



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

**Appeal Reference: EA/2017/0131**

**Heard at Birmingham Employment Tribunal,  
On 17th. November, 2017**

**Before**

**Judge**

**David Farrer Q.C.**

**Tribunal Members**

**Anne Chafer**

**and**

**Narendra Makanji**

**Between**

**Andrew Brown**

**Appellant**

**and**

**The Information Commissioner (“The ICO”)**

**Respondent**

Mr. Brown appeared in person.

The ICO did not appear but made written submissions.

## Decision and Reasons

The Tribunal finds that the exemption provided by s.31(1)(g) is not engaged. The appeal is therefore allowed. The Royal College of Veterinary Surgeons is required to provide the requested information to Mr. Brown within 28 days of the publication of this decision.

1. The Royal College of Veterinary Surgeons (“the RCVS”) regulates the professional conduct of veterinary surgeons. Its powers are contained and its procedures prescribed in the Veterinary Surgeons Act, 1966 (“the VSA”).
2. Section 2 of the VSA requires that a register be maintained of qualified veterinary surgeons eligible to be registered. Section 15(1) requires the RCVS to set up a preliminary investigating committee to investigate any case in which a veterinary surgeon is liable to be suspended or removed from the register for disciplinary reasons and to decide whether the case should go to the Disciplinary Committee. The Disciplinary Committee is charged to determine whether the surgeon should be disciplined in either of the ways referred to. Section 16(1), so far as material to this appeal, provides that it may do so where the surgeon has been convicted of a criminal offence rendering him unfit to practice or is guilty of “*disgraceful conduct in any professional respect* “. As the epithet indicates, that means conduct falling far short of proper professional standards, as set out in the RCVS Code of Conduct.
3. A number of years ago, the RCVS set up the Practice Standards Scheme (“the PSS”) in order to promote high professional standards and, consequently, animal welfare, in veterinary practices. Membership (involving practices, not individuals) is voluntary and involves a subscription. Accreditation of a practice to the PSS, at one or other of the levels of good practice for which it provides, is a kite mark for the public, hence a legitimate marketing tool.
4. PSS membership requires a planned programme of (usually) quadrennial assessments of the practice, including visits to surgeries and monitoring of a wide range of administrative activities. Advanced notice is given of these assessments. Such assessments are followed by PSS reports, which cover all aspects of the practice and, where appropriate, recommend improvements to be completed by target dates. It follows that such reports will cover matters

directly linked to professional standards, such as storage of drugs, veterinary hygiene within a surgery and the harmonious handling of a wide variety of pets and more general features, like sanitary facilities and the overall physical appearance of the practice premises. If evidence of disgraceful professional conduct by a member of the practice came to light during the assessment that would evidently be material to the overall picture of the practice. Such a discovery, in the course of assessment, seems highly improbable, however, and there was no evidence of such an event.

5. The content of a report will determine whether a practice will retain its present, or any, accreditation to the PSS, or whether it may be raised to a higher level.
6. PSS reports have not been published hitherto, save to the RCVS.
7. The history of the request, which is the subject of this appeal is rather complicated but a short precis will suffice.
8. On 25<sup>th</sup>. May, 2016, Mr. Brown posed a long series of questions to the RCVS regarding the Preliminary Investigation Committee, the operation of the PSS and regulation of noise on veterinary premises. Included in this series was –

“2(c) Is the information I have from RCVS officers correct that members of the public cannot as of right see the reports and certainly not from the RCVS?”.

The RCVS disclosed some information, stated that it did not hold other information and invoked s.12 (cost exceeding the appropriate limit) in relation to the rest. Following an internal review, it provided advice as to the “s.12 information”.

9. Following the involvement of the ICO, Mr. Brown’s complaint focused on Request 2(c). The RCVS stated that it did not publish PSS reports because they did not reflect improvements made in response to criticisms, which they contained. It then wrongly asserted that such reports were not subject to FOIA. That response was retracted, following correspondence with the ICO.
10. For the purposes of the Decision Notice (“the DN”) it was evidently accepted on all sides that the material request should be treated as confined to the content of PSS reports on the Severn

Practice, of which Mr. Brown was a client. There were two; the first dating from 2012, the second from 2016. We received both in the Closed Bundle.

11. The RCVS relied, first, on the exemption provided for in s.31(1)(g), that is, prejudice to the exercise of its functions for purposes specified in s.31(2)(a) to (d). Those purposes were -

- “(a) The purpose of ascertaining whether any person has failed to comply with the law,*
- (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 the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become authorised to carry on”.*

Plainly, those purposes all fell within the remit of the Disciplinary Committee of the RCVS. No attempt was made by either party to treat them separately in submissions and the Tribunal is satisfied that the material issues are the same in relation to each of them.

12. The RCVS also invoked as an exemption s.43(2) which protects commercially sensitive information. The DN gave no ruling on this claim and neither party advanced distinct arguments on the subject in submissions to the Tribunal. The disputed information is not of the kind usually involved when this exemption is relied on but disclosure of criticism of a practice may, in principle, prejudice its commercial interests so it cannot be said that s.43(2) is plainly inapplicable. However, we seriously doubt that it is engaged on the facts of this appeal. If s.31(1)(g) fails to protect this information, s.43(2) will not do so. Beyond that, the Tribunal, following the parties’ example, has nothing to add.

13. The ICO, in her DN, found that s.31(1)(g) was engaged and that the balance of public interests favoured the maintenance of the exemption. She therefore dismissed the complaint. Mr. Brown appealed to the Tribunal.

14. The first and, depending on our finding, possibly the only question for determination is whether s.31(1)(g) is engaged in relation to the two reports on the Severn Practice. The only

contentious issue is whether disclosure of these two reports would or would be likely to prejudice the exercise by the RCVS of its functions for the purposes set out in s. 31(2)(a) to (d) (see §11 above).

15. The RCVS's case, accepted and supported by the ICO is that -

- (a) Disclosure would undermine trust between practitioners and the RCVS.
- (b) It would be unfair to the Severn Practice and would threaten practices generally with similar unfairness because it would involve disclosing failings which had been rectified by the time of disclosure and would, in the case of older reports, paint a picture of the practice which could well be seriously out of date.
- (c) The relevance of such weakening of trust and such potential unfairness is that practices not currently members of the PSS would be deterred from joining and current members were likely to leave. These developments would or would be likely to prejudice the regulatory function of the ECVS because PSS reports were a source of information and evidence which were available to the Disciplinary Committee when considering disciplinary complaints under VSA s.16. Hence disclosure was liable to deprive that committee of material relevant to its decisions.
- (d) A reduction in PSS membership would deprive it of subscriptions and therefore damage its ability to promote animal welfare.

16. Further, more extensive submissions were made on the question of the public interest.

17. Mr. Brown's submissions on the engagement of s.31(1)(g) are largely reflected, though not repeated, in the reasons for our decision given below.

#### Our reasons

18. We are directly concerned with two reports. Nevertheless, broader considerations of the possible effect of our decision on a wider range of veterinary practices are a relevant factor. It is, however, important to emphasise that the question posed at §14 is one of fact and the answer will depend, to a substantial degree, on the content of the particular report(s) under consideration.

19. The PSS is not a statutory scheme. Its members are practices, not individual veterinary surgeons. The distinction is important because criticisms contained in its reports are likely to

be directed at the practice, not at a particular surgeon. That is certainly the case as regards the two reports in question.

20. The regulatory function of the RCVS is to discipline individual members guilty of serious professional misconduct, involving a criminal conviction or “disgraceful conduct in any professional respect”. The latter term designates misconduct of a very grave kind. So far as negligent acts or omissions are concerned, they would need to be far below any reasonable professional standard to attract suspension or deregistration.
21. Such a function is far removed from that of a PSS report, which, we apprehend, will generally be concerned with observed failures of a fairly routine kind, attributable to a number of individuals performing both veterinary and administrative roles. That is certainly the case as regards the two reports giving rise to this appeal. The likelihood of such a report dealing with misconduct by a veterinary surgeon justifying suspension or deregistration seems to us very slight.
22. It is not apparent, therefore, how such reports could be generally relevant, let alone evidentially useful, to a Disciplinary Committee investigating allegedly disgraceful conduct. We note that no reference was made by the ICO, or to her by the RCVS, to any case in which a report had been used for such a regulatory purpose. If this were commonly, or even occasionally true, we should have expected some examples, or references to examples, to be put in evidence by the ICO. No instance was cited.
23. We are not, therefore, impressed by the argument that the regulatory function would be prejudiced, if fewer PSS reports were available. Moreover, the submission that fewer would be available because practices would be discouraged from joining the PSS scheme is also unconvincing. Practices that do not join the PSS are subject to inspection by the Veterinary Medicines Directorate (the “VMD”) under a statutory scheme. Similar considerations to those identified in this appeal are likely to apply to disclosure of VMD inspection reports. We are not aware of any statutory prohibition on such disclosure. Accreditation to the PSS evidently offers practices a kitemark with a potential marketing value and other advantages listed in the PSS Handbook. Those are substantial incentives to join the scheme.

24. Many reports will be broadly satisfactory. Where a report identified flaws, would its disclosure undermine trust or be unfair to the practice?
25. As to trust, there is no question of imposing a regime of routine disclosure of PSS reports. The Tribunal has no power to do anything of the sort. What is sought in this appeal is a ruling that such reports are not immune from disclosure and that the two reports giving rise to this appeal should be disclosed. As stated above, whether a particular report should be disclosed in response to a FOIA request will depend on the facts of the case, in particular the content of the report.
26. If disclosure were unfair to veterinary practices, that could be relevant to the argument about discouragement from joining the PSS and consequent loss of evidence for disciplinary proceedings. However, there is no good reason why disclosure should be automatically unfair. It is surprising that the ICO should adopt the argument that it would be unfair because a report may be out of date and refer to faults long since rectified, as required by the PSS. As Mr. Brown cogently observes, albeit with reference to the public interest, the ICO's Guidance, at §§44 and 46, states that partial, out of date or misleading information can, indeed should be accompanied by a note putting it in context and, if appropriate, stating the current position. This is relevant to the submission that disclosure of inaccurate material would affect membership of the PSS. If it is now inaccurate, the practice is entitled to and surely will indicate that the faults identified were remedied by the target dates set out in the report. There is no reason for criticisms that are no longer justified to be published without explanation or for practices to withdraw or stand back from the PSS because of fears of unfair and incomplete disclosure.
27. The submission as to possible loss of funding for animal welfare has no relevance to the question whether s.31(1)(g) is engaged.
28. Like the ICO, the Tribunal approaches the RCVS reliance on s.31(1)(g) on the basis that it is arguing, not that disclosure "would" but that it "would be likely to prejudice", its specified functions. It is now trite law that this requires proof, on a balance of probabilities, of a "real and significant risk of prejudice". We find that the evidence does not demonstrate any such risk in relation to the two Severn Practice reports. Any risk is, put at its highest, speculative. We think it most unlikely that there would be such a risk as regards the majority of PSS

reports but any further request for such information will be determined by reference to the particular report.

29. Having found that the exemption is not engaged, we do not proceed to consider the competing arguments as to the public interest.

30. For these reasons we allow this appeal.

31. This is a unanimous decision.

David Farrer Q.C.

Judge of the First-tier Tribunal

Date: 4th. December, 2017