

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 March 2011

Public Authority: Health Professional Council
Address: Park House
184 Kennington Park Road
London SE11 4BU

Summary

The complainant requested information about whether the public authority had received complaints about health professionals from an organisation called Citizens Commission for Human Rights (UK) Ltd. The public authority withheld this under section 30(2)(a)(iii) and section 31(1)(g) but failed to cite this initially. Further, it did not explain to the complainant that it was neither confirming nor denying whether it held the requested information; however it did clarify this with the Commissioner subsequently. The Commissioner finds that the public authority was correct to neither confirm nor deny whether it held the requested information. However he also finds that the public authority breached its obligations under section 17 of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The public authority is a regulator set up to protect the public. It is charged under the Health Professions Order 2001 with maintaining the fitness to practise of certain health professionals; it currently regulates 15 health professions.

The Request

3. On 6 April 2010 the complainant submitted the following request:

'Please provide details of any complaints against health professionals received from an organisation names Citizens Commission for Human Rights (UK) Ltd (also known as CCHR).'

4. On 21 April 2010 the public authority responded. It explained that its Fitness to Practise department was responsible for dealing with complaints made about health professionals registered with it. The public authority went on to explain that the department does not give this information out as it is held confidentially for the purpose of regulatory investigations. However it did not explain which exemption(s) it was applying.
5. On 19 May 2010 the complainant requested an internal review; on 19 May 2010 the public authority confirmed it had carried out the internal review. It explained that it was withholding requested information under section 30(2)(a)(iii) and section 31(1)(g).

The Investigation

Scope of the case

6. On 6 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner has considered the application of the exemptions. He is satisfied that as the complainant asked only for details of complaints received from the CCHR rather than for details about investigations the public authority had conducted within its statutory responsibilities, section 31(1)(g) applies. Therefore he will not be considering the application of section 30(2)(a)(iii).

Chronology

8. On 22 October 2010 the public authority responded to correspondence from the Commissioner. It clarified that it was withholding the requested information under either section 30(2)(a)(iii) and 30(3) or section 31(1)(g) and section 31(3).
9. On 8 November 2010 the Commissioner contacted the public authority to discuss the complaint. The public authority explained that it was neither confirming nor denying whether it held the requested information. The Commissioner explained that it had not made this

clear to the complainant and that he would need confirmation that this is what the public authority was doing.

10. On 6 December 2010 the public authority contacted the Commissioner. It confirmed that it was neither confirming nor denying whether it held the requested information.
11. On 17 December 2010 the public authority provided further clarification about why it wanted to neither confirm nor deny whether it held the requested information.

Analysis

Exemptions

Section 31(1)(g) and section 31(3)

12. When read together with section 31(1)(g), section 31(3) provides that the duty to confirm or deny does not arise if compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise by a public authority of its functions for any of the specified purposes in section 31(2).
13. In this case the public authority has relied upon section 31(2)(d): the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on. These sections are set out in full in the attached legal annex, as are all of the other sections of the Act referred to in this Notice.
14. The public authority clarified that it would be likely that disclosure of the requested information would significantly prejudice its ability to exercise its statutory function in connection with fitness to practise.
15. It is the Commissioner's view that for this exemption to be engaged the likelihood of prejudice must be real. He notes the comments in the Information Tribunal (the Tribunal) case of *John Connor Press Associates v Information Commissioner (EA/2005/005)* paragraph 15 which states:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."
16. As referred to in paragraph 15, the public authority's reason for engaging section 31(3) is that confirming or denying whether it held the requested information would be likely to prejudice its functions.

This is because if complainants' information was disclosed in public, complainants would be less likely to make complaints. The public authority went on to explain that complainants were only called as witnesses if there was a public hearing otherwise their details are not disclosed.

17. The public authority also explained that it always responded carefully to requests for information. This was to ensure that information already in the public domain could not be used together with any responses it made to draw inferences as to whether a person or organisation had made a complaint.

Public interest arguments in favour of disclosing the requested information

18. The Commissioner accepts that disclosure of the requested information could reassure the public that complaints about health professionals are taken seriously. It would also help to make the public authority more accountable and transparent. Further it would help to maintain public confidence in the public authority as a regulator.

