

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2019

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the GMC's decision to appeal the Medical Practitioners Tribunal (MPT) decision on a particular case. The GMC responded refusing to disclose the requested information citing section 42 of the FOIA.
2. The Commissioner's decision is that the GMC was incorrect to refuse to disclose the requested information under section 42 of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 42 FOIA.
4. 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

5. On 24 August 2018 the complainant made the following request for information under the FOIA for:

"Many thanks for your response to my previous request (F18/9666/LG). Based on the information you have kindly provided, I would like to provide an updated request:

1) Please provide any information received from the Department of Health (or its subsequent DHSC entity), including the Secretary of State, about the appeal after the GMC had commenced it. This can be limited to, as you suggest, the central correspondence log.

2) I ask again, please can you provide all the information your chief executive/final responsible officer had when deciding to appeal the MPT decision on Dr Bawa-Garba.

As the case has now been judged, and the GMC have indicated they are not appealing, the picture has substantially changed since my first request since the legal action is now completed (and unlikely to change again). I realise Section 42 may be engaged again, but please consider the substantially changed public interest: As a result of this decision made by the GMC, 1,200 doctors including a sitting MP have called for a public investigation in to how the GMC handled this case? The health secretary has indicated his plan to remove the right of the GMC to appeal MPT Decisions? The GMC has apologised to both the Adcock family and Dr Bawa-Garba. I therefore feel it is likely public interest will lie in seeing this information, so that scrutiny can be carried out on a decision on unsuccessful litigation made by a public body in a completed case."

6. On 18 September 2019 the GMC responded. In relation to part 1 of the request it confirmed that it did not hold this information. In relation to part 2 of the request it refused to provide the requested information under section 42 FOIA.
7. The complainant requested an internal review on 18 September 2018 in relation to the GMC's application of section 42 to part 2 of his request. The GMC sent the outcome of its internal review on 15 October 2018. It upheld its application of section 42 FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 15 October 2018 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to determine whether the GMC is entitled to rely on section 42 of the FOIA for the non-disclosure of the information requested at part 2 of the request.

Background

10. The General Medical Council (GMC) is the independent regulator for doctors in the UK. It works to protect the public by setting, upholding

and raising the standards of medical education and practice. All doctors working in the profession must be registered with the GMC.

11. One of the GMC's key statutory responsibilities is to ensure all doctors who are registered with it are fit to practise. This is measured against the scope of section 35C(2) of the Medical Act 1983¹, which states:

(2) A person's fitness to practise shall be regarded as "impaired" for the purposes of this Act by reason only of -

(a) misconduct;

(b) deficient professional performance;

(c) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;

(d) adverse physical or mental health;

(da) not having the necessary knowledge of English...;

(e) a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect.

12. The GMC's role is to investigate any serious allegations made about a doctor's fitness to practise (FTP) and the process is regulated under the General Medical Council (Fitness to Practise) Rules Order of Council 2004² (FTP rules). The GMC itself cannot unilaterally impose a sanction or a warning on a doctor³. At the conclusion of its enquiries, it can refer the matter to a hearing if it concludes a doctor's FTP may be impaired.

13. As of 2011, this adjudicatory function is carried out by the Medical Practitioners Tribunal Service⁴, which is part of the GMC's organisation but operationally independent. Any findings of impairment of FTP by the

¹ https://www.gmc-uk.org/-/media/documents/medical-act-1983_pdf-73285575.pdf

² https://www.gmc-uk.org/-/media/documents/consolidated-version-of-ftp-rules--as-amended-29nov17-_pdf-72742310.pdf

³ For further information, please review Rules 7 to 11 (inclusive) of the FTP rules

⁴ <https://www.mpts-uk.org/>

MPT may lead to the doctor receiving a sanction on their registration, including erasure.

