

FOIA s.51 – Information notices

DPA s.59 – Confidentiality of information

Health Professions Council v IC

EA/2007/0116

14th March 2008

Cases:

Facts

This was an appeal against an Information Notice to the Health Professions Council (HPC), a professional regulatory body. The HPC's functions include the maintenance of a register of health professionals and a mechanism, called the Fitness to Practise process (the Process) whereby the conduct and performance of registrants may be investigated and called to account. Members of the public, employers etc. may make allegations to the HPC with regard to the fitness to practise of particular registrants. Such cases are investigated by the HPC and as a preliminary step in the Process a decision will be taken by a Panel of the Investigating Committee (the Investigating Committee) whether there is 'a case to answer'. Where it is decided that there is not, that will be the end of the case against the registrant. Where the Investigating Committee decides there is case to answer this is referred to a different Committee for a full hearing.

The original request arose in relation to an allegation to the HPC that a particular registrant's fitness to practise was impaired. This was investigated and papers duly put before the Investigating Committee. The Committee decided that there was no case to answer. The requester who was unhappy with this decision, then made a FOIA request in relation to the papers that were put to the Investigating Committee. This was refused by the HPC on the grounds that certain exemptions applied, namely ss.30 (investigations and proceedings conducted by public authorities), 40 (personal data) and 41 (confidentiality).

Findings

The Tribunal firstly considered whether the net effect of the practises and procedures of the IC; and the prohibition against disclosure under s.59 of the Data Protection Act 1998 (DPA) was a sufficient guarantee of the IC keeping the disclosed information confidential to negate or at least substantially reduce the perceived fears of registrants that their information would become public which it was argued, in turn, by the HPC would thereby inhibit future cooperation with the fitness to practise process (the purported damage to the Process).

The Tribunal was of the view that the extent to which it protected information in the hands of the Information Commissioner from onwards disclosure could not be said to be coterminous with the restrictions on disclosure that arose from the duty of confidentiality owed by the HPC to registrants. Thus it was accepted that there could

potentially be circumstances in which the IC would make onwards disclosure against the wishes of the HPC or the author of the information (registrant, third party witnesses etc.) This was however unlikely to happen given the protection afforded by s.59.

Secondly, they considered whether the IC had failed to take into account relevant considerations, namely the potential damage to the Process in the exercise of his discretion. The Tribunal concluded that the IC had as a matter of fact taken into account the alleged damage to the Process. This included the purported damage to the Process.

Thirdly, whether, in the light of the above, the purported damage to the Process was, as argued, sufficiently serious to mean that the IC ought to have exercised his discretion differently and not to have issued the Information Notice. The Tribunal was of the view that in most circumstances the IC would need to see the disputed information and that it would be a very high hurdle to clear to convince a Tribunal that the IC could and should carry out his functions without sight of the relevant material. This case came nowhere near that mark.

The Tribunal was of the view that the public interest in the IC being able to carry out his regulatory function in the way intended by Parliament was so important as to outweigh any negative impact from disclosure under the Information Notice. Thus, it considered that the IC had exercised his discretion correctly and that the Notice had been in accordance with law.

Conclusion

The Tribunal concluded that there could be cases whereby the IC could make onwards disclosure without consent of the reviewed party, but that it is unlikely to happen as a result of s.599 DPA. They held the IC to have considered effectively and exercised discretion properly. The Tribunal therefore upheld the Decision Notices and dismissed the appeal.