



Neutral citation number: [2024] UKFTT 61 (GRC)

Case Reference: EA/2023/0289

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Determined, by consent, on written evidence and submissions.

Considered on the papers on 4 January 2024.

Decision given on: 21 January 2024

Before

**TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Aimée Gasston
TRIBUNAL MEMBER Suzanne Cosgrave**

Between

JEWISH MEDICAL ASSOCIATION (UK)

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) GENERAL MEDICAL COUNCIL**

Respondents

Decision: The appeal is Dismissed.

Substituted Decision Notice: No substituted decision notice.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. The Tribunal considered an agreed open bundle of evidence and submissions of 181 pages and a closed bundle.

BACKGROUND

3. The Jewish Medical Association (the Appellant) requested the General Medical Council (GMC) to disclose the legal advice that it received on the matter of definition(s) to be used by the GMC in response to allegations of antisemitism by UK registered doctors.
4. Thus, on, 2 May 2022, the Appellant requested the GMC to provide the following information:-

...for sight in full of the Legal advice that was both requested and received on the matter of the definition/s to be used by the GMC in response to allegations of antisemitism by UK registered doctors.
5. The GMC responded on 25 May 2022, refusing to disclose the requested information citing section 42 of FOIA (which relates to legal professional privilege (LPP)).
6. The Appellant requested an internal review on 21 July 2022, and then followed this up with further correspondence on 29 July 2022.

7. The GMC carried out an internal review and notified the Appellant of its findings on 6 October 2022. It upheld its previous application of section 42 FOIA.
8. The Appellant complained to the Commissioner who provided a short decision notice dated 10 May 2023. The relevant part of the decision notice reads as follows:-
 11. 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 of legal advice. It falls within the definition of advice privilege and is therefore subject to LPP.
 12. This 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.
9. The Commissioner concluded that the public interest in maintaining the exemption in section 42(1) FOIA outweighed the public interest in disclosure, as follows:-
 - 16 ...He acknowledges the public interest in openness, transparency and accountability. He also accepts that disclosure may assist the complainant and other interested members of the public in understanding more clearly how the particular complaints brought to the GMC were handled and what legal advice it was provided with and potentially relied on. He also understands that the complainant considers the decisions reached in these complaints and their concerns over the Jerusalem Declaration have a wider impact on Jewish doctors, medical students and patients.
 17. However, in this case the Commissioner considers the public interest rests in maintaining the exemption. He notes that the GMC has shared what information it believes it can in respect of the complaints and the decisions it reached. This goes some way to meeting the public interest in disclosure.
 18. The Commissioner considers the public interest lies in protecting the GMC's ability to seek and obtain candid, free and frank legal advice and use this information to consider the options available to it. Disclosure would damage the long standing principle of LPP and reduce the quality of legal advice the GMC is able to obtain in the future as a result of public disclosure. He considers there needs to be a very substantial public interest in disclosure that warrants, in a given case, going against this principle. In this case, the Commissioner does not consider this threshold is met.
10. Therefore, the Commissioner decided that the public interest in favour of disclosure was outweighed by the public interest in favour of maintaining the exemption and that GMC had correctly applied section 42(1) FOIA.

LEGAL FRAMEWORK

11. Section 42 FOIA states that information in respect of which a claim to LPP could be maintained in legal proceedings is exempt information. Section 42(1)(a) FOIA reads, materially, as follows:-

42.— Legal professional privilege.

(1) Information in respect of which a claim to legal professional privilege... could be maintained in legal proceedings is exempt information.

12. There are two types of LPP – litigation privilege and advice privilege. In this case the GMC has claimed that the withheld information is subject to advice privilege, as it is a confidential communication between client and lawyer, made for the dominant purpose of seeking or giving of legal advice.
13. The development of the doctrine of privilege in relation to legal advice, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court, ex p B*, [1996] AC 487, and then summarised by him as follows at 507D:-

The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

14. However, this is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. When applying the public interest test the approach to be taken is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: s2(2)(b) FOIA.

15. In relation to the application of the public interest test in s42 FOIA cases, in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following important guidance:-

41. ... it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

53....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

16. Further, in *Corderoy and Ahmed v Information Commissioner, A-G and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted as follows in emphasising that the s42 FOIA exemption is not a blanket exemption:-

68. The powerful public interest against disclosure ... is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute.

17. The fact that the advice is still 'live' is capable of attracting significant weight: *Szucs v Information Commissioner* FTT, 16th September 2011 (EA/2011/0072).

18. The inherent weight afforded to non-disclosure of legal professional privilege material alone may outweigh the pro-disclosure factors: *Callender Smith v Information Commissioner and CPS* [2003] UKUT 60 (AAC).

19. In *Montague v Information Commissioner and the Department for International Trade* [2022] UKUT 104 (AAC), the Upper Tribunal decided that the public interest balance must be assessed as how matters stood at the date of the public authority's initial response.

THE APPEAL AND RESPONSE

20. The Appellant's appeal is dated 9 June 2023. The grounds state that:-

The Decision Notice was wrong and not in accordance with the law, inter alia because

(1) Other than recording that the Commissioner "took note" of JMA's arguments, it fails to consider those arguments.

(2) To the extent that the Commissioner did take note of JMA's arguments, the Decision Notice does not give adequate reasons for finding that the balance of public interest fell in favour of maintaining the exemption: paragraphs 16-18 go little further than stating points of general principle in relation to FOIA, and the section 42 exemption.

To the extent that the Decision Notice involved an exercise of discretion by the Commissioner, he ought to have exercised his discretion differently.

21. The Appellant explained as follows:-

14. Notably, JMA explained to the Commissioner that it has been aware for some time that there are instances where Jewish doctors and medical students have been exposed to harmful, distressing and unwarranted criticism by fellow doctors and students. The recipients of the criticism have considered these criticisms to be antisemitic. However, complaint referrals about these matters to the GMC have been limited. This is felt to be because of concerns about exposure of complainants to discrimination as effectively whistle blowers against fellow members of their profession. Furthermore, when the GMC suggested that faith should be declared alongside other protected characteristics on the registration details held by the GMC, few Jewish doctors took up this option. The JMA believe this reluctance to disclose may be because of concern about potential discrimination.

15. Consequently, when further unpleasant comments were made on social media in 2021, the JMA agreed to lodge complaints with the GMC on behalf of anonymous complainants. The common feature of these complaints was that the recipients considered them to be antisemitic in nature. The GMC provided information as to how these complaints should be submitted. However, the GMC response to this was that in three instances the complaints did not reach the requisite "threshold". The fourth required supervisory advice without sanction, with no indication about GMC follow-up. It was unclear whether the doctors against whom complaints were lodged had been informed about these matters.

16. One factor which the GMC highlighted in its response was that it had defined "antisemitism" by reference not only to the widely accepted/used working

definition of the International Holocaust Remembrance Alliance, but also to the “Jerusalem Declaration”.

17. As JMA had explained to GMC (and then to the ICO) “the Jerusalem Declaration has been the subject of significant criticism. Furthermore it is, at times, at odds with the International Holocaust Remembrance Alliance's working definitions of antisemitism. If the GMC are relying on contradictory definitions (one of the sources of which has been heavily criticised) on the basis of legal advice, it is of intense public interest that that advice be disclosed”.

18. The Decision Notice makes no reference to this background, other than to say, in pat terms, that the Commissioner “understands that the complainant considers the decisions reached in these complaints and their concerns over the Jerusalem Declaration have a wider impact on Jewish doctors, medical students and patients”. The Commissioner was not required merely to “understand” this, and the very much more detailed submissions, but to weigh them in the balance. The Decision Notice gives no indication that this was done, or, at least, done adequately.

19. The Decision Notice also fails completely to note or deal with JMA's submission to the effect that the GMC had told JMA that disclosure would be (as it would with any and every other FOIA disclosure) effectively disclosure to the world at large, yet that this appears to have counted as a factor militating against disclosure (GMC said “I am...mindful of the ‘public disclosure’ element of FOIA. Any disclosure made to you, whilst I fully understand the heightened interests of your association in this matter, would in fact be a public disclosure”). JMA had submitted that this was, at best, an irrelevance, but might also indicate a failure to recognise that JMA's concerns and interests were both valid and of wider public interest.

20. Furthermore, and most egregiously, the Decision Notice also fails completely to note or deal with JMA's submission that GMC had correctly identified that there have been occasions where legally professionally privileged information has been ordered to be disclosed under FOIA, but went on to say that “a major factor in [that decision to disclose] was the impact of the legal advice on a large cohort of the public (benefit claimants in that case). Whilst I wouldn't wish to downplay the numbers impacted by the legal advice in respect of your request it would, in my view, be of a lesser magnitude than those impacted in the decision notice linked above”. JMA submitted that this was a legally flawed approach – the numbers of people affected cannot be taken as a general factor to be taken into account on an analysis of section 42. JMA also submitted that the GMC's approach suggested that because there are relatively few Jewish doctors – perhaps because there are relatively few Jewish people in British society – it believed that the public interest in JMA's request was diminished. This was a flawed approach by GMC, but the Decision Notice makes no reference to JMA's submissions in relation to it.

22. In a later submission the Appellant reiterates a number of these points including that:-

It is not just in the JMA's interests, but also greatly in the public interest – including not only the interests of Jewish doctors and patients, but also of all doctors and patients and of the general public – to know the legal advice upon which the GMC will determine if particular statements, actions or threatened actions are, or are not, antisemitic.

23. The Commissioner's response defended the approach and conclusions adopted in the decision notice.

24. The GMC emphasised in its response why maintaining LPP is of importance, reflecting the approach in the Derby Magistrates Court case (see paragraph 13 above), and other case law. Whilst recognising the public interest in disclosure, the GMC points out that the Appellant has been informed of definitions of antisemitism which were considered by the GMC in evaluating the complaints and has been informed of the outcomes of the complaints the Appellant referred to the GMC.

