



NCN: [2024] UKFTT 00701 (GRC)

Appeal Number: EA/2022/0308

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights

Between:

Kevin Thornton

Appellant:

and

The Information Commissioner

First Respondent:

and

General Medical Council

Second Respondent

Date and type of Hearing: On CVP: 27 June 2023, 9 January 2024, 7 & 8 May 2024, (post Directions deliberations on 19 January 2024) and final hearing of evidence and deliberations thereon, 17 July 2024.

Panel: Brian Kennedy KC, & Specialist members Paul Taylor and Suzanne Cosgrave.

Date of Final Decision - 17 July 2024.

Representatives:

For the Appellant: Mr. & Mrs. Thornton as Litigants in Person.

For the First Respondent by way of written Response dated 6 December 2022.

For the Second Respondent: Leo Davidson of Counsel 11 KBW

Result: - The Tribunal dismiss the Appeal.

N.B. - As both Mr. and Mrs. Thornton attended all hearings and contributed to the hearing collectively and individually, we refer to them both as "The Appellants".

REASONS

1. The Background, Chronology, previous submissions and deliberations are provided in preliminary hearings with Case Management Directions. At this final hearing, we have had the advantage of the helpful evidence of Joanna Farrell dated 31 May 2024. Ms. Farrell is the Assistant Director of Investigations

within the Fitness to Practice Directorate at the General Medical Council (“GMC”). As such she has responsibility for the Investigations team. She has worked at the GMC since 2002 and in 2008 she was appointed Adjudication Manager. She was promoted in 2010 to the role of Head of Investigation and in 2014, she was appointed to her current role.

2. Ms. Farrell had no previous involvement in this case to which the withheld material relates, and she has not reviewed the withheld material having only seen an index of the documents it contains. She has been made aware that the withheld material consists of a bundle, which is evidence collected by the GMC, and presented to Dr. A in this case when disclosing allegations, and which would have been reviewed by the Case Examiners when making their decision to refer the matter to the Medical Practitioners Tribunal Service (“MPTS”).
3. Ms. Farrell attended the hearing and identified and adopted her witness statement demonstrating her awareness of the importance of the Truth of her evidence to the Tribunal. All of the content of her witness statement are relevant and worthy of our careful attention, but particularly important and pertinent parts of her witness statement are set out as follows:

On the GMC Investigation Process:

4. §15 - *“Much of the information obtained as part of a GMC investigation is highly sensitive. Organisations may be reluctant to disclose information to the GMC if there was a risk of this information being routinely disclosed under the Freedom of Information Act. A court may consider this may be a reasonable argument raised in s35A enforcement proceedings, which would hinder the GMC’s ability to obtain information even using our compulsory powers.”*
5. §17 - *“The GMC’s s35A powers can also only be used to request information once an investigation has been opened. If witnesses or organisations were reluctant to raise initial concerns with the GMC due to concerns that sensitive information may be released under the Freedom of Information Act, the GMC’s s35A powers would not assist in obtaining this initial information.”*

On GMC Disclosure and Policy:

6. §23 - *“The hearing bundle itself (which is likely to be different from the closed bundle compiled at an earlier stage of the investigation process) is not released to the public at large, either during or after an MPT hearing. The bundle will potentially contain a substantial amount of highly sensitive material with information from a wide range of*

people such as patients and colleagues of the registrant, which may not have been referred to in the public hearing or may relate to allegations that fall away during the course of the Tribunal."