14. On 31 December 2015, section 40A of the Medical Act 1983 (section 40A) came in to force, giving the GMC powers to appeal MPT determinations to the High Court. Prior to this, only the doctor who received a sanction could lodge such an application.
15. Dr Hadiza Bawa-Garba (GMC number 6080659) is a doctor registered with the GMC, having gained her full registration on 4 August 2004.
16. On 18 February 2011, a six-year-old patient died while being treated at the Leicester Royal Infirmary. Dr Bawa-Garba was one of the medical professionals involved in the child's care.
17. On 4 November 2015, she was found guilty of gross negligence manslaughter for the death of the patient at the Nottingham Crown Court and was subsequently sentenced to 24 months imprisonment suspended for 24 months.
18. Dr Bawa-Garba sought to appeal her conviction but the Court of Appeal declined permission for the case to be heard on 8 December 2016⁵.
19. The MPT hearing against Dr Bawa-Garba took place between 20 to 22 February 2017 and 12 to 13 June 2017. The Tribunal determined to suspend her from the GMC register for a period of 12 months on 13 June 2017.
20. The GMC subsequently lodged an appeal against the MPT decision under section 40A. The case was heard by the Divisional Court (part of the High Court) on 7 December 2017 and its Judgment was handed down on 25 January 2018 which allowed the appeal, thereby substituting the sanction of suspension to erasure from the register⁶.
21. Dr Bawa-Garba then applied to the Court of Appeal to have this decision set aside. Three organisations (the British Medical Association⁷, the Professional Standards Authority for Health and Social Care⁸, and the

⁵ R v Bawa-Garba (Hadiza) [2016] EWCA Crim 1841 :-<http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2016/1841.html>

⁶ General Medical Council v Bawa-Garba [2018] EWHC 76 (Admin) :-
<http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/76.html>

⁷ <https://www.bma.org.uk/>

⁸ <https://www.professionalstandards.org.uk/>

British Association of Physicians of Indian Origin⁹) joined the case as interveners and were allowed each to make submissions. The hearing took place on 25 and 26 July 2018 and the Court ruled that the Divisional Court's decision should be set aside and the MPT decision be reinstated¹⁰.

22. The withheld information relates to the GMC's decision to appeal the MPT decision.

Reasons for decision

23. Section 42 of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
24. It is a qualified exemption. So, in addition to demonstrating that the requested information falls within the definition of the exemption, the GMC must consider the public interest arguments for and against disclosure and demonstrate in a given case that the public interest rests in maintaining the exemption.
25. There are two types of legal professional privilege (LPP); advice privilege and litigation privilege.
26. The GMC explained that since being given statutory powers to appeal the determinations reached by the MPT, it has been its policy to review all cases where the sanction imposed is less than the one sought by the GMC. It is upon this consideration, a decision is made as to whether or not to lodge an appeal in the High Court. In practice, it is the Registrar of the GMC who makes the final decision.
27. In Dr Bawa-Garba's case, the GMC's in-house solicitors sought external legal advice from a barrister on the prospects of appeal. Upon receiving this, a memorandum incorporating the external lawyer's views was produced and the matter was discussed with the Registrar who made his decision. This memorandum was drafted by a practising lawyer, employed by the GMC, acting in their capacity as a legal adviser.

⁹ <https://www.bapio.co.uk/>

¹⁰ Bawa-Garba v GMC [2018] EWCA Civ 1879 :-<https://www.judiciary.uk/wp-content/uploads/2018/08/bawa-garba-v-gmc-final-judgment.pdf>

28. The GMC went on that, as to whether it relies on legal advice privilege or litigation privilege, it referred the Commissioner to the High Court decision of *SFO v ENRC* which states:

"If the communication is between client (or the client's agent) and lawyer for the purpose of obtaining legal advice in connection with anticipated litigation, it is covered by legal advice privilege rather than litigation privilege."¹¹

29. This point was not challenged in the subsequent appeal¹².

30. By this definition, the information withheld is subject to legal advice privilege, even though it was created for the sole purpose of contemplated litigation.

31. Rule 2 of the FTP rules state as follows:

'representative for the GMC' means a barrister, solicitor or other legal representative instructed by the Registrar to present the case on behalf of the General Council at any hearing before a Tribunal or Committee

32. The GMC therefore explained that any instructions of lawyers for the purposes of FTP process is made by or in the name of the Registrar, who also makes the appeal decisions. It is therefore the GMC's view that the communication could not have been anything other than "between a professional legal adviser and client" as the Registrar is clearly authorised to seek and receive legal advice. Equally, given the circumstance, the communication was clearly for "the sole... purpose of obtaining legal advice" and the lawyer who provided the advice were acting "in their professional capacity".

33. The GMC said that litigation was anticipated and did subsequently take place; the sole purpose of the communication was to obtain advice on the litigation; and the communication was between a legal adviser and a client.

