

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2020

Public Authority: General Chiropractic Council
Address: Park House
186 Kennington Park Road
London
SE11 4BT

Decision (including any steps ordered)

1. The complainant has requested information relating to the level of fees the General Chiropractic Council (GCC) has paid to an expert. The GCC withheld the information, citing the exemption under sections 31(1), 36, 40 and 43(2) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that the GCC has correctly engaged the section 43(2) exemption and the balance of the public interest favours maintaining the exemption.
3. However, the Commissioner has recorded a procedural breach of section 10 of the FOIA, as the GCC failed to respond to the complainant's request within the statutory time limits.
4. The Commissioner does not require any further steps to be taken as a result of this decision notice.
5. The Commissioner notes that the request and complaint has been submitted by a solicitor's firm on behalf of an individual. However, for ease of reference this decision notice will refer to them as the complainant.

Background

6. The Commissioner understands from the complainant that in 2010/2011 the GCC received around 500 complaints about chiropractors' websites which was a considerable cost to the profession.

7. In 2016 the GCC received several complaints from a charity raising concerns about approximately 300 registered chiropractors' websites. The complainant was one of the chiropractors complained about.
8. The GCC's then Registrar sought advice from a Queen's Counsel (QC) regarding the status of these complaints and the advice given did not require the complaints to be processed through the GCC's disciplinary procedure and investigated by the GCC's Investigating Committee. The registered chiropractors were not informed by the GCC about the charity's complaint about them.
9. When the new Registrar took over, these complaints were revisited, and further advice was sought from another QC. This resulted in the earlier decision being reversed and disciplinary investigations commenced, with the decision made to refer the complaints to the Investigation Committee. There were more than 300 complaints and the consequential cost to the profession was again considerable as it was in the 2010/2011.
10. The complainant has explained that the GCC's approach, whose act is the Chiropractors Act 1994, in comparison to the approach adopted by the General Osteopathic Council (GOsC), whose Act is the Osteopaths Act 1993, is almost the same. The GOsC also received a number of complaints from the same charity about osteopaths' websites and the GOsC only referred cases to its Investigating Committee where the Advertising Standards Agency had made a finding about the osteopath as to their publicity and the osteopath failed to comply with the finding.
11. The GCC instructed the individual named in the complainant's request to prepare a report addressing various medical conditions and health concerns which broadly fell in to two categories:
 - i. Those which may benefit from chiropractic treatment.
 - ii. Those which a chiropractor may properly advise on.

If any of the conditions fell outside of the above categories, then the individual named in the request for information was to give their opinion on whether the advertising chiropractic treatment/advice could potentially amount to unacceptable professional conduct.

12. The report was produced in May 2018 and a further addendum was produced in October 2018.

Request and response

13. On 13 July 2018, the complainant wrote to the GCC and requested information in the following terms:

"... please advise on the level of fees paid to [name redacted] so that we can consider whether the GCC's actions in this case have been reasonable and proportionate. Please treat this request for information as a freedom of information request. We are content to receive the information in electronic format."

14. The GCC responded on 11 September 2018. It refused to provide the requested information citing section 31(1)(g) (law enforcement) and section 43(2) (commercial interests) of the FOIA.
15. The complainant requested an internal review on 5 October 2018. The GCC provided the outcome of its internal review on 21 December 2018, maintaining its original position in refusing to provide the requested information under sections 31(1)(g) and 43(2) of the FOIA. It also considered section 40 (personal information) and section 36 (prejudice to effective conduct of public affairs) applied to the requested information.

Scope of the case

16. The complainant contacted the Commissioner on 11 April 2019 to complain about the way their request for information had been handled.
17. The Commissioner considers the scope of her investigation to be to determine if the GCC has correctly withheld the requested information on the basis of any of the cited exemptions - sections 31, 36, 40 or 43 of the FOIA.

Reasons for decision

Section 43 – prejudice to commercial interests

18. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
19. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.
20. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case, the withheld information relates to the fees paid to the individual named in the request in respect of the report they produced. The Commissioner is satisfied that the information relates to the purchase and sale of services and is therefore commercial.
 21. The GCC has argued that disclosing the fees it paid to the individual named in the request would be likely to prejudice both its own commercial interests and those of the named individual.
 22. It is therefore necessary to consider whether the GCC has demonstrated that disclosing the withheld information would cause both its own and the third party's commercial interests to be prejudiced.
 23. In relation to the commercial interests of third parties it is not appropriate to take account of speculative arguments which are advanced by public authorities about how any prejudice may occur. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects arguments advanced by the public authority to be based on its prior knowledge of the third party's concerns.
 24. With regards to the prejudice to its own commercial interests, the GCC has drawn a parallel to the arguments made by the Commissioner in paragraphs 9 c) and e) of the Information Tribunal decision in relation to

the appeal case for Williams v Information Commissioner EA/2018/0148¹.

25. Specifically the GCC has stated that its commercial interests would be prejudiced if experts were less willing to accept instructions (or charged higher fees because of the 'overhead' of the prospect of disclosure of their fees) and/or the amount charged by the individual named in the request was then used as a precedent or comparator for other experts in future cases. It stated that this would cause challenges for the GCC in recruiting further experts, because notwithstanding that the GCC considers that the report produced by the individual named in the request was value for money, it would provide a benchmark for other experts. The GCC has stated that the individual named in the request is a highly regarded chiropractor and experienced expert, and therefore although this report was, in the GCC's view, good value for money, disclosure of information about its costs could still create an inflationary pressure for future experts' fees. This will particularly be relevant if the GCC publishes the evidence from the report, which it envisages it may do.
26. The GCC has stated that it does not generally advise experts that details of their fees would be disclosed and therefore considers that the disclosure would be likely to be damaging to the wider business relationship between the GCC and the individual named in the request.
27. The GCC has confirmed that it publishes its annual accounts which include details of what it has spent on fitness to practise issues. However, these do not include a breakdown of the fees paid to individual experts or on individual cases. The GCC stated that costs generally are not recoverable between the parties in its regulatory proceedings (i.e. there would be no need for one party to know the fees incurred by the other because unlike in civil proceedings, there is no expectation that the 'loser' will pay the 'winner's' costs). As a result, there would be no expectation that this information would be disclosed outside of the GCC because it would not be necessary for anyone else to have that information.
28. With regards to the named individual's commercial interests, the GCC has stated that the individual named in the request has indicated their concerns about the disclosure of the requested information and the

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2373/Williams,Edward%20EA-2018-0148\(18.02.19\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2373/Williams,Edward%20EA-2018-0148(18.02.19).pdf)

impact it would have on them as an independent contractor. The GCC has stated that the individual named in the request does not consent to the disclosure of their fees and they would not expect the GCC to publish this information.

29. The GCC also believes that the disclosure of the requested information would cause unjustified damage and potentially some distress to the individual named in the request because their private and commercially confidential dealings with the GCC would be disclosed. Specifically, the named individual's income would be disclosed. The GCC has stated that the named individual may be criticised by registrants that feel aggrieved by perceiving them to be paid to 'act against them' in fitness to practise proceedings. The named individual has also said that they would not agree to their name being associated with a published version of the report, which indicates that they believe there may be prejudices caused to them by other members of the profession and the wider public were information about their work to be put into the public domain.
30. The Commissioner has considered the arguments put forward by the GCC and the named individual. The Commissioner considers that it is reasonable to accept that disclosing the withheld information is likely to create a benchmark for the amount the GCC would be willing to pay, and that this would therefore prejudice the GCC's ability to achieve value for money in future negotiations. Additionally, should experts believe that their fees may be publicly disclosed, this may damage the GCC's ability to attract experts in the future.
31. In order to accept the exemption is engaged the Commissioner usually requires evidence of a causal link between the information in question and the alleged prejudice argued. This is usually easier to argue where an issue is ongoing, such as retendering or negotiating a new commercial contract or deal. Whilst the GCC has not specifically provided evidence of this, the Commissioner considers it is reasonable to assume that, given the work of the GCC, there is a frequent need to engage experts to provide opinion evidence for the GCC. Therefore, it can be argued that disclosing the fees will have a likely impact on future negotiations as it may make experts more reluctant to offer favourable rates due to their competitive advantage being diminished.
32. The Commissioner therefore considers that section 43(2) of the FOIA was correctly engaged and she has gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

33. There will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority

such as the GCC carries out its functions. This public interest is heightened where the information relates to the spending of public money.

34. The complainant is of the view that a failure in being open and transparent leads to inefficiencies, a lack of confidence and a loss of confidence in the regulator from the profession in general which they state will result in professionals de-registering, describing themselves as professionals other than chiropractors and denies the public the protection that regulation offers.
35. The complainant has stated that because the GCC does not publish the requested information chiropractors have no way of knowing how much of their registration fees are used by the GCC to pay for chiropractic experts. The complainant has stated that, given the significance and controversy surrounding the treatment by the GCC of these mass complaints and its impact on the finances and future of the profession more generally, it is in the public interest that the overall cost to the profession is known.
36. The GCC acknowledges that there is a public interest in transparency and accountability around its spending.
37. However, the GCC has stated that it does not consider that the disclosure of the fee is reasonably necessary for the proper conclusion of regulatory proceedings. The GCC has stated that it is self-evidently the case because the case against the complainant and all the other advertising cases has now concluded without this information being disclosed.
38. The GCC has stated that costs, including expert fees, are not normally recoverable between the GCC and the registrants who are subject to the fitness to practise processes (prior to any appeal to the High Court). The GCC has stated that whilst it treated the request as 'applicant and motive blind', the suggestion in the request is that the complainant wishes to understand whether the costs incurred were proportionate. The GCC does not think the information could be used in any meaningful way during the regulatory processes themselves, or indeed to make an assessment of the kind that the complainant proposes.
39. The GCC has also considered whether the prospect of the disclosure may result in a decrease in expert fees in other cases. However, it does not believe that this would occur in practice, given the views of the expert concerned.

Public interest arguments in favour of maintaining the exemption

40. The GCC states that it has taken account of the strong public interest in promoting and ensuring the proper and effective discharge of its' statutory functions, which ultimately are designed to protect the public. The Commissioner understands this to mean that the GCC believes that the disclosure of the requested information prejudices its ability to effectively discharge its statutory functions.
41. The GCC has argued that there is a public interest in the timely and effective resolution of complaints about chiropractors for the benefit of the profession, which requires having unrestricted access to expert advice. The GCC has stated that, at the time of the request and this complaint to the Commissioner, the report was still being used for the remaining cases of the advertising complaints and it believes experts would be discouraged from working with the GCC in other cases if they believed their fees would be disclosed.
42. The GCC has stated that there is a recognised need to protect commercially confidential information, a clear public interest in a fair market and competition reflected in the exemption, and a public interest in having due regard to the interests and views of its suppliers in the decisions it takes.
43. The GCC has argued that the public interest in promoting economy and value for money in the GCC's spending would be undermined by the disclosure of the requested information. It has stated that it is funded almost entirely by its registrants, and therefore needs to achieve best value in how it goes about its work whilst securing the proper discharge of its functions.

Balance of public interest arguments

44. Taking into account the timing of the request and the currency of the information in its processes, the GCC considers that the strength of the public interest factors against disclosure to be much more significant than the public interest factors in favour of disclosure.
45. The GCC is of the view that the public interest is served by having access to broader information about its expenditure, which the GCC does by publishing the total expenditure on fitness to practise issues in its annual reports and accounts, which the GCC has stated are laid before Parliament and subject to audit. The GCC believes that this diminishes the public interest in favour of disclosure of the specific information requested.
46. The GCC acknowledges that a greater level of transparency might be said to be in the public interest but it does not see what public interest

lies in knowing what one individual expert has agreed with the GCC in respect of their fees for a particular report, in the absence of any other information about the contractual arrangement as a whole (or without seeing the entirety of the report about complaints regarding a very large number of other registrants). The GCC has stated that it has not been necessary to disclose the requested information to conclude the complainant's case against them.

47. The GCC has stated that it is aware that some other regulators publish the total of their expert witness spend. However, it is not aware of any regulator publishing the cost of any individual report. The GCC has referred to the Information Tribunal decision in relation to the appeal case for Williams v Information Commissioner EA/2018/0148, in which the Commissioner and the Tribunal held that information like the information requested in this case should not be disclosed. The GCC has reiterated that larger healthcare regulators have a much larger and wider pool of expert witnesses than the GCC, given the size and specialist nature of the chiropractic profession.
48. Therefore, the GCC considers that the public interest in ensuring the GCC is not put to the disadvantages covered by the exemption outweighs any public interest in disclosure of the requested information.
49. The Commissioner has considered both the factors in favour of disclosure and those in favour of maintaining the exemption and she fully acknowledges the public interest in transparency and accountability. Additionally, in this case, disclosing the fee paid to the named individual would give an insight into the spending of the GCC in respect of external expert advice. That being said, the Commissioner notes that the GCC publishes the total cost spent on fitness to practise issues in its annual reports, which includes the fee paid to the named individual, and that this does go some way to satisfying the need for transparency in connection with the fees.
50. Beyond increasing transparency generally, the Commissioner does not consider there to be any other compelling public interest arguments in favour of disclosing the information.
51. Balanced against this, the Commissioner accepts that disclosure of the requested information would be likely to prejudice the GCC's commercial interests and she must therefore accept that there is weight to the argument that disclosure would not be in the public interest. Disclosing information which would put the GCC at a disadvantage when negotiating rates for experts would not be in the public interest.
52. The Commissioner considers that any arguments in favour of disclosure are somewhat diminished by the information the GCC has published in

its annual reports. The Commissioner considers that there is significant public interest in not prejudicing the commercial interests of the GCC, not only in securing best value for public money, but in ensuring it can operate efficiently in its duty as a regulator by relying on the services of an expert it has a relationship with and at a reasonable cost.

53. The Commissioner therefore finds that section 43(2) has been properly engaged and that in all the circumstances of the case, the public interest test favours maintaining the exemption. As the Commissioner has found that section 43(2) is engaged, she has not gone on to consider the GCC's reliance on sections 31(1), 36 and 40 in respect of the fees paid to the individual named in the request.

Procedural matters

Section 10 – Time for compliance

54. Section 10(1) of the FOIA states that a public authority shall respond to information requests promptly and, in any event, no later than 20 working days from receipt.
55. In its submission to the Commissioner the GCC has recognised that its response to the initial request was not within 20 working days.
56. The Commissioner has therefore recorded a breach of section 10 of the FOIA against the GCC as a result.

Other matters

57. The Commissioner notes that the GCC's response to the internal review exceeded 40 working days. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that the GCC review the Section 45 code of practice².

² <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

58. The complainant has also raised concerns that the GCC is not adhering to the Commissioner's "definition document for health regulators"³, specifically the publishing of financial statements of expenditure for suppliers and contracts over £25,000.
59. The FOIA requires every public authority to have a publication scheme and to publish information covered by the scheme. The Commissioner has created a model publication scheme that commits public authorities to publish certain classes of information such as information about the structure of your organisation, minutes of meetings, contracts, reports, plans and policies. The Commissioner has also produced definition documents for various sectors which set out the types of information the Commissioner would normally expect particular types of public authorities to publish. Public authorities should include all information that falls in the seven classes, unless there is a good reason to withhold it.
60. In relation to the information requested in this case, one of the reasons that a public authority may not publish information is if the information is exempt from disclosure under the FOIA. As explained above, the Commissioner is satisfied that the information requested in this case is exempt from disclosure.

³ https://ico.org.uk/media/for-organisations/documents/1241/health_regulators.pdf

Right of appeal

61. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.
63. 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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