7. §27- *"If an investigation does not proceed to an MPT hearing for any reason, no information will be made publicly available. At this stage, the information gathered may include evidence that is not relevant, probative, accurate or plausible, or may relate to an allegation which is not proceeding. The doctor may not have responded to the allegation or produced any rebuttal evidence. No findings have been made against the registrant, and there will have been no public hearing."*

Prejudice to the GMC's regulatory functions:

8. §28 - *"Following voluntary erasure, a registrant may apply to be restored to the Medical Register. In cases where the registrant was voluntarily erased while there was an open fitness to practise investigation, the GMC would consider the allegations previously under investigation when making a decision on whether the registrant should be restored to the Medical Register. This may include referral to an MPT Hearing to consider the previous allegations, and whether the registrant is fit to practise and should be restored to the Medical Register."*
9. §29 - *"If allegations or investigation documents were disclosed to the world at large following a registrant's Voluntary Erasure, there may be prejudice to any consideration of the previous allegations if the registrant were to apply to be restored to the Medical Register. We may not be able to rely on certain witness evidence and so the consideration of the previous allegations may be insufficient to protect the public."*
10. §30 - *"There is a significant risk to the GMC's regulatory functions if we were to disclose information regarding a registrant's fitness to practise which has not been tested or proven and would therefore be prejudicial to the registrant. There is a real risk that publication of such information would also impact peoples' willingness to share information with us, or to disclose serious allegations which may have an impact on patient safety and public protection".*
11. §31 - *"As set out above, the GMC has powers to compel parties to provide information, but these powers may only be used once an investigation is ongoing. Use of these powers may also detrimentally impact our relationships with Organisations or individuals and may have serious impacts on the timescales of our investigations. If the GMC were to seek a court order to compel disclosure of information, a court may accept that fear of disclosure of sensitive information under FOIA is a reasonable reason for the information not to be released to the GMC. This could seriously impact the GMC's*

ability to investigate allegations which are serious in nature and require the careful consideration of sensitive material.

12. §32 - *“These powers cannot be used to compel individuals or organizations to approach us in the first instance with concerns. If people were concerned that the information they provided to the GMC may be routinely disclosed under FOIA, they may not disclose the allegations to us in the first instance, which would result in the GMC being unable to investigate potentially serious concerns, and fulfil our statutory functions of protecting the public, maintaining public confidence in the profession, and maintaining proper professional standards.*

13. §33 - *“The majority of our investigations include obtaining medical records for one or more patients. All medical records contain highly sensitive information and are treated as confidential. We investigate doctors for inappropriately accessing, viewing, sharing and /or storing medical records. It would be incongruent if the GMC did not treat medical records in the same way that we expect doctors to and were to disclose this material under FOIA.”*

14. Ms. Farrell was questioned by the Tribunal members and the Appellants on all material issues pertaining and beyond. The witness dealt comprehensively with the reasons for the refusal to release the withheld information and more. She assisted the Appellants in understanding the rationale in the position taken by the public authority in all of these very sensitive matters. The witness helpfully indicated that the Appellants were welcome to raise lingering issues and complaints directly with the GMC, promising personally to receive and deal with any such issues. The Tribunal welcomes this development given the very personal way in which Mr & Mrs Thornton are directly affected by the matter at hand. Whilst the offer of assistance is outside the remit of FOIA, it is no less valuable recognition of how deeply and traumatically they were affected by events. It also addresses a miscommunication which lead the Thornton’s to believe that the only way they could engage with the GMC on this matter, could only be via FOIA. We will return to this later.

15. In response to the many issues raised by the Appellants and the Tribunal, and without prejudice to the generality of her evidence in support of the GMC processes the witness described in detail and gave evidence on the following:

- The Hearing bundle which constitutes most of the evidence and information usually prepared and compiled for an MPTS internal hearing within the GMC, is usually completed just before the hearing. In this case it would probably and most likely not have been fully complete as that hearing never took place.
- Nevertheless, the withheld information in this appeal would have contained much of that relevant information which the witness described and averred presented significant competing interests on both sides of the public interest in disclosure.
- In response to a question she distinguished the role of the GMC from the Appellants' interests, describing the reasons for the GMC investigation as not to determine what happened to a particular patient or individual but to determine a doctor's ability in general terms to provide safe care. There would be a "huge" (her adjective) volume of personal and sensitive information about many other individuals other than a patient. Redacted portions that have been disclosed to the Appellants e.g., Case Examiner's report OB C42-C62 would be largely other people's personal data rather than about the individual patient.
- It is not in the medical profession's interests or the GMC's interest, or indeed in the public interest that this highly sensitive Personal data be released into the public domain.
- The GMC do not easily accept applications for Voluntary erasure and in fact very serious problems or difficulties need to firmly be established by a Doctor before this is accepted as an alternative course of action when a MPTS hearing is being considered. In the case e.g. of an application on grounds of ill health of a Doctor the GMC would often obtain their own independent medical report.
- Important points in §§16 and 32 of the witness statement re use of GMC's powers under 35A to compel assistance by parties only when an investigation is in train.
- §§ 23-24 and the witness' written, but also in her oral evidence, was that a bundle (the Closed material in this case) is never disclosed. The information that is made public is derived from the Hearing bundle and the minutes of the MPTS hearing into the doctor's fitness to practise. In this case there has been no such hearing for this doctor.

The Legal Framework (further to that outlined in the Interim Decision of 19 January 2024).

16. Section 16 FOIA: Advice and assistance.

s16: - states:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

17. Section 31 FOIA: - regulatory action.

s31: provides, so far as is relevant to this appeal:

Law enforcement:

(1) 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... (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2) ...

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

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence, in relation to any profession or other activity which he is, or seeks to become, authorised to carry on, ...

18. The feared prejudice need be no more than "*real, actual or of substance*", and there must be "*more than a hypothetical or remote possibility ... a real and significant risk of prejudice*": *Hogan v IC* [2011] 1 Info LR 588 at [29]-[35]; endorsed by the Court of Appeal in *DWP v IC* and *Zola* [2016] EWCA Civ 758; [2017] 1 WLR 1 at [27].

Discussion:

19. For discussion on the Legitimate Interests of individuals and the GMC's position on Rights and Freedoms under the Data Protection Act 2018 and the UK GDPR as set out in §§ 62-75 of our Interim Decision dated 19 January 2024 herein and the GMC provide a helpful starting point at the Open Bundle ("OB"), p.95 which sets out their '*Publication and disclosure policy – Fitness to practise*'.

20. **Further to the Case Management Directions of 19 January 2024**, the Tribunal now have the advantage of the direct evidence from Ms. Farrell and are in a much better position to consider the actual effect that disclosure could have, including the realities of how some sections of the media work and of the impact this can have.
21. s31 is a qualified exemption, so that the obligation under s1(1)(b) to communicate information is disappplied if or to the extent that, 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.
22. Section 31 applies to the entirety of the withheld material. The GMC's investigative functions rely to a considerable extent on voluntary cooperation. It does possess some coercive powers, but it is much more resource-intensive and onerous to use those powers. There is a real and significant risk that people – who may be the subjects of investigations, their employers or co-workers, patients and their families or other witnesses – will be less open and forthcoming in providing documents (which may be confidential or otherwise sensitive) or answering questions for the purposes of those investigations if they fear that the information may be released to the public, the world at large under FOIA. They would of course anticipate that those documents might be used in public regulatory proceedings but would take comfort from the safeguards and controls which are built into that procedure and process as extensively described and illustrated by Ms. Farrell. Disclosure via FOIA without those safeguards would be of great concern and would be likely to inhibit the required co-operation from so many other sources. This would cause, at minimum, inconvenience and delay, and possibly limit the evidence which the GMC is able to gather, at the cost of the effectiveness of the investigation and therefore the public interest in protecting the public while simultaneously ensuring fairness to the doctor.
23. Similar considerations apply to the GMC itself and its various manifestations as Ms. Farrell affirmed. Investigators and interim decision-makers need to carry out their functions within a safe space. In particular, they will need to explore avenues (which may turn out to be blind alleys) and seek and compile evidence (which may be irrelevant or sensitive or both). In due course, they may need to prepare a prosecution so as to ensure that all charges are evidentially sound and in the public interest and ensure fair and lawful disclosure of information in the context of any proceedings. All of those functions would be likely to be impaired

if investigators and decision-makers were concerned about intermediate and provisional matters being made public to the world at large via FOIA.