25. The GMC notes that:-

...the vast majority of the Legal Advice addressed whether particular complaints met the definition of antisemitism (some of which were not complaints made by the Appellant) and how these should be pursued by the GMC (for example, what further enquiries may be necessary). This constitutes legal advice in relation to case specific matters, rather than any general issue of principle and the public interest in disclosure of the parts of the legal advice which deal with complaint specific matters is limited.

26. The GMC argues that even if s42(1) FOIA does not lead to non-disclosure then s40(2) FOIA should prevent disclosure of these parts of advice, as they concern the personal information of individual doctors.

DISCUSSION

27. In relation to this last point, the Tribunal has seen the withheld material and can confirm that the majority of the advice addressed whether particular complaints met the definition of antisemitism (some of which were not complaints made by the Appellant) and how these should be pursued by the GMC. We note that the request was for 'Legal advice...on the matter of the definition/s to be used

by the GMC in response to allegations of antisemitism by UK registered doctors'. In our view the parts of the advice which deal with individual complaints and how they should be dealt with are outside the scope of the request for information in any event, and would not be disclosed even if disclosure of the other parts of the advice were directed by the Tribunal.

28. The Appellant does not dispute that the exemption in s42(1) FOIA applies and that the advice privilege limb of LPP applies. As stated, the Tribunal has viewed the withheld material and can confirm its view that the Commissioner was correct to find that the exemption in s42(1) FOIA applies.

29. In that context, the central question in this case is whether the Commissioner was correct to find that the public interest in relation to information covered by LPP favoured the withholding rather than the disclosure of those documents.

30. In relation to the application of the public interest test in s42 FOIA cases we repeat what was said in the *DBERR* case (see paragraph 15 above) and consider that the 'proper approach for the Tribunal' is that set out in *O'Brien v IC* [2009] EWHC 164 QB, where Wyn Williams J gave the following important guidance, advising that the Tribunal should:-

...acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

31. Thus, we recognise the significant in-built weight to be given to the exemption in considering the public interest balance. It is then necessary to assess whether there are other factors to be taken into account which support non-disclosure, and then consider whether the public interest in disclosure is equal to or outweighs those combined factors.

32. We accept that the issue to which the legal advice refers is still very much a live one, which will attract additional weight. Disclosure of legal advice could have a

significant prejudicial impact on the ability of the GMC to defend its legal position if challenged.

33. In relation to public interest factors in favour of disclosure, there is a clear public interest in knowing the content of legal advice obtained by the GMC in relation to controversial issues, and disclosure would support transparency and accountability. We also accept that there is a public interest in disclosure of legal advice to the JMA given the specific role that the JMA has played in referring complaints to the GMC. However, in relation to this latter we must also bear in mind that disclosure to the Appellant would also mean disclosure to the world at large, as there would be no restrictions placed on the JMA as to how it used the information once disclosed.
34. In this case, we do not support the Commissioner's approach that, because relatively few people may be affected by the disclosure of the information, then this in some way diminishes the public interest in disclosure. In our view there can be high public interest where the information in question may impact on the fundamental rights of even a few people.
35. The advice concerns both the way in which the rights and obligations of individuals will be assessed. In our view this adds both to the public interest in disclosure and non-disclosure.
36. We note the JMA's concern that the GMC is using both the International Holocaust Remembrance Alliance and Jerusalem Declaration definitions of antisemitism, and its view that this might increase the public interest in disclosure. Conversely, however, as the GMC has already set out (see correspondence of 2 September 2021, at C1 of the bundle) that it refers to both definitions, the disclosure of legal advice confirming this will add little to what is already known. Debate on the consequences of the use of both definitions is possible without the disclosure of the information. In our view, having seen the advice, the GMC has been transparent and have not misrepresented the legal advice, nor cherry-picked parts of the advice. We also note that the Appellant has already been informed in the complaint closure letters of the

reasons for the decisions taken by the GMC in respect of each of the four doctors who were the subject of complaints by the Appellant.

37. We also bear in mind that it might be expected that further guidance on the approach taken by the GMC in relation to complaints of antisemitism would be published on the GMC website (for example), for the assistance and understanding of all doctors and the public, but this is not the case, and disclosure would enable further understanding of the GMC's position.
38. We recognise that there may be cases where the public interest in disclosure will outweigh the in-built public interest in protecting LPP, and that s42 FOIA does not provide for a blanket exemption. However, 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.
39. However, in our view this is not one of those cases. Although the Appellant has explained why it is of the view that there is a strong public interest in disclosure, it has not made submissions as to why that public interest is strong enough to outweigh the built-in public interest against disclosure where LPP applies. In essence, the Appellant's public interest submissions amount to a call for disclosure to inform the debate in relation to the definition adopted by the GMC in relation to antisemitism, and in our view that is a debate which can happen without disclosure of the legal advice sought.
40. In our view the Commissioner was correct to find that the balance of public interest lies in withholding the information and protecting the GMC's ability to obtain free, frank and high quality legal advice without the fear of premature disclosure.

CONCLUSION

41. On the basis of the above, the Tribunal dismisses the appeal.

Recorder Stephen Cragg KC

Sitting as Judge of the First-tier Tribunal

Date: 21 January 2024

Date Promulgated: 22 January 2024

