

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 August 2015

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the General Dental Council (GDC) for details of legal fees incurred in relation to its investigating committee. The GDC disclosed some of the requested information but withheld some information under the exemption in section 43(2) (commercial interests) and found that the public interest in maintaining the exemption outweighed the public interest in disclosure.
2. The Commissioner's decision is that section 43(2) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The GDC shall disclose to the complainant the information withheld under the section 43(2) exemption.
4. The public authority 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 October 2014 the complainant made a freedom of information request to the GDC for details of legal fees it had incurred. The request read as follows:

I would be grateful for the following information concerning the legal costs incurred by the General Dental Council in relation to the Investigating Committee since 1 August 2013 but not restricted to:

- 1. The legal fees paid to Penningtons/Penningtons-Marche LLP in respect of the Hudson report and related activities;*
 - 2. The fees paid to Field Fisher Waterhouse LLP in respect of the secondment of Caroline Jaggard;*
 - 3. The fees paid to Kingley Napley in respect of the letter before claim sent on behalf of Hayley Lawrence and others;*
 - 4. Counsel fees and associated legal costs in respect of the review of the empanelment policy in 2014;*
 - 5. The fees paid to Kingsley Napley or any other legal advisers in respect of any other legal matters or proceedings involving a member of the Investigating Committee.*
6. The GDC responded to the request on 31 October 2014 when it explained that the information was being withheld under the section 43 exemption as disclosure would be likely to prejudice the commercial interests of the suppliers of legal services.
 7. On 9 November 2014 the complainant asked that the GDC carry out an internal review of its response.
 8. On 26 February 2015, following the complainant making his complaint to the Commissioner, the GDC presented the findings of its internal review. The review upheld the application of section 43(2) to the information in requests 1 – 3 and request 5. It added that it did not have a method for calculating internal legal costs and so this information was not held. For request 4 the GDC said that it was now prepared to release the requested information and this was provided to the complainant.

Scope of the case

9. On 27 November 2014 the complainant contacted the Commissioner to complain about the GDC's decision to refuse to disclose the requested information by relying on the section 43(2) exemption.
10. The Commissioner agreed with the complainant that the scope of his investigation would be to consider whether the GDC had applied section 43(2) correctly to the withheld information.

Reasons for decision

Section 43(2) – Commercial interests

11. Section 43(2) of FOIA provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. In this case the GDC has said that disclosure of the requested information would be likely to prejudice its own commercial interests because it could enable suppliers to gain an unfair advantage when seeking to negotiate future fees with the GDC. It said that it could also affect the GDC's ability to negotiate favourable fees in the future. The GDC offered no further explanation to support its application of the exemption.
12. Section 43(2) is a prejudice based exemption which means that in order to engage the exemption a public authority must be able to demonstrate that disclosure would cause the prejudice the exemption is designed to protect against. To do this a public authority must be able to meet the requirement of the prejudice test which involves a number of steps.
 - Identify the "*applicable interests*" within the relevant exemption
 - Identify the "*nature of the prejudice*". This means:
 - Show that the prejudice claimed is "*real, actual or of substance*";
 - Show that there is a "*causal link*" between the disclosure and the prejudice claimed.
 - Decide on the "*likelihood of the occurrence of prejudice*".
13. Identifying the applicable interests within an exemption means that a public authority must be able to show that the prejudice it envisages affects the interest which the exemption is designed to protect. Here the Commissioner would accept that its arguments are relevant to the section 43 exemption. Clearly, if it can be shown that disclosure would make it harder to negotiate fees in the future this would affect its commercial interests.
14. However, before the exemption can be successfully engaged the GDC must also be able to show that there is a link between disclosure and the prejudice occurring. That is to say, it must be able to show how disclosure would, or would be likely to, cause the prejudice. Any argument must be more than just assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice.

15. In this case the GDC has offered no evidence to show how disclosure of the requested information might affect future negotiations. For instance, it has not said anything to suggest that it will need to negotiate fees for similar legal advice in the future nor has it been able to demonstrate that there is anything about the requested information which is particularly sensitive or revealing. The GDC's arguments amount to little more than mere assertion.
16. Even if the GDC had provided a more substantive argument, the Commissioner would still be sceptical about any claim that disclosure of fees paid to a particular legal firm would prejudice future, unspecified negotiations. The information requested is the total fees spent. The complainant has not asked for the fees to be broken down in any way. For instance, he has not asked for the number of hours involved or the type of legal advice or assistance that was offered. Therefore, it is very difficult to see how disclosure of the requested information would provide any kind of commercial advantage as a competitor would not know on what basis these legal fees had been negotiated.
17. The Commissioner therefore finds that the GDC has failed to demonstrate a causal link between disclosure of the information and any prejudice to its commercial interests. For these reasons the Commissioner has decided that section 43(2) is not engaged.

Right of appeal

18. 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

19. 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.
20. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF