



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2016/0186

**Heard at Alfred Place, London WC1
On 7 December 2016**

Before

**JUDGE
CHRIS RYAN**

Between

DR ABDUL SAEED

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

GENERAL MEDICAL COUNCIL

Second Respondent

DECISION AND REASONS

Summary

1. This is an appeal from the Decision Notice of the Information Commissioner issued on 4 July 2016 under reference number FS50619386.
2. The Information Commissioner decided that, on the balance of probabilities, the General Medical Council (“GMC”) did not hold information which the Appellant had requested it to disclose under section 1 of the Freedom of Information Act 2000 (“FOIA”).
3. I have decided that the appeal from that decision should be dismissed for the reasons set out below.

Background Facts

4. In July 2011 the GMC's Fitness to Practice Panel ("the Panel") decided that the Appellant's fitness to practice as a doctor was impaired and that he should be suspended from practice for 12 months. It set out its decision in a 20 page document which recorded that it had given careful consideration to, among other matters, the evidence it heard from three expert witnesses. It found that, in the course of conducting a circumcision on a 5 year old male, the Appellant had, among other things:
 - a. failed to ensure that the patient's parents had given informed consent;
 - b. failed to ensure that the patient should not eat or drink before the operation;
 - c. failed to undertake an adequate pre-operative assessment;
 - d. failed to secure venous access to the patient by means of a venous cannula prior to commencing the procedure;
 - e. performed the role of both sedationist and surgeon during the operation, without engaging a suitably qualified and experienced person to assist him;
 - f. failed to monitor the patient's condition or to provide monitoring equipment;
 - g. administered pethidine and midazolam, in a non-hospital setting, without appropriate support or monitoring;
 - h. carried out the operation in unhygienic conditions, without surgical gloves or protective clothing;
 - i. failed to allow the patient to recover appropriately from sedation before allowing him to leave the surgery; and
 - j. failed to undertake an adequate post-operative assessment of the patient.
5. The Appellant did not appeal those findings of fact (some of which were recorded as having been admitted by him) or the decision as a whole.
6. On 9 July 2012 the Panel considered the steps which the Appellant had made to remedy the deficiencies identified in the July 2011 decision. It concluded that the Appellant had "*developed some insights into your failings and have gone some way to remedy them*" but that "*you have not yet developed sufficient insight and there does remain a risk of repetition of some of your previous failings*". It therefore decided that the suspension from practice should be lifted, but only against certain undertakings by the Appellant in relation to his future activities.
7. That decision was communicated to the Appellant by a letter dated 10 July 2011 from the Medical Practitioners Tribunal Service. The letter set out a full summary of the Panel's findings and recorded that the Panel considered that the deficiencies it had identified amounted to a systematic failure to meet current standards of practice. The letter continued:

"That panel considered that you have demonstrated only limited insight into your failings and despite being aware that your techniques and methods were out dated and potentially unsafe. You made no changes to your practice."
[underlining added]

In order to avoid repetition, I will refer to the words underlined in that quotation as "the Words Quoted".

The Appellant's request for information and the GMC's response

8. On 1 December 2015, over three years after the lifting of his suspension, the Appellant wrote to the GMC setting out the Words Quoted and then putting his FOIA information request in these terms:

“I shall be grateful to provide me the copy of the modern (latest) techniques and methods of circumcision of a child of 5 years and over”

9. The GMC responded to the information request by letter dated 16 December 2015, in which its representative wrote:

“The dissemination of guidance on clinical practice is not the GMC’s function. However, I have made enquiries in case any information on this subject is held. Unfortunately we don’t hold any current guidance on this subject. It may be helpful for you to look at the Education and Training papers on our website at www.gmc-uk.org . Also I have enclosed an information sheet about Personal Beliefs that refers to circumcision and may be of interest.”

10. The GMC maintained its position that it did not hold any information falling within the scope of the information request when, at the Appellant’s request, it carried out an internal review of its initial refusal. The Appellant was informed of the outcome of the internal review on 26 January 2016.

The Information Commissioner’s investigation and Decision Notice

11. On 3 March 2016 the Appellant complained to the Information Commissioner about the manner in which the GMC had handled his request. The Information Commissioner investigated the complaint and, as mentioned, published his decision notice on 4 July 2016. It recorded that the GMC had confirmed that disseminating guidance on clinical practice was not part of its functions. It published advice to doctors on the standards expected of them but not clinical guidance relating to medical procedures. The Information Commissioner noted that the GMC had nevertheless made enquiries with the team responsible for issuing the standards guidance and had established that the only relevant information held was the GMC guidance which it had provided to the Appellant.
12. In light of those findings the Information Commissioner concluded that, on the balance of probabilities, the GMC did not hold the specific information that the Appellant had requested

The Appeal to this Tribunal

13. The Appellant lodged an appeal to this Tribunal on 26 July 2016. His Grounds of Appeal drew attention to a perceived inconsistency between the GMC’s statement that it does not hold the requested information and the Quoted Words.
14. The powers of this Tribunal, when considering an appeal from a decision notice are set out in FOIA section 58, which reads, in relevant part:
- “(1) If on an appeal...the Tribunal considers –*
- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

15. The GMC was made a party to the Appeal and, in response to its request, a direction was made that the Appeal be determined at a hearing.
16. The President of the General Regulatory Chamber issued a direction on 12 August 2016 that the Appeal should be decided by a Judge alone, sitting without lay members.
17. The hearing took place on 7 December and was attended by the Appellant, representing himself, and by Ms Heather Emmerson of counsel representing the GMC. The Information Commissioner did not attend and was not represented.
18. By the time that the Appeal came to be heard the Appellant had modified his approach. In a letter to the GMC dated 21 October 2016 he wrote:

"Since you do not hold the latest techniques and methods in Circumcision I shall be grateful to have the reference or evidence of my Technique and method that was outdated and potentially unsafe."

The Appellant then referred again to the Quoted Words and asserted that the GMC must have got the quote from somewhere and concluded *"Please supply me from where it has been taken for quote"*.

19. The GMC explained in a letter of 3 November 2016, that it did not hold a document from which the Quoted Words had been taken. They represented the overall conclusion of the Panel based on the documentary and oral evidence it had considered, including expert evidence.
20. The Appellant then changed his position again. In a letter dated 5 November 2016 he suggested that the GMC should provide him with:

*"1. Copy of the witnesses and point out the particular paragraph which states that my Practice was outdated and potentially unsafe.
2. The copy of the expert witnesses report of [name] and [name] and point out the paragraph where they wrote that my practice was outdated and potentially unsafe.
3. The copy of the submission of the GMC barrister to the [Panel] in which he/she wrote that my practice was outdated and potentially unsafe."*

21. The Appellant accepts that he had been provided, in preparation for the 2011 Panel hearing, with reports of the expert witnesses, the statements of witnesses of fact and the transcript of the hearing at which the experts answered questions. However, he argued that, as he was unable to find anywhere in those materials the precise language which the Panel had adopted to describe his practices, the GMC should write to the experts in question and ask them to explain the techniques and methods that they considered were outdated and potentially unsafe.
22. Ms Emmerson, on behalf of the GMC, argued that the information now being requested did not fall within the scope of the original request, which was quite clearly limited to specific information. She reminded me that FOIA section 1 only obliges a public authority to disclose information which it holds at the time of an information request. It is not required to obtain information from third parties. However, the

Appellant argued that the language of the original information request was wide enough to include this information.

My conclusions

23. The Appellant appears to have proceeded, initially, on the assumption that the Panel would not have used the words it did to describe his practices if they had not appeared, verbatim, in an expert's evidence. Read in context, however, the Quoted Words were clearly intended to record the Panel's own summary of the conclusion it reached in light of all the evidence presented to it. And, without straying into an area of expertise which the Panel possessed, and I do not, there would seem to be very good reasons for it to have characterised the many, apparently basic, failings summarised in paragraph 4 above in the way that it did. It follows that the fact that the Appellant could not find the Quoted Words in any part of the evidence made available to him previously does not mean that other materials must exist that do replicate that language. Still less that any materials of that kind were held by the GMC at the relevant time. I am satisfied that they were not and that the Decision Notice contains no error in this respect.
24. The GMC had presented the Information Commissioner with a cogent and credible statement explaining why it was unlikely to hold detailed information on up to date clinical techniques. Its role is to maintain medical standards, which it will assess, in the context of a particular clinical procedure, by reference to guidance provided by those who are expert in that field. The Information Commissioner went on to establish that the GMC had made enquiries to see if, despite expectations, it did hold information falling within the scope of the request. He was therefore entitled to conclude that the GMC had made an appropriately rigorous search for information among those of its staff most likely to have been aware of its existence. His conclusion that, on the balance of probabilities, the GMC did not hold any relevant information was fully justified on the facts presented to him and I am unable to detect any error in his decision notice to that effect.
25. Finally the suggestion that, in the circumstances outlined above, the expert witnesses should nevertheless be asked at this stage to explain anew what conclusions they reached about the Appellant's practices is simply unarguable. The original information request was addressed to the GMC and not the expert witnesses. The fact that they were, in the Appellant's words, "commissioned" by the GMC does not mean that their information can be said to be held by the GMC for the purposes of FOIA section 1. Nor may the GMC be required to seek from them information that it does not hold now and did not hold at the time of the request.
26. For the reasons I have set out the Appeal is dismissed.

Signed

CHRIS RYAN

Judge of the First-tier Tribunal

Date: 12 December 2016

Date of Promulgation: 13 December 2016