

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 May 2021

Public Authority: General Dental Council
Address: 1 Colmore Square
Birmingham
B4 6AJ

Decision (including any steps ordered)

1. The complainant requested information relating to a decision taken not to alter the Annual Retention Fee. The General Dental Council ("the GDC") withheld the requested information and relied on section 36 of the FOIA to do so.
2. The Commissioner's decision is that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged in respect of all the withheld information. In respect of the majority of the withheld information, the public interest favours maintaining the exemption. However, in respect of one document, the public interest favours disclosure. Section 36(2)(c) is not engaged in respect of any of the withheld information.
3. The Commissioner requires the GDC to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of the Chairman's email to colleagues of 27 April 2020
4. The GDC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 4 June 2020, the complainant wrote to the GDC and requested information in the following terms:

"[1] Please can you give full details of the soundings taken from the Council as detailed by the Chair within point 9.1 of the minutes of the council meeting on 13th may 2020, relating to the reported unanimous view that Annual Retention Fee should not be revisited.

"[2] Please can this information include the names of said council members, the full written communication both to them and received from them regarding this matter, as referred to above.

"[3] Regarding point 10. Please can you give full details of the decision making process that has led to the Council decision to use the staff payroll budget to top up furloughed staff salaries to 80% of their usual salary amounts, when above the government cap.

"[4] Further more, please give full details of the month by month expenditure for this purpose that has been taken directly from the staff payroll budget. in addition, please give details, which can be suitably anonymised, of the exact excess payments for each staff member affected, also on a month by month basis."

6. The GDC responded to elements [3] and [4] on 2 July 2020 and provided some information. In respect of elements [1] and [2], it confirmed that the information was held, but it considered that a qualified exemption (section 36) would apply to the information and it required additional time to consider the balance of the public interest.
7. The GDC responded to the remaining elements on 27 July 2020. It relied on section 36 to withhold the information.
8. Following an internal review the GDC wrote to the complainant on 27 August 2020. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner 27 August 2020 to complain about the way his request for information had been handled.

10. The complainant has not raised any issue with the way that the GDC responded to elements [3] or [4] and so the Commissioner has not looked at these elements.
11. The Commissioner considers that the scope of her investigation is to determine whether the GDC has correctly applied section 36 of the FOIA to the withheld information.

Background

12. The Annual Retention Fee (ARF) is the fee all registered dentists and dental care professionals must pay each year to remain on the dentist or dental care professional register. Nearly all of the GDC's funding comes from its collection of the ARF.
13. On 13 May 2020, the Council of the GDC met in private session to consider the organisation's response to the Covid-19 pandemic. A range of matters were discussed at that meeting, including consideration of reducing the ARF in recognition of the effect the pandemic might have on members. The published minutes of that meeting state that:

"The Chair reported that soundings taken of the Council by correspondence had indicated a unanimous view that the Annual Retention Fee should not be revisited

"The Council agreed the report and noted that no changes would be made to the Annual Retention Fee."¹

Reasons for decision

Section 36 – Prejudice to the Effective Conduct of Public Affairs

14. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
15. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:

(a) would, or would be likely to, prejudice—

¹ <https://www.gdc-uk.org/docs/default-source/council-meetings/council-meetings-2020/19-may-2020/3b-13-may-2020---closed-council---confirmed-abbreviated-minutes.pdf>

- (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
- (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
- (iii) *the work of the Cabinet of the Welsh Assembly Government.*

(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.*

16. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role in determining whether or not the exemption has been correctly applied is to: establish that an opinion has been provided by the Qualified Person; assure herself that that opinion is "reasonable" and; make a determination as to whether there are public interest considerations which might outweigh any prejudice.

The Qualified Person's opinion

17. In the case of the GDC, the Qualified Person for the purposes of section 36 of the FOIA is Mr Ian Brack: its Chief Executive and Registrar.

18. The complainant disputed that Mr Brack was the "appropriate" person to give such an opinion, noting that:

"The GDC's Chief Executive is not best placed to provide a truly objective view of this decision, as the CEO is accountable for the liquidity of the GDC with regard to its financials, he thus has an inherent conflict of interest between that key personal performance indicator, and the need for an entirely objective decision here."

19. The Commissioner notes that the requirement of section 36 is that the Opinion from the *Qualified Person* – a role defined in the legislation. She is therefore satisfied that Mr Brack is the Qualified Person for the purposes of the legislation.

20. The GDC has furnished the Commissioner with copies of the submission that was made to Mr Brack on 22 July 2020, explaining why section 36

applied to the information. There is also correspondence from Mr Brack, dated the same day, agreeing to adopt that submission as his Opinion.

