

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2023

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

Decision (including any steps ordered)

1. The complainant has requested from the General Dental Council (GDC) information about 'points of learning' relating to a fitness to practice (FTP) case. The GDC answered some of the questions asked and withheld some information, citing section 42 of the FOIA (legal professional privilege).
2. The Commissioner's decision is that the GDC is entitled to rely on section 42 to withhold the requested information.
3. The Commissioner does not require the GDC to take any steps.

Request and response

4. On 27 May 2023, the complainant wrote to the GDC and made the following request for information under the FOIA:

"Regarding this case (Luke J W Charnley FTP case), please provide the following information:

1. The reasons for the original GDC engaged barrister withdrawing from the case. Please provide the date of said withdrawal and details of any GDC Senior Team written communications regarding this, continuation of the case and engagement of a new barrister.

2. Due to the length of time involved in this case, the associated enormous strain placed on the registrant and their family, and also the massive financial cost of the case, please detail any formal plans for the GDC to reflect and plan regarding learnings from this case going forward. Please include any early-stage planning documentation and/or communications.
3. Regarding point 2 above. Please include whether the Williams appeal will be part of those reflections, and include any formal communications regarding the use of dental expert witnesses in light of these two cases”
5. On 26 June 2023, the GDC responded to the request. In regard to points 1 and 3, it provided answers to the questions. In regard to point 2, it confirmed that it holds some information about learning points and applied section 42 to withhold the information.
6. The complainant wrote to the GDC on the same day. In regard to point 2 of the request, he asked it to carry out a review. He said “I do not believe that you have applied the public interest test with correct weighting towards disclosure”.
7. On 4 August 2023, the GDC carried out a review and wrote to the complainant maintaining its decision. The GDC said it is satisfied that on balance the public interest favours maintaining use of the exemption.

Scope of the case

8. On 4 August 2023, the complainant contacted the Commissioner to complain about the way his request for information had been handled, specifically about its application of section 42 to withhold some of the requested information.
9. The Commissioner considers the scope of his investigation to be to establish whether or not the GDC is entitled to withhold the requested information in accordance with section 42.

Reasons for decision

10. Section 42 of FOIA states that a public authority may refuse to disclose information which is subject to legal professional privilege (LPP). It is a qualified exemption, and so it is also subject to the public interest test.

11. There are two types of LPP – litigation privilege and advice privilege. The GDC has claimed that the withheld information is subject to advice privilege, as it is a confidential communication between client (the GDC) and an external Solicitor (legal advisor), made for the dominant purpose of seeking and giving legal advice.
12. The Commissioner has reviewed the withheld information and he is satisfied that it is a confidential communication between client and lawyer for the dominant purpose of seeking and giving legal advice. It falls within the definition of advice privilege and is therefore subject to LPP.
13. Section 42 is a class based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.

Public interest in disclosure

14. In regard to the public interest in disclosing the withheld information, the complainant has argued that the information relates to a FTP hearing that concluded with a determination of 'No Case to Answer'. This impacted the registrant's health and well-being and the case was scrutinized by the dental profession. The withheld information would provide insight and understanding into 'how such a serious case went so wrong'.
15. The complainant also argued that as the GDC is funded by dentists there is significant public interest in ensuring funds were used correctly.
16. The GDC has acknowledged that the general public interest in transparency counts in favour of disclosure. That there is a specific interest in a more detailed understanding of factors which the GDC considered that led to the outcome of the case and of 'frank analysis' of cases where there are acknowledged to be learning points. It also acknowledged that it is the statutory regulator for the dental profession, is funded by the profession, and its overarching objective is the protection of the public.

Public interest in maintaining the exemption

17. The GDC argued that the withheld information (legal advice) was provided in relation to a specific FTP case for the management of current and future FTP cases and the avoidance of legal issues which arose in that specific case. It said that the withheld information does not address issues of wider public interest or significance.

18. The GDC argued that the withheld information seeks to improve the legal position and outcomes for it in current and future FTP cases. Disclosure could provide information which may be used by others that seek to weaken, frustrate and undermine its position and progress in current and future cases. This would in turn undermine the GDC's FTP regime (there is public interest in the regime functioning efficiently), negatively impacting on the effectiveness of its regulatory role and public confidence in it.
19. The GDC argued that there is a general public interest inherent in the exemption due to the importance of legal privilege, e.g., safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. The GDC argued that it is 'vital' for it to be able to obtain full and frank legal advice in a safe space, to aid it in complying with its legal obligations and conducting its business accordingly. Release of the withheld information would likely inhibit the free and frank provision of legal advice. This is because, if legal advice were to be disclosed, the GDC may be reluctant to seek advice as the disclosed information could contain information which may damage its position.

Balance of the public interest

20. The public interest here means the public good, it is not what is of interest to the public; or the private interests of the requester (unless those private interests reflect what is the general public good, e.g., holding public authorities to account).
21. The Commissioner recognises that, in this case, the complainant's interest in the information aligns with broader public interests. These are the general public interest in transparency, the public interest in good decision making, and ensuring that registrant funds were used correctly in pursuing the case to its conclusion.
22. The public interest here, then, is in ensuring that the GDC is able to obtain and use legal advice and engage in future FTP proceedings without its position being prejudiced by the disclosure of information. Whilst the Commissioner recognises that there is a general public interest in understanding why the case was pursued to its conclusion and its use of registrant funds in taking this action, he considers that disclosure would, in this case, undermine the effectiveness of the GDC's position and prejudice its ability to successfully pursue existing and future FTP cases.

23. The Commissioner has reviewed the withheld information and although he accepts that it may provide some insight in to how the case was managed, he also notes that some or all of the advice could be relevant in the management of other current and future FTP cases. The likelihood that the information would assist in the management of existing and future cases is dependent on the specific circumstances of each case as to whether part(s) or all of the advice may be followed in managing the cases.
24. The Commissioner accepts that the withheld information may therefore inform the management of current and future cases on a case by case basis to varying degrees and that there is a real risk that disclosure could frustrate and undermine the GDC's position in the progress of those cases, and ultimately undermine the GDC's FTP regime.
25. The Commissioner notes concern shown by dental profession about the way in which the FTP hearing was conducted. The British Association of Private Dentistry (made up of private dentists) published a statement on its website on 27 May 2023 in response to the hearing decision. It expressed concern about the GDC pursuing the case to its conclusion. The Commissioner however also notes that it stated it will be requesting a meeting with the GDC where it hopes the GDC will show the insight it expects it to display.
26. The Commissioner has also reviewed the determination in the FTP case, and notes that a number of charges were withdrawn during the hearing, that it concluded with a decision of 'No Case to Answer' and that the GDC published the decision on its website. The FTP process therefore appears to contain the necessary safeguards that require it to consider a matter thoroughly and ensure that it is settled fairly and that public funds are being used in pursuit of this. It would not be in the public interest to undermine that process by disclosing the withheld information.
27. In balancing the public interest arguments for and against disclosure the Commissioner has given particular weight to the fact that disclosing the information has the potential to affect the outcome of ongoing / future FTP cases. The Commissioner accepts that disclosing the information in these circumstances would undermine the confidence the GDC would have in its ability to have free and frank discussions with legal advisors.
28. Having considered the relevant factors the Commissioner is satisfied that that the public interest in withholding the information in this case outweighs the public interest in disclosure. He considers that any public benefits in disclosure would be overshadowed by the resulting detriment to the GDC's position in current and future FTP cases and ultimately to the effectiveness of the FTP regime.

Right of appeal

29. 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

30. 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.
31. 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

**Pamela Clements
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