Public interest arguments in favour of maintaining the exemption

19. The Commissioner accepts that there is likely to be a deterrent effect on complainants if their identities were disclosed outside of a public hearing. He is satisfied that this would be likely to deter potential complainants from approaching the public authority and would create a significant risk of prejudice to the public authority's ability to regulate effectively.
20. The public authority also argued that there is a great deal of information about its operations and decision making on its website. However it also pointed out that this had to be balanced against an individual's right to a fair hearing.
21. The public authority explained that the complaints it received reporting issues relating to the fitness to practise of health individuals often resulted from an individual's interaction with the regulated individual, as part of their medical treatment. This meant the complainant provided a great deal of detail. This enabled the public authority to evaluate the complaint and take the necessary steps to protect the public against individuals who were not fit to practise.
22. Further, the public authority argued that if complaints were either not made or the information provided was limited because the perception was that a complainant's details would be disclosed, its role would be made more difficult, including its role of protecting the public.

23. The public authority explained that it needed to maintain its position with regard to neither confirming nor denying whether it held the requested information. It provided the following example: if a person made two requests for information and received one response stating that the requested information was held and exempted and a second response stating that the public authority would neither confirm nor deny that the information was held and if it were it would be exempt, it would indicate to the requestor that in the first case a complaint had been made but in the second case, no such complaint had been received.

Balance of the public interest arguments

24. The Commissioner has considered the arguments for and against the public authority neither confirming nor denying whether it holds the requested information. He accepts that disclosure would help maintain confidence in the public authority as a regulator and provide greater transparency and accountability.
25. However, in this case he also accepts the public authority's arguments that disclosure would be likely to prejudice its ability to carry out its regulatory role. He accepts that potential complainants need to be able to provide details without worrying that their details would be routinely disclosed, especially given the nature of these types of complaints. The Commissioner also accepts that the public authority needs to be consistent in its response to requests for information of this kind.
26. The Commissioner therefore upholds the public authority's application of section 31(3).

Procedural Requirements

Section 17

27. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice which
- a. states that fact,
 - b. specifies the exemption in question, and
 - c. states (if that would not otherwise be apparent) why the exemption applies.
28. During the Commissioner's investigation the public authority informed him that it was relying on section 31(3) to neither confirm nor deny

whether it held the requested information. However, the public authority had not previously informed the complainant of this. By failing to do so, the Commissioner considers that the public authority did not comply with the requirements of section 17(1)(a),(b) and (c).

29. As section 31(3) is a qualified exemption the public authority should have considered whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether it held the information. It also should have let the complainant know the outcome of its deliberations either in its refusal notice or in a separate notice given within such time as is reasonable. As the public authority did not do this the Commissioner considers that it has breached section 17(3).

The Decision

30. The Commissioner's decision is that he upholds the public authority's application of section 31(3). However, the public authority did not deal with the request in accordance with the Act:
- It breached section 17(1) of the Act by failing to specify that it was relying on section 31(3) and by failing to properly state why the exemption applied, within 20 working days of receiving the request.
 - It breached section 17(1)(b) and section 17(1)(c) by failing to cite the exemption and explain why it applied by completion of the internal review.

Right of Appeal

31. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 3rd day of March 2011

Signed

**Faye Spencer
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 17(1) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 17(2) states –

Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - 1. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - 2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

Section 17(3) provides that -

A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2

applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 17(4) provides that -

A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

Section 17(6) provides that –

Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

Section 17(7) provides that –

A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 31(1) provides that –

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (c) the prevention or detection of crime,
- (d) the apprehension or prosecution of offenders,
- (e) the administration of justice,
- (f) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (g) the operation of the immigration controls,
- (h) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (i) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (j) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (k) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

Section 31(2) provides that –

The purposes referred to in subsection (1)(g) to (i) are-

- (l) the purpose of ascertaining whether any person has failed to comply with the law,
- (m) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (n) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

- (o) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (p) the purpose of ascertaining the cause of an accident,
- (q) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (r) the purpose of protecting the property of charities from loss or misapplication,
- (s) the purpose of recovering the property of charities,
- (t) the purpose of securing the health, safety and welfare of persons at work, and
- (u) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

Section 31(3) provides that –

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).