21. On the evidence available, the Commissioner is therefore satisfied that an Opinion was given by the Qualified Person on 22 July 2020.

The withheld information

22. The withheld information comprises of an email sent by the GDC's Chair to members of its Council, setting out a number of issues that could result in the event the GDC were to reduce Annual Retention Fees. There are then a number of emails received from Council members in which those members set out their thoughts on the proposal. Finally there is a table in which the response of each Council member is summarised.
23. The Commissioner notes that all the correspondence was sent prior to the Council's meeting of 13 May 2020.

Is the Qualified Person's Opinion reasonable?

24. The Qualified Person identified three limbs of the exemption that he believed were applicable to the withheld information. Disclosure would be likely to prejudice: the free and frank provision of advice; the free and frank exchange of views and; otherwise prejudice the conduct of public affairs.
25. In the Qualified Person's Opinion, disclosure would prejudice the free and frank provision of advice because:

"In its decision-making process, the GDC Council members need a confidential ('safe') space in which to express their opinions openly and freely with a wide area of considerations and without external distraction. Council members, knowing that their advice may become public from a FOI request, for example, may be reluctant to explore a full range of ideas which would in turn impair the quality of their advice and the effectiveness of their decision making.

"It is foreseeable in these circumstances that Council members would be less likely to give opinions, put forward views, or record advice, even in private Council sessions. If people didn't feel able to discuss all of the issues or perspectives, through fear of disclosure, it would be likely to not only impact the quality of decisions, but the efficiency of Council decision making itself."

26. In the Qualified Person's Opinion, disclosure would prejudice the free and frank exchange of views for the purposes of deliberation because:

"Disclosure of the information would have a chilling effect on future discussions in private and would be likely to inhibit the free and frank exchange of views of GDC Council members. It is important that a wide range of options are considered in these types of discussions.

"Council members, knowing their views may become public, may be more wary to explore more diverse considerations; particularly options that are known, or thought, to be unpopular or more extreme and creative.

"It is foreseeable in these circumstances that Council members would be less likely to give opinions, put forward views, or record advice, even in private Council sessions. If people didn't feel able to discuss all of the issues or perspectives, it would be likely to not only impact on the quality of decisions, but the efficiency of Council decision making itself.

27. Finally, in the Qualified Person's Opinion, disclosure would otherwise prejudice the conduct of public affairs because:

"In the round, if this information from a closed private session of Council is released, then the 'chilling effect' concept would not only impact on future discussions in private council sessions, it would also inhibit the GDC's ability to administrate Council meetings, effectively and efficiently. This ability would be significantly undermined if information from discussions the GDC had chosen to protect had to be disclosed immediately in the aftermath of those discussions under the FOI Act.

"Standing Order 5.5(g) of the GDC standing orders for the conduct of business gives the Council Chair discretion to consider an agenda item in a private session where to do otherwise would lead to the inappropriate disclosure of confidential or sensitive information or would/ or would be likely to prejudice the effective discharge of the Council's functions.

"Standing Order 5.7 states items to be discussed in private session will not be disclosed to the public or media and papers, documents and information will not be published on the website.

"Disclosure of the information requested would therefore be likely to undermine the Standing Orders for Council and the way Council is run. The discussion was held in private, with the intention of good governance, to allow wide-ranging discussion of the issue freely for the purpose of decision making. Releasing this information through the FOI Act would frustrate this process.

"Resultingly, the Council decision making process is either likely to be slower and less efficient in the future which would not be in the public interest. Alternatively, if the Council's decisions were quicker, because no one aired views, it would be likely to lead to Council having to revisit and retake decisions, because those decisions had not been taken properly and with the benefit of a candid and full discussion. Again, this would be likely to prejudice the effective conduct of public affairs (the exemption in section 36(2)(c) because it would not be an efficient and effective use of public money and, therefore, would be likely to impact on the GDC's ability to regulate the dental profession and protect the public."

28. Section 36 places the Qualified Person's opinion at the centre of exemption. The Commissioner's approach – supported by case law – is that the threshold to establish that an opinion is reasonable should be a low one. It is not for the Commissioner to substitute her own opinion for that of the Qualified Person. For an opinion to be reasonable, it need not be the most reasonable opinion available. It need only be within the range of opinions a reasonable person might hold.

29. The Commissioner considers that an opinion is likely to be unreasonable if: it fails to explain why the exemption applies to the particular withheld information; if the explanations do not relate to the limb(s) of the exemption that have been cited or; if it seeks to withhold information that is already in the public domain.

