPP and accepted by the Commissioner in various rulings:

'The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.'

The GMC considered this applies in this instance.

47. The GMC further stated that the advice to doctors, which the legal advice informed, is still current and applicable to doctors. The guidance for decisionmakers also protects the rights of individuals contemplating suicide to request their own medical records from a doctor. This is because it confirms that the fitness to practise of a doctor will not normally be called into question by providing a patient with access to their medical records in response to an Article 15 GDPR request.
48. While the GMC accepted that release of the legal advice would likely increase accountability and transparency as well as moderately contribute to any public debate on the issue, these are undermined because there was no lack of transparency by the GMC, the legal advice that was given has not been misrepresented and no selective disclosure of it has taken place. Transparency is achieved by the publication of the guidance and the GMC confirmation of the conclusion of the legal advice.
49. Furthermore, it considered the number of people affected by the legal advice is limited. Relative to the population, not many members of the public seek their medical records with the intention of ending their own life and so consequently comparatively few doctors are ever going to be asked by a member of the public for their medical records for the purposes of ending their own life.
50. Finally, given the content of the legal advice and what is in the published advice and guidance, the GMC did not consider that disclosure

of the legal advice in full would strongly contribute to public understanding, as it is clear from the advice to doctors, guidance to decisionmakers and response to the applicant's original email to the Standards team, what the conclusion of the legal advice was. The background and full reasoning is much less important than the overall conclusion which it supported.

51. Finally the GMC countered the argument with regard to the Commissioner's decision FS50794284 which related to the documents the Chief Executive of the GMC had when deciding whether to appeal the Tribunal decision made in relation to Dr Bawa-Garba. This matter does not relate to the powers vested in the regulator, there is less interest from healthcare professionals in the issue, which is live, rather than concluded. In that decision the Commissioner felt that there were 'exceptional' circumstances present. For the reasons set out above, the GMC do not consider that this situation is comparably exceptional.

Balance of the public interest test

52. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, she 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)

53. The Tribunal also explained the balance of factors to consider when assessing the PIT in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006):

'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'.

54. 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.

55. The Commissioner has also considered whether the advice is still live. The advice itself is approximately eight years old, however it is clear

that it is still relied upon for the purposes of the GMC guidance as noted above.

56. 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.
57. 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

58. 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@justice.gov.uk

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

59. 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.
60. 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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