

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2016

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

Decision (including any steps ordered)

1. The complainant has requested information about meetings between the General Medical Council (GMC) and the government regarding the Shape of Training (SHoT) report. The information was withheld under section 36(2)(b)(ii) - inhibition to the free and frank exchange of views section 36(2)(c) – prejudice to the conduct of public affairs, section 41 – information provided in confidence and section 28 – prejudice to relations between administrations within the United Kingdom.
2. The Commissioner's decision is that the GMC was entitled to withhold the majority of the information under section 36(2)(b)(ii) but there is a limited amount of information which is not exempt under either of the section 36 exemptions or those provided by sections 41 and 28. This information has been identified to the GMC in a confidential annex.
3. The Commissioner also finds that the GMC failed to issue the complainant with a refusal notice within twenty working days of receiving the request. This is a breach of section 17(1).
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose the information identified in the confidential annex.
5. 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

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 18 March 2015 the complainant requested information of the following description:

“Since the Shape of Training report was published has the GMC met with any Ministers/civil servants/politicians to discuss the implementation of the review? If so may I see the full documentation of these meetings and who was involved.”
7. On 11 November 2015 the GMC responded. It confirmed that the GMC held information falling within the scope of the request and directed the complainant to where some minutes had been published on the internet. However the GMC refused to provide any further information. It cited the following exemptions as the basis for withholding this information:
 - Section 36(2)(b)(ii) - prejudice to the conduct of public affairs through the inhibition of the free and frank exchange of views,
 - Section 36(2)(c) - prejudice to conduct of public affairs by other means,
 - Section 41 – information provided in confidence,
 - Section 28(1) – prejudice to relations between administrations within the United Kingdom.
8. The complainant requested an internal review on 16 November 2015. The GMC sent her the outcome of its review on 10 December 2015. The GMC upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 16 November 2015 to complain about the way her request for information had been handled. However it was only after the GMC had completed its internal review that the complaint became eligible for investigation.
10. The complainant argued that there was a strong public interest in disclosing the requested information so that any influence from

government during the implementation of the review's recommendations is, "transparently declared so that the public can judge the end product in the due political context.

11. She also raised concerns over the length of time it took the GMC to deal with her request.
12. The Commissioner considers the scope of the request to be whether the GMC is entitled to rely on sections 36, 41 and 28 to withhold the requested information. The Commissioner will also look at the length of time it took the GMC to deal with the request.

Background

13. In October 2013 the independent Shape of Training Review, chaired by Professor Greenway, published its report. The review had been established to examine whether the way in which doctors are trained meets the current and future health care needs of patients across the UK. The review outlined 19 recommendations to the UK Governments suggesting how changes to the structure of medical training can help deliver high quality care for the future. Those recommendations included doctors being fully registered upon graduation. The review also found that currently consultant training is too specialised and takes too long. It proposed the introduction of a broader but shorter training programme taking four to six years rather than five to eight years.
14. Following the report's publication the UK Health Ministers asked officials to consider the recommendations and make policy proposals, where possible on the basis of a four-nation consensus. As a consequence the UK Shape for Training Steering Group was set up to consider how the reports recommendations could be implemented.
15. The withheld information relates to the GMC's participation on that steering group, together with other meetings at which the implementation of the review was discussed.

Reasons for decision

Section 17 – time for complying with the obligation to issue a refusal notice.

16. Section 17(1) of FOIA states that where a public authority is relying on an exemption to withhold information it must give the applicant a

notice explaining which exemptions have been applied and why they apply. This must be done within twenty working days of receiving the request. In this case the request was made by email on 18 March 2015 and not responded to until 11 November 2015. This is clearly outside the twenty working days permitted. The GMC breached section 17(1) of the FOIA.

17. The Commissioner monitors complaints where a serious contravention of section 10 is recorded and where persistent contraventions occur we will consider placing a public authority on our monitoring programme (http://www.ico.org.uk/what_we_cover/promoting_openness/monitoring_compliance.aspx).

Section 36(2)(b)(ii) - inhibition to the free and frank exchange of views

18. The GMC has applied the exemptions provided by section 36(2)(b)(ii) and section 36(2)(c) to all the withheld information. Having viewed the withheld information the Commissioner will start by looking at section 36(2)(b)(ii) as she considers that this is likely to have the widest application. Section 36(2)(b)(ii) protects information if its disclosure would or would be likely to inhibit the free and frank exchange of views for the purpose of deliberation,
19. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
20. For the purpose of section 36 the GMC's qualified person is its Chief Executive. The GMC has provided the Commissioner with a copy of the submission that was put to the qualified person and explained that the qualified person was also provided with copies of all the documents subject to the exemption. It is clear from the documentation provided by the GMC that on 3 November 2015 the qualified person gave his opinion that the information in question was exempt under 36(2)(b)(ii).