30. In respect of section 36(2)(b)(i), the term "advice" is not defined in the legislation. However the Commissioner's guidance states that:

"Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views."

31. The Commissioner notes that the Council is made up of both professionals and lay members. Its composition is designed to reflect a range of opinions and views. Whilst the withheld information leans more toward a process of deliberation than the giving and receiving of advice, she does accept that disclosure of the responses could inhibit council members from responding with their advice in future. She also accepts that disclosure of the Chair's email could dissuade both the Chair and others from seeking advice in the future.

32. The Commissioner is therefore satisfied that the Qualified Person's Opinion is reasonable in respect of this limb and the limb is thus engaged.
33. Turning to the free and frank exchange of views, the Commissioner does not consider it unreasonable to suppose that any of the Council members might be less likely to voice their opinion in future if this information were to be disclosed. The withheld information clearly represents an exchange of views as part of a process of internal deliberation that took place prior to the meeting of 13 May.
34. The Commissioner is therefore satisfied that this part of the Qualified Person's Opinion is reasonable and thus this limb of the exemption is also engaged.
35. Finally, the Commissioner must consider whether it is reasonable to argue that disclosure would be likely to "otherwise prejudice" the conduct of public affairs.
36. The Commissioner's guidance on "otherwise prejudice" states that, in order to demonstrate that this limb of the request would apply, the Qualified Person must be able to demonstrate that the prejudice envisaged is something that would not be covered by any other limb of the exemption.
37. The Qualified Person's Opinion identifies two potential consequences of disclosure. Firstly, it considers that disclosure would undermine the GDC's standing orders. Secondly, it argues that disclosure would undermine the GDC's decision-making process more generally. The Commissioner does not consider either line of argument is reasonable.
38. Firstly, the standing orders of the GDC do not override the FOIA. Any information that the GDC holds, regardless of whether it has been discussed in private session or not, is already vulnerable to a FOIA request. Council members should be aware of the GDC's responsibilities under the FOIA. The mere fact that information has been discussed in private session does not remove that information from the scope of the FOIA, nor does it automatically mean that it will be exempt from disclosure.
39. The Commissioner does not accept that disclosure in this particular case would prevent council members from discussing any matter in a private session in future. The GDC is entitled to hold private meetings – if it wishes to do so. In the event that requests are received for minutes of private meetings or for material discussed during those meetings, each request must be considered on its own merits and in accordance with the legislation.

40. In addition, the Commissioner notes that all the correspondence within the scope of the request was sent prior to the private meeting being held. Therefore even if members (mistakenly) believed that the standing orders protected any views they expressed in a private meeting from disclosure, they could have no reasonable expectation that any correspondence they sent prior to that meeting would be covered by such protection. Furthermore, the content of the withheld information does not indicate that the exchange of emails was predicated on a meeting (private or otherwise) taking place.
41. On the second argument, the Qualified Person's arguments about decision-making do not identify any detriment that does not already result from an inhibition of either free and frank advice or of free and frank deliberations.
42. The Commissioner's guidance recognises that there may be occasions where the process of making a particular decision could be undermined by disclosure of information, pertaining to that decision, prior to the decision being taken. In those circumstances, the prejudice would be "otherwise" to that envisaged by the other limbs of the exemption.
43. However, the Qualified Person's Opinion does not relate to the specific ARF decision (which, in any case, had already been taken), but to its decision-making process more generally. That is a prejudice that is already covered by the limbs of section 36(2)(b) – it is not a distinct prejudice in its own right.
44. The Commissioner therefore considers that, in respect of section 36(2)(c) of the FOIA, the Qualified Person's Opinion is not reasonable. It thus follows that this limb of the exemption is not engaged.

Public interest test

45. As the Commissioner has found that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged, she must next consider whether the balance of the public interest favours maintaining the exemption.
46. The GDC applied the lower bar that disclosure "would be likely to" cause prejudice, meaning that the likelihood of prejudice is less than 50% but is still more than hypothetical.
47. In carrying out a public interest test, the Commissioner must weigh the public interest in preventing the prejudice, that she has already decided may occur, against the public interest in disclosure. The lower the likelihood, or the lower the severity, of the prejudice that may occur, the weaker the public interest will be in preventing it from occurring.

48. In explaining why the public interest should favour disclosure, the GDC noted that:

"The public interest arguments in favour of maintaining the exemption which the GDC considered, were that the GDC had already been sufficiently transparent about the decision and the reasons for it. The abridged minutes had been published and this information provided a brief overview of the discussions and the views of Council members. The update from the GDC's Chair: Update from the Chair of the GDC to dental professionals published on the GDC website also provided the rationale for the decision made by the GDC Council. Given the information that had been published, we did not agree that disclosure of the substantive information would assist with the debate about the decision.