Conclusions:

24. The Tribunal are still not persuaded that the exemption claimed of s40(2) relating to the doctor's personal data can be applied in a blanket fashion. We have considered the GMC's alternative, position (Closed submissions 21 March 2024; §§ 8-18) which was to claim exemption s40(2) for Doctor A's information and s40(2) for other people's personal information for some, and s31 re GMC's Regulatory functions for the whole of the withheld information plus other exemptions.
25. Having considered the GMC witness evidence, the Tribunal are satisfied that the exemption at s31 FOIA does apply to the whole of the withheld information for the various reasons addressed by Ms Farrell. While, like the GMC, and the Commissioner, we recognise the general and significant public interest in disclosure, this Tribunal unanimously accept that on the material facts pertaining in this appeal, the public interest in non-disclosure outweighs the public interest in disclosure. Accordingly, we find the public interest is in favour of withholding the disputed information.
26. It is clear from the witness evidence at this hearing that the process by which the GMC use their statutory powers to require information are carefully calibrated to achieve the most just and time efficient outcomes. Disclosure of the withheld material in this case would pose a real risk that the operation of the GMC's regulatory process would be likely to be prejudiced. For example, and as the witness evidence identified, those providing information to the GMC may be more inclined to require the formal court order process to be followed, rather than the less formal time and cost-efficient process currently followed, as described by Ms Farrell. Should this occur, the GMC are likely to find it harder to obtain the information they require in order to reach a just outcome. Additionally, those affected by allegations (both the accused and those affected by the alleged actions/inactions of the accused) would have to wait longer for an outcome, undoubtedly causing undue stress. Accordingly, the Tribunal must dismiss the appeal.

The process specific to the Appellants who were litigants in persons and the proportionate use of the court time:

27. Obiter, without prejudice and with a view to more insight for future FOIA requests in similar circumstances, we comment as follows;

- a) If the GMC had observed s16 FOIA and had given more considered advice and assistance earlier, or demonstrated that they had properly addressed other exemptions which might apply rather than what seemed to be an overly simple reliance on a single exemption (in effect a blanket application of exemption s40(2)), then the Appellants, who are Litigants in Person would have been assisted in having time to consider their options and those exemptions earlier in this process. The Appellants' much-repeated evidence throughout was that they were led to believe, and understood the only option was to go to the Commissioner and other means of complaint or redress were time barred.
- b) The GMC, and ultimately the Commissioner could have given greater consideration to providing alternative exemptions (even without full arguments) as assisting with the objective of the proportionate use of the Tribunal's time. It was not until the Closed submissions prior to the third hearing that the question of the application of the s31 exemption (then exposed by the Tribunal), was finally, fully and properly raised.
- c) Extensive Closed material and Closed hearings to consider the Closed material do put Litigants in Person at a significant disadvantage, and one that made the Appellants herein feel bewildered, isolated and excluded. The more assistance that can be provided by a public authority and the Commissioner in anticipating and assisting the Appellants by early discussion of options and of what may be alternative relevant exemptions or points to consider, in our view would undoubtedly have been more resourceful, pragmatic and helpful.
- d) At the final hearing of this appeal Ms. Farrell instantly granted the Appellants enormous tangible relief with one sentence, saying there are no time limits for them to complain, and further that she would personally welcome the opportunity to deal with their complaints. Her evidence assured the Appellants, and the Tribunal of her good will in this regard

Coda: All members of the panel have contributed to the writing of this decision.

Brian Kennedy KC

17 July 2024.

Promulgation date : 31 July 2024