21. The qualified person may apply the exemption on the basis that the inhibition to the free and frank exchange of views either 'would' occur or would only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition to the free and frank exchange of views is more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.
22. It is clear from the response provided by the qualified person that he considers the inhibition to the free and frank exchange of view is only 'likely' to occur.
23. The Commissioner has gone on to look at whether that opinion was reasonable. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
24. The qualified person stated that the withheld information reflects the views of senior individuals from external organisations in relation the SHoT Review. He believes that disclosing this information may restrict open and robust discussions in the future. This is likely to be prejudicial to the work of the GMC. Disclosing the information would be likely to prejudice the relationships between all the parties involved resulting in them being less willing to share free and frank views in the future. In forming this opinion he had regard for the fact that the work to implement the SHoT Review's recommendations is ongoing and therefore any disclosure could prejudice the implementation process and ultimately its end product.
25. Having viewed the withheld information and considered the arguments above the Commissioner finds that the qualified person's opinion is a reasonable one. Therefore the exemption provided by section 36(2)(b)(ii) is engaged. The exemption is however subject to the public interest test.

Public interest test

26. The public interest states that information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

27. As explained earlier, the Commissioner does not have to agree with the qualified person's opinion to accept the exemption is engaged. However in this case, by accepting the opinion is reasonable, the Commissioner does recognise there is potential for those participating in the meetings captured by this request to be more circumspect when sharing their views with others in the future. In assessing the public interest the Commissioner will consider the severity, extent and frequency of this inhibition.
28. As one would expect with any request relating to meetings the information captured by the request consists of agendas, papers, including drafts, circulated for discussion and minutes. In addition there are some email exchanges which include updates from meetings or seek approval of minutes.
29. The GMC has contacted the two main parties involved in the meetings to seek their views on disclosure. One was adamant that the information should not be disclosed arguing that to do so would substantially inhibit the free and frank exchange of views. The other party's concerns focussed on one particular draft paper which it had produced as an internal document to stimulate thinking. It was concerned that releasing the document would mislead the public and misrepresent its own position.
30. The fact that at least one of the main parties to some of the meetings has expressed serious concerns over disclosing the information supports the GMC's position that to do so would alter the nature of the relationship between itself and other attendees and could dampen the candour of their discussions. This in turn could prevent those tasked with implementing the recommendations of the SHoT Review from exploring all possible options as robustly as is necessary. The Commissioner recognises the importance of the proposed changes to the roles of doctors and the changes this requires to their training. This is a major piece of public policy and the success, or otherwise of its implementation will have a direct and major effect on the public for a long time. The Commissioner therefore recognises the importance of protecting this policy process.
31. The GMC has given its view that disclosure,

"... would be likely to have a significant impact on the willingness of key stakeholders, ..., to share honest opinions with the GMC about important and sensitive matters, and would be likely to inhibit the GMC's ability to conduct robust and meaningful reviews in the future on such issues in our role as a regulator, which affect patient care."

32. However the extent of any inhibition would depend on the actual nature of the information being disclosed. Where the information records candid views on sensitive issues the Commissioner accepts it is likely that its disclosure would change the nature of any future discussions. However some of the withheld information simply records what issues are to be discussed, for example agendas. There can be occasions when disclosing such information could itself reflect areas of particular concern or signal the direction in which policies are developing. However on this occasion the Commissioner is not satisfied that the agendas are as sensitive as the information recording the contents of the discussions that followed.
33. The Commissioner is aware that the implementation of the SHoT review was ongoing at the time of the request and still is. Undoubtedly the GMC and many of the other parties who participated in the meetings to which the request relates, will continue to be involved in discussions and debates over its implementation. Therefore any inhibition caused by disclosing this information could continue to impact on this important policy area.
34. Having said that, the implementation of the review involves a number of different work streams each of which could have several stages to it. Having reviewed the withheld information the Commissioner has identified one issue discussed at the meetings which by the time of the request had already passed a significant stage. This had resulted in the proposals under discussion becoming public, or at least known by health care professionals and their representatives. Disclosing such information would have less of an effect on the willingness of people to hold free and frank discussions compared with the disclosure of truly confidential information. Similarly the Commissioner has identified drafts of documents which would have been published by the time of the request. Although it is accepted that disclosing earlier drafts of documents can lead to speculation over the reasons for any differences between the draft and the final version, the Commissioner is not convinced there is anything particularly remarkable about the drafts in question. Again this reduces the severity of any inhibition their disclosure might cause.
35. The complainant has argued that the SHoT review represents a key matter of public interest and any influence on these proceedings from government should be publicly transparent. The GMC itself has recognised the inherent public interest in operating in an open and transparent way and being held to account for decisions made.
36. The Commissioner considers the reform of how doctors work, the role they fulfil in the NHS of the future and therefore how they are trained to perform that role, is an issue which that will affect the entire

population of the UK. She is aware of the concerns expressed over the proposed reforms to doctors' training and the linked issue of doctors' contracts. There is a very real public debate on these issues. The requested information would fuel that debate and perhaps provide the opportunity for some to make informed challenges to the proposals being developed.

37. However it is likely that informing that public debate would be at the cost of the allowing those such as the GMC, with specific responsibilities for implementing the Review's recommendations, to fully contribute to that implementation process. The Commissioner is aware that some of the information relates to meetings that took place only days or weeks before the request was made. This and the fact that the implementation of the Review is still ongoing (even if some individual work streams have been completed) increase both the severity of the extent of the inhibition that could be caused. The Commissioner is therefore satisfied that in respect of the majority of the information which engages section 36(2)(b)(ii) the public interest in maintaining the exemption outweighs the public interest in disclosure.
38. Other information, including that relating to matters or drafts of documents which are now within the public domain would not cause such a significant effect on the candour of future discussions. Similarly the information contained in the agendas would not have a significant effect on individuals' willingness to openly discuss the Review's implementation whilst going some way to meeting the genuine public interest in making the implementation process more transparent. In respect of this information the Commissioner finds that the public interest in favour of maintaining the exemption does not outweigh the public interest the disclosure. The GMC cannot rely on section 36(2)(b)(ii) to withhold this information.
39. However before determining whether this information should be disclosed it is necessary to consider the other exemptions that have been applied to this information.

Section 36(2)(c) – prejudice to the conduct of public affairs

Section 36(2)(c) states that information is exempt if in the reasonable opinion of the qualified person its disclosure would otherwise prejudice, or would be likely otherwise to prejudice the effective conduct of public affairs.

40. As explained in the Commissioner's guidance¹, the Tribunal has ruled that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it must relate to a prejudice not covered by section 36(2)(b)(ii). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b).
41. The Commissioner understands the GMC's position to be that disclosing the requested information at this stage in the development of policies for the implementation of the Review's recommendations would prejudice the quality of the final policy. This would appear to be as a result of the inhibition caused to the free and frank exchange of views. Therefore the Commissioner finds that this prejudice is in effect the same as that already considered under section 36(2)(b)(ii). In light of this it is inappropriate to consider the application of section 36(2)(c) to the same information.

Section 28 – prejudice to relations between UK administrations

42. At paragraph 38 the Commissioner has outlined the information which cannot be withheld under section 36(2)(b)(ii). The exemption provided by section 28 has also been applied to the majority, but not all, of this information.
43. Section 28 states that information is exempt if its disclosure would or would be likely to prejudice relations between any administration in the United Kingdom and any other such administration. The administrations referred to are the government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly and the Welsh Assembly Government.
44. The GMC has applied the exemption on the basis that the prejudice to relations between the administrations is only likely to arise.
45. As already explained, following the publication of the SHoT Review report UK Health Ministers asked officials to consider the report's recommendations and make policy proposals, where possible on the basis of a four-nation consensus. As a consequence the UK Shape for Training Steering Group was established. That group is chaired by the Scottish Government. The Scottish Government considers itself to be

¹ Prejudice to the effective conduct of public affairs (section 36)

guardians of the papers produced in relation to the discussions on how best to implement the Review's recommendations. The GMC has argued that it is likely that disclosing such information would lead to other UK administrations being more reluctant to share information with the Scottish Government. This in turn would reduce both the frequency and openness of communications between the Scottish Government and other administrations.

46. The Commissioner is not satisfied that disclosing the information in question would have such a result. It should be remembered that although section 28 has been applied to the vast majority of the information captured by the request, the Commissioner is only considering its application to the information which she found was not protected by section 36. This residual information is therefore of a less sensitive nature compared to some of the other information to which the exemption has been applied. This clearly has a bearing on how the other parties to the meetings would react to its disclosure.
47. More importantly though the Commissioner finds that the rationale used when applying the exemption is flawed. The GMC operates on a UK wide basis. It is not solely an English body, nor is it solely a Scottish body. The SHoT Review was commissioned by all four administrations and all four are obviously involved in the implementation of its recommendations. The GMC has an important role in that implementation process within the jurisdictions of all four administrations. It is difficult to see how the disclosure of information by a UK wide body could reasonably be interpreted by any of the administrations as being indicative of how the Scottish Government handles information.
48. Furthermore all the administrations are subject to freedom of information legislation. Their officials attending the meetings in question should have been aware of the potential for any of the public authorities involved to receive requests and would respect the need of those bodies to deal with them in accordance with the relevant legislation. Not all attendees were from public authorities, but those who were not would also have been aware of the legislation. Bearing this in mind, together with the benign character of the actual information under consideration the Commissioner does not accept that its disclosure is likely to lead to other administrations being less willing to share information with the Scottish Government.
49. The Commissioner finds that the exemption provided by section 28 is not engaged in respect of the information considered above.

Section 41 - information provided in confidence

50. Section 41 has been applied to a large number of the documents captured by the request. However it is only necessary to consider the exemption in respect of the handful that have not already been found to be exempt under either section 36 or 28.
51. Section 41 provides that information is exempt if it has been obtained from a third party and its disclosure by the public authority holding it would constitute an actionable breach of confidence. The first issue to consider therefore is whether the information was provided to the GMC by another person.
52. The information under consideration consists of a number of agendas, together with some of the papers circulated with one of those agendas and a brief note of a meeting. It may be that agendas were circulated by whichever body organised the meeting. However it is possible that the agenda itself was compiled from agenda items put forward by attendees. Similarly some of the papers may have been the result of collaborative work between attendees. Nevertheless having viewed the information the Commissioner accepts that it is most likely that the information was produced by parties other than the GMC.
53. In respect of the note of a meeting the Commissioner finds only one sentence to be information that was provided by another person. That sentence reports what a third party said at the meeting in question.
54. When considering whether disclosing the information provided by a third party would constitute a breach of confidence, the Commissioner takes into account whether:
 - the information has the necessary quality of confidence
 - the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
55. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible. The Commissioner accepts that the agendas and meeting note have both these qualities. As for the papers circulated with one of the agendas they relate to events that had taken place before the request was received. Much of the papers' contents would already have been made available to a wider audience and as a consequence would have lost much of their quality of confidence.

56. At the time the agendas, papers and meeting note were created it would have been recognised that their contents were confidential as they dealt with the high profile and controversial issue of reforming the way doctors are trained and their future role within the health service. This is supported by the views of the Scottish Government which chaired the meetings to which some of the agendas relate.
57. The final test is whether disclosing the information would be detrimental to the confider. The agendas simply set out the matters for discussion which reflect the work to be tackled by the steering group. Those matters are predictable and do not in themselves reveal anything about the discussions generated by the various agenda items.
58. As previously mentioned, the papers circulated with one of those agendas relate to the planning of events that had already occurred by the time of the request. The Commissioner recognises that the papers are only draft proposals for those events and that it is possible that the final events followed a slightly different programme. Nevertheless the papers do not appear to contain anything of a sensitive or controversial nature.
59. The meeting note is very brief and again gives away nothing of significance in respect of how it is proposed to implement the SHoT review.
60. In light of the above the Commissioner is not satisfied that the disclosure of this information would be detrimental to the confider. Therefore the Commissioner finds that section 41 is not engaged.

Summary

61. The GMC applied section 36 to all the information captured by the request and the Commissioner has found that the majority of the information is exempt under section 36(2)(b)(ii). However there is some which is not protected by that exemption. The GMC had also withheld some of that information under section 28 and/or section 41. The Commissioner has found that neither of these exemptions are engaged. The GMC is therefore required to disclose this information. The Commissioner has provided the GMC with a confidential annex which sets out the information to be disclosed.
62. However before disclosing the information the GMC is entitled to redact any information contained in those documents which constitutes personal data if its disclosure would breach the data protection principles of the Data Protection Act 1998. The Commissioner considers it likely that any redactions should be limited to names and direct phone numbers or email addresses. In deciding whose personal data

should be redacted the Commissioner would expect the GMC to have particular regard for the seniority of the individual concerned, their position within the organisation they represent and the public's legitimate interest in understanding who influenced the development of these important policy proposals.

Right of appeal

63. 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

64. 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.
65. 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