"The level of the ARF is a regular area of discussion for the GDC and Council and there remain issues regarding the restrictions from COVID-19 which may also mean emergency options may need to be discussed and agreed in future. Disclosing the information [the complainant] has requested would be likely to inhibit these future discussions carried out in the meetings that are properly conducted in private. Knowing the discussions could be released under the FOI Act would be against the public interest as Council members would likely be reluctant to discuss issues on this topic in future. Slow or poorly taken decisions is not in the public interest and nor is the additional time and cost such decisions would be likely to incur."

49. The complainant on the other hand argued that the decision to reduce (or not reduce) the ARF affected a large number of dentists and dental care professionals. There was therefore a strong public interest, in his view, in understanding the process by which the GDC reached its decision and the factors it considered.
50. In weighing the balance of the public interest, the Commissioner considers that the balancing is different for the responses from the individual Council members (and the summary of those responses) compared to the original email from the Chair.
51. The Commissioner expects public officials to be robust. They should not easily be dissuaded from giving their opinion – regardless of the hypothetical possibility of disclosure. Members of the Council should be subject to the same expectations – they are, after all, elected to represent their fellow dental professionals.
52. Nevertheless, the Commissioner also recognises that an official's reasonable expectation of their opinions being disclosed will vary according to their seniority within the organisation.

53. The Council minutes show that the members of the Council were in unanimous agreement that the ARF should not be reduced. Therefore, to some extent, each individual's view is already in the public domain. The withheld information though goes further and records more detailed reasons – alongside queries and concerns that the Council members had.
54. The Commissioner notes that members of the Council do not participate in the day-to-day running of the GDC. They are not amongst the most senior members of the organisation.
55. Whilst the views that were expressed were not expressed within the confines of a private meeting, the Commissioner accepts that there would have been a broad expectation that the emails were not intended for publication – at least in the short term.
56. The Commissioner further accepts that, in the event that this information were to be disclosed, Council members may be less likely to express private views or may be less forthright in challenging the GDC's leadership. There is a strong public interest in preserving the ability of Council members to be robust and forthright in expressing opinions and debating options. The interest in transparency has already been met by the information already in the public domain.
57. In the circumstances of this case, the Commissioner therefore considers that the balance of the public interest favours maintaining the exemption in respect of the individual responses from the Council members or the summary of those responses.
58. However, in respect of the original email from the Chair, the Commissioner takes the view that there are several factors which tip the balance in the opposite direction.
59. Firstly, this email was written by the Chair of the organisation. Alongside the Chief Executive, the Chair is one of the most senior members of the GDC and would be one of the "public faces" of the organisation. The Chair should therefore reasonably expect that his views will be more closely scrutinised and he should be robust enough to put forward his views anyway.
60. Secondly, whilst the email is framed as being the view of the Chair, in the Commissioner's view, the actual content of this information is likely to represent, in practice, the "corporate view" of the GDC. The Chair was putting forward a proposal and explaining the rationale behind it. The Commissioner considers it unlikely that the Chair would have reached his view entirely independently of the Chief Executive and other senior leaders within the organisation. Whilst this does not automatically mean

that the correspondence is not deserving of protection, the Commissioner considers that there is a stronger public interest in disclosing information which represents an organisation's thinking, compared to the thinking of a particular individual.

61. Thirdly, the Commissioner has considered the information that is already in the public domain – in particular, the Chair's blog.² Whilst some of the factors mentioned in the Chair's email are also referenced in the blog post, the email contains additional reasons which appear to have influenced the GDC's thinking.
62. Finally, the GDC made reference to its need to review the ARF periodically and the public interest in not prejudicing future deliberations. The Commissioner is not persuaded by this argument.
63. Whilst there was, at least at the time of the request, a realistic possibility that the GDC might need to consider the level of ARF again, the content of the withheld information suggests that the factors weighing against a reduction would be largely unchanged so the probability of a "chilling effect" is reduced. Were the GDC to consider the possibility of raising fees, the Commissioner considers that the content withheld information would add little to such a discussion.
64. In respect of the Chair's email, the Commissioner therefore considers that the public interest favours disclosure.

² <https://www.gdc-uk.org/news-blogs/news/detail/2020/05/20/update-from-the-chair-of-the-gdc-to-dental-professionals>

Right of appeal

65. 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

66. 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.
67. 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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