

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2012

Public Authority: Health Care Professions Council

Address: Park House, 184 Kennington Park Road
London SE11 4BU

Decision (including any steps ordered)

1. The complainant has requested information relating to a transcript of a hearing carried out by the Health Care Professions Council (HCPC).
2. The Commissioner notes that the Health Professions Council changed its name to the Health Care Professions Council on 1 August 2012. This decision notice will therefore refer to the Health Care Professions Council (HCPC) throughout for consistency.
3. The Commissioner's decision is that the HCPC has incorrectly applied section 14 of the FOIA.
4. However the Commissioner has also considered section 1 of the FOIA with regard to whether the information requested is held by the HCPC. He is satisfied that this information is not held and therefore the HCPC has complied with section 1(1)(a).
5. The Commissioner does not require the public authority to take any steps.

Request and response

6. On 27 March 2012, the complainant wrote to HCPC and requested information in the following terms:

"I am requesting documentary copies of the legal assessors advice, including questions which led to the advice, the responses after and the advice itself from the Legal Assessor in the matter of the Conduct and Competence Committee hearing against [named individual] which took place in June 1/2 2011.

7. The HCPC responded on 26 April 2012. It refused to provide the information citing section 14 of the FOIA as its basis for doing so.
8. Following an internal review the HCPC wrote to the complainant on 31 May 2012. It stated that it was not amending its position with regard to responding to the request.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her request for information had been handled.
10. The Commissioner considers the scope of this case to be to determine if HCPC has correctly applied section 14(1) of the FOIA.

Reasons for decision

11. Section 14 of the FOIA states that:

(1) Section (1) does not oblige a public authority to comply with a request for information if the request is vexatious.

12. The Commissioner has issued guidance to assist in the consideration of what constitutes a vexatious request. This guidance explains that for a request to be deemed vexatious the Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties arguments.

13. The Commissioner will consider arguments put forward in relation to some or all of the following five factors to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the requests on the grounds that they are vexatious:

- whether compliance would create a significant burden in terms of expense and distraction;
- whether the request is designed to cause disruption or annoyance;
- whether the request has the effect of harassing the public authority or its staff;
- whether the request has any serious purpose or value;
- whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable;

14. The Commissioner agrees with the Tribunal that the bar need not be set too high in determining whether to deem a request vexatious. He also agrees with the Tribunal that the term 'vexatious' should be given its ordinary meaning, which is that it 'vexes' (causes irritation or annoyance; in relation to section 14(1), the annoyance must be caused by the process of complying with the request).

Would compliance with the request create a significant burden in terms of expense and distraction?

15. In its response to the Commissioner, the HCPC stated that based on the history of the correspondence with the complainant it felt any response would be likely to lead to further requests. Since it refused this request, it did not receive any further requests from the complainant until 26 October 2012.
16. The HCPC further stated that in the period between 11 November 2011 and 29 March 2012, the complainant had made four FOIA requests and requested three internal reviews during that period. All the requests related to this specific hearing and HCPC processes.
17. Whilst this in itself may not be considered a large number of requests the HCPC argue that each response generates further requests.
18. The complainant acknowledged that there has been a large amount of correspondence between her and HCPC. In her complaint to the Commissioner the complainant stated that it was determined that the content of the information she required was of sufficient nature to create the likelihood of further information requests but argued that HCPC had prematurely determined her request to be vexatious.
19. The Commissioner does not consider that HCPC has demonstrated what expense or burden would be created by responding to this request.

Is the request designed to cause disruption or annoyance?

20. The HCPC stated that a copy of the transcript had been provided to the data subject of the hearing. It understood that the complainant had access to that transcript. The complainant's letters were signed by the data subject. The HCPC stated that the transcript made clear that the Legal Assessor did not provide any legal advice whilst the panel were *'in camera'*.
21. This factor relates to the requestor's intention. Having considered the history and context of the request it cannot be established that the requestor has the intention to cause disruption or annoyance, to the HCPC.

22. The Commissioner considers that while the HCPC may be annoyed or irritated by the complainant's requests, this is a normal part of the role of a public authority dealing with requests. This is not the same as harassment and the Commissioner does not consider that the HCPC has provided sufficient arguments to establish an intention to cause disruption or annoyance from the complainant's requests, Similarly a degree of annoyance or irritation is something which public servants will experience from time to time and can be expected to rise above, unless it approaches levels which will indeed constitute harassment. The Commissioner does not consider this is such a case.

Does the request have the effect of harassing the public authority or its staff?

23. The HCPC explained that the complainant has mingled her requests under the FOIA with complaints about the HCPC and its employees. It quotes an example from a letter from the complainant who states *"Given the lack of response perhaps this demonstrates how lax the HCPC procedures seem to be"*. It goes on to provide one further example.
24. The HCPC explained that as a result of substantial correspondence with the complainant the Fitness to Practise Department had adopted an approach that all its future correspondence to the complainant should be short and robust.
25. Whilst the Commissioner accepts that the HCPC is entitled to adopt a robust approach in its responses to the complainant, he does not accept that the examples provided have demonstrated the effect of harassing the public authority or its staff.

Can the request otherwise fairly be characterised as obsessive or manifestly unreasonable?

26. The HCPC advised that the complainant was not a party to the hearing and had no connection with it. The complainant's correspondence began approximately four months after the hearing had taken place. Her most recent request was dated 25 October 2012, nearly one year since the correspondence had begun.
27. The Director of Fitness to Practise wrote to the complainant on 17 January 2012 to explain that the data subject had the right to appeal to the High Court. However, the complainant wrote to the HCPC on 23 January 2012 stating that she was carrying out an 'investigation' into the Panel's decision and indicating that she wanted to scrutinise the judgement to 'assess' the findings of the Panel. The complainant wrote to the HCPC on 1 May 2012 stating *'...it is my intention to ensure that, in the case against [named individual], all parties acted appropriately,*

within the correct procedures and protocol and that a correct judgement was made based on the facts of the case'.

28. The HCPC state that all these points could have been challenged in an appeal by the named individual and since the complainant's letter of 1 May, that individual has had an opportunity to present evidence to a further hearing.
29. The HCPC points out that the complainant's letter of 1 May 2012 acknowledges that there has been substantial correspondence about the case. The same letter states that '*...the investigative part in respect of this case is drawing to its conclusion*'. However, the complainant has made a further request dated 25 October 2012. The HCPC consider this suggests that the complainant is continuing with her 'investigation' more than five months after she stated that it was drawing to a conclusion.
30. The Commissioner accepts that at times there is a fine line between obsession and persistence and although each case is determined on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue.
31. It is the Commissioner's view that although there has been a large amount of correspondence in relation to this issue, and in isolation could be seen as obsessive, having considered the context of the requests they are not manifestly unreasonable.

Does the request have any serious purpose or value?

32. The HCPC have stated that the data subject of the hearing did not exercise their right of appeal and has, since the date of the complainant's request, had their evidence considered by a hearing on September 2012. The data subject can appeal against that decision if they wish. The HCPC does not consider that the complainant's request would add anything of serious value to any appeal as the data subject could challenge the panel's proceedings in the High Court.
33. The Commissioner's guidance states that an apparent lack of serious purpose or value is not enough on its own to make a request vexatious. The FOIA is not generally concerned with the motives of the applicant, but with transparency for its own sake. Even a request that seems spurious or tedious to a public authority may have genuine value to the individual.
34. It is not appropriate to use lack of value as an argument simply because it cannot be imagined what the value might be. A public authority must demonstrate that a request has no purpose or value, rather than suggest that because the requestor did not provide a reason for the

request there cannot be one. On this basis the Commissioner does not consider that it can be said that the request had no value. Furthermore the Commissioner is satisfied that in the complainant's eyes her request to carry out her own investigation in order to assess the findings of the panel does have a serious purpose.

Section 1 – General right of access

35. Section 1 of the FOIA states:

(1) Any person making a request for information to a public authority is entitled -

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him

36. In this case the complainant requested "*documentary copies of the legal assessor's advice*". It is the HCPC's position that the complainant has had sight of the transcript of the case and this document contains that advice.

37. The complainant appears to have focussed her complaint to the Commissioner on legal advice given '*in camera*'. The Commissioner notes that the complainant states that within the transcript **is** advice given by the Legal Assessor to the panel with regard to certain statements.

38. The complainant questions why the panel chose to ignore the Legal Assessor's advice and believes that this advice, together with any and all other advice, legal or otherwise during the whole of the hearing, including the decision, following deliberation of the panel, whether to accept or otherwise the advice must be supplied to assist any action that may be necessary.

39. The FOIA provides the complainant with the right of access only to recorded information, if held. It does not provide access to reasons behind why advice was provided and why decisions were made, unless there is recorded information about the matter.

40. The HCPC has confirmed that there is no documented advice by the Legal Assessor other than the contained within the transcript which records what the legal assessor said during the hearing and therefore does not hold the information requested.

The Commissioner's conclusion

41. The Commissioner has been provided with a copy of the relevant pages of the transcript and notes that the Legal Assessor states three times

they have not provided any legal advice but had assisted in the drafting of the Panel's determination.

42. The Commissioner notes that in its internal review the HCPC advised the complainant that the Legal Assessor did not provide any legal advice whilst the panel were '*in camera*'.
43. '*In camera*' describes legal hearings or court cases or portions thereof that the public and press are not admitted to.
44. The HCPC further stated that the complainant has had access to the transcript which clearly states that the Legal Assessor did not provide any legal advice whilst the panel were '*in camera*'. Consequently it considered that the request was vexatious as the complainant ought reasonably to have known that a document of the Legal Assessor's advice does not in fact exist.
45. Having considered the arguments presented by the HCPC the Commissioner has concluded that it has not demonstrated sufficient reasons to deem the request to be vexatious.
46. The question of when a request should be refused as vexatious is a question of balance. It is clear that the threshold for refusal should not be set too high, so that a public authority would have to go to extraordinary lengths in dealing with a difficult applicant. By the same token, the bar should not be set too low so that legitimate enquires might be unfairly refused as vexatious.
47. The Commissioner therefore finds that on balance, the present request was incorrectly refused as vexatious.
48. However, the Commissioner further notes that at internal review the HCPC had advised the complainant that it did not hold the requested information.
49. The Commissioner understands that the role of the Legal Assessor is to provide guidance on the law to all parties involved in the meeting.
50. The Commissioner acknowledges that it can be difficult for a public authority to "prove" that it does not hold any information on a particular subject. Having reviewed the evidence, the Commissioner is satisfied that, on the balance of probabilities, the requested information is not held by the HCPC.

Right of appeal

51. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

52. 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.
53. 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

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