34. The Commissioner has reviewed the withheld information and she is satisfied that the memorandum was written by a GMC 'in-house lawyer based upon external legal advice sought from a barrister to provide to

¹¹ The Director Of The Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017, para 65 :-<https://www.bailii.org/ew/cases/EWHC/QB/2017/1017.html>

¹² Serious Fraud Office (SFO) v Eurasian Natural Resources Corp. Ltd [2018] EWCA Civ 2006 :-<https://www.bailii.org/ew/cases/EWCA/Civ/2018/2006.html>

the Registrar to enable a decision to be made regarding whether to appeal. The pre-dominant purpose of this is to provide legal advice.

35. The Commissioner is therefore satisfied that the withheld information is subject to LPP and section 42 of the FOIA is engaged. She now needs to consider the public interest test.

36. The complainant provided the following public interest argument in favour of disclosure:

- As a result of this decision made by the GMC, 1,200 doctors including a sitting MP have called for a public investigation in to how the GMC handled this case.
- The health secretary has indicated his plan to remove the right of the GMC to appeal MPT Decisions.
- The GMC has apologised to both the child's family and Dr Bawa-Garba.
- Sir Terrence Stephenson has subsequently blamed the decision to appeal the tribunal decision on the legal advice received by the GMC.
- Given the public and professional response to the whole case, and the fact that the GMC's course is being blamed on external advice, it is clearly in the public interest to see this advice that is being blamed. The GMC accepted that the case attracted a great deal of interest from the public but is unaware of the source of information where Sir Terence allegedly exerted "blame" of any description. The GMC did however confirm that Sir Terrence Stephenson was the Chair of the GMC from 1 January 2015 until 31 December 2018. In May 2018, Sir Terence told the Royal College of Physicians:

"If you take external advice from the QC, and they say the tribunal has erred in law, and if you then don't appeal, you're setting a precedent. In that sense you have no choice, because the regulator can't be above the law. You seek the legal advice – and you can take it or not take it – but I think most people take the advice of QCs, especially if you're a regulator."

- The complainant said that his request was made after the case had concluded and the GMC confirmed it wouldn't appeal, so the case was not 'live'.
37. The GMC provided the following public interest arguments in favour of maintaining the exemption:

- The GMC faced scrutiny about the matter and has already taken actions to learn from the experience, such as the review into how to examine gross negligence manslaughter cases.
 - The request pertains to a high-profile litigation which was ultimately heard in the Court of Appeal. The judgment was ultimately made against the GMC. It does not believe that the outcome of the litigation itself is a significant factor to consider in relation to disclosure when matters are so recent.
38. The Commissioner considers that this cases has attracted substantial public interest. Whilst at the time of the request the matter had concluded and the GMC had confirmed it wouldn't appeal, she does accept that whilst the case was no longer live the matter was still recent. Whilst she accepts that the GMC does not appear to have attributed 'blame' as such to the external legal advice, the previous Chair did indicate that the GMC's decision was based upon the external legal advice it has received. Whilst the advice appears to have been followed in this case, given the widespread condemnation of the GMC's decision, this does strengthen the public interest in understanding why and how that decision was reached.
39. That being said the Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption simply because of the long standing, important principle of LPP and the clear and important need for all (not just the public sector) to have access to free, frank and candid legal advice. Only in very exceptional cases can this be overridden when considering where the public interest lies.
40. The Commissioner considers that there is a strong public interest in favour of maintaining LPP and the ability of the GMC to be able to seek and obtain good quality legal advice. Without this ability, this would have a negative impact on the GMC's decision making and ultimately the statutory functions it is required to perform. However, the Commissioner considers that as the case has now concluded, whilst recent, it is no longer live and therefore this does to some extent reduce the public interest in favour of maintaining the exemption.
41. Furthermore she considers that the public interest in favour of disclosure can be considered to be exceptional in this case, due to the significant public interest in this particular matter but also in the wider issue as to whether the GMC should continue to have the power to be able to appeal MPT decisions. This has attracted significant interest from the public but also many healthcare professionals. For the above reasons, the Commissioner has decided that the public interest in favour of maintaining the exemption is outweighed by the public interest in disclosure in this case.

Right of appeal

42. 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

43. 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.
44. 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.....

Gerrard Tracey
Principal Adviser, FOI Complaints
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF