IN THE FIRST-TIER TRIBUNAL Case No. **Appeal No. EA/2014/0063**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50526142

Dated 5th March 2014

BETWEEN	Mr Benjamin Dean	Appellant
	And	
	The Information Commissioner	Respondent
	And	
	General Medical Council	Second Respondent

Determined on 15th September at Field House and thereafter on 13th November 2014

Date of Decision 3rd December 2014

BEFORE

Fiona Henderson (Judge)

Alison Lowton

And

Marion Saunders

Mr Dean represented himself,

Counsel for GMC– Mr Timothy Pitt Payne QC

The Information Commissioner chose not to be represented at the oral hearing.

Subject matter: s36(2)(b)(ii) FOIA (inhibition of the free and frank exchange of views for the purposes of deliberation)

DECISION

The Appeal is allowed. The Tribunal orders the Second Respondent to disclose the withheld material within 35 calendar days of the date of this decision.

REASONS FOR DECISION

1. This appeal is against the Information Commissioner's Decision FS FS50526142 dated 5th March 2014 which concluded that the General Medical Council (GMC) had correctly applied s36(2)(b)(ii) FOIA (inhibition of the free and frank exchange of views for the purposes of deliberation) to the withheld information.[1] The Appellant appeals against this decision.

Background

2. In 2011 Medical Education England identified issues facing the future of postgraduate medical training. A steering group scoped out key themes for a review of the structure of postgraduate training. The Shape of Training Review (the Review) was set up to review the postgraduate education after trainees have graduated from medical school, to determine whether postgraduate training was fit for purpose and whether it met current demands and if not how it might change. The GMC were one of a number of sponsors of the report and were providing secretarial support to Professor Greenaway the Chair of the review. The terms of reference were framed in March 2012 and the review was published in October 2013. With the Review an annex was published listing, summarising and analysing the types of evidence taken into consideration.

3. Some of the conclusions of the Review were that:

   a) Whilst at present Doctors are provisionally registered upon graduation and are fully registered after their first foundation year, they should instead be fully registered upon graduation.

   b) Consultant training is too specialised and takes too long – a broader, shorter programme was recommended (4-6 years instead of the current 5-8).

4. The Appellant is a Doctor in training. He points to concern within the profession that full registration upon graduation would compromise patient safety and that it would not be possible to maintain the same level of expertise if the training is broader and shorter. The concern is that a "sub consultant" class will be created or that newly

[1] The Commissioner also found that s10 FOIA was breached as it took 42 days to respond. This is not the subject of the appeal and is not considered by the Tribunal.

qualified consultants will be less well qualified than existing consultants which would compromise patient safety[2].

5. Although the review has now been published this was the first stage of policy making; the process of whether to implement the recommendations and if so how, was still ongoing in early 2014.

6. Following the framing of the terms of reference and prior to the formal evidence gathering process, Professor Greenaway had meetings with various representatives. The GMC state that notes were made of these meetings which were an informal record of the conversations had and the issues raised, to help "inform our thinking"[3]. These meetings did not feed directly into the evidence for the review. At some of these meetings notes were taken although they were not agreed by the parties to the meeting and do not have the status of formal minutes. The contents of these meetings have not been disclosed and are not reflected in the evidence summaries which form the annex to the report. The GMC maintain that these meetings were informal and that there was no expectation that the notes would be disclosed. Mr Dean argues that there is no evidence that the individuals believed that the conversations would be kept confidential and in light of the controversial findings of the review it is important that the public should know whether pressure or influence was brought to bear on Professor Greenaway to undertake the review in a certain way.

The Information Request

7. The Appellant wrote to GMC on 25th July 2013 asking:
"Has the Chair of the review (Professor Greenaway) discussed the review with any ministers/civil servants? If so may I see the documentation of these meetings and who was involved?"

8. GMC dealt with this request as a FOIA request and refused the request on 23rd September 2013 relying upon s36(2)(b)(ii) FOIA. This decision was upheld on internal review for the same reasons (notified to the Appellant on 9th January 2014).

[2] Eg OB p44-5, p103-6 and p160-165
[3] GMC letter for Commissioner 12.2.14 OB 87

9. The Appellant had complained to the Commissioner upon receiving the initial refusal and had been told to wait for the internal review, however, in light of the length of time that this took, the Commissioner accepted the complaint for investigation on 6th January 2014.

10. The Commissioner upheld the reliance upon s36(2)(b)(ii)FOIA and found that the public interest in disclosure was outweighed by the public interest in withholding the information.

The Appeal

11. The Appellant appealed on the grounds that the Commissioner had got the balance of the public interest wrong. An open bundle has been provided and both parties have had the opportunity to make submissions in writing and orally, the Tribunal has also been provided with a closed bundle containing the disputed information. The Tribunal heard some argument in closed session relating to the specific content of the closed material. The Tribunal has been referred to the Review and Annexes and has looked at it in order to form an assessment of its format, detail and presentation but it was not argued by either party that it was necessary to read the Review and Annexes and therefore we have not.

Scope of the Appeal

12. During the hearing it became apparent that the GMC had not included all the material that fell within the scope of the request in the closed bundle or the schedule that was sent to the Qualified Person for their opinion. The case was adjourned to enable the additional material to be provided to the Tribunal and to enable all parties to provide submissions relating to what if any impact there is of the failure to show the new material to the Qualified Person. The Tribunal is therefore satisfied that it is required to determine whether s36(2)(b)(ii) FOIA is engaged in relation to the additional closed material.

Does the Qualified Person's Opinion apply to the additional withheld material?

13. The Tribunal has considered whether the GMC are now entitled to rely upon s36(2)(b)(ii) in relation to the additional handwritten notes. In the open hearing the GMC confirmed that in relation to the current closed material:
"A particular GMC officer took handwritten notes which were put into typed notes a few days later." Also in the open hearing the GMC confirmed that separately some handwritten notes had been made that were not disclosed and do not form part of the typed-up notes that appear in the current closed material. These notes were described as :*"single word jottings"*[4].

14. In their adjournment response the GMC confirmed that these handwritten notes were taken by a second GMC official of two meetings that they had attended in the course of the relevant meetings. Typed transcripts have been prepared following the hearing on 15th September 2014, in order to assist the Tribunal. They were not transcribed prior to that as, due to their sparse nature, it was not felt that their transcription was necessary. The GMC accept that these notes were within the scope of the request.

15. S36(2) provides that:
Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—...
(b) would, or would be likely to, inhibit—...
(ii) the free and frank exchange of views for the purposes of deliberation, ...
The GMC accept that these single word jotting notes were not placed before the Qualified Person in order to enable him to form his opinion however, they maintain that despite this the opinion covers this additional material.

16. The question for the Tribunal is whether there is in existence an opinion from a Qualified Person in relation to the new material. The GMC argue that:

[4] This was apparent from material which was disclosed to the Appellant in a subsequent information request dated 1.5.14 to the GMC relating to the internal correspondence held relating to the request of 25.7.13. Email of 3.12.13 at 08.15

a) The reasoning in the Qualified Person's opinion is not confined to the specific documents that the qualified person has seen. It relates to *any* information held by the GMC that falls within the scope of the request; this would include the additional notes.
b) The points made by the Qualified Person are just as applicable to those notes as they are to the material that he actually saw.
c) The reasons for the opinion are provided in it.

d) The further disputed information is part of the scope of the request and substantially similar. (However, they accept that these notes are a great deal more fragmentary and consequently less informative[5]).

The Commissioner supports these arguments for the same reasons.

17. Mr Dean contends that the new material is not the subject of the opinion by the Qualified Person as it has never been viewed and was not in his contemplation at the time that the opinion was given. He refers the Tribunal to the ICO guidance and argues that this information is of a different nature and more resembles a "live record" rather than notes that are typed up later.

18. We have had regard to the wording of the Qualified Person's opinion itself which states:
"S 36(2)(b)(ii) is applicable to the above material[6] [which is a schedule] as follows:".
The schedule does not explicitly state that it is exhaustive, equally it does not state that this was a representative sample. We are satisfied that the implication was that the schedule and documents were the entirety of the withheld material. The actual documents that were contained in the original closed bundle are attached and the reasons for applying s 36(2)(b)(ii) are set out in a schedule. We are satisfied that the submission purported to be exhaustive and that the Qualified Person was not applying his mind to the generality of documents such as those included in the submission but was limiting his decision to those specific documents.

19. Additionally the ICO guidance includes the following:
Blanket rulings

[5] in the context of the weight of public interest
[6] Emphasis added

28. Section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion. We recognise that public authorities will tend to develop a general approach to, or policy on, releasing certain types of information, but this must not limit the qualified person's discretion. An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified person should consider the facts in each case, weigh the relevant factors and ignore irrelevant factors in order to reach their opinion.

20. We accept that there is no requirement to view the actual material and that a reasonable opinion could be formed from a representative sample, however, we are satisfied that it must be based on a proper understanding of the disputed information. Whilst the ICO guidance is not binding upon us we agree with his assessment within the guidance of the relevant factors in forming a reasonable opinion. Having had regard to the documents that were attached and considered by the Qualified Person when he gave his opinion it is accepted that they were minute-like and clearly attributable, they were more detailed and therefore of a different quality and hence arguably significance to the single word jottings. The Qualified Person did not have an example of the single word jottings and could not therefore weigh the relevant factors in relation to this type of note.

21. From this we conclude that there is no reasonable opinion from a Qualified Person in relation to the additional withheld material and that consequently s36(2)(b)(ii)FOIA is not engaged.

Was additional material held which has not yet been disclosed to the Tribunal?

22. A search has now been made for the original notes from which the typed notes in the original withheld material had been transcribed. These have not been found. The GMC's case is that they were not held at the date of the request because:

a) the notes would have been transcribed shortly (probably a few days) after the meetings.

b) It is likely that the hand written notes would have been discarded when the notebook in which they were jotted down became full, as the author gets through approximately 6 per year.

c) That would have been well before Mr. Dean's freedom of information request was received.

23. Whilst the GMC ought to have considered whether the original notes were still in existence when they first received the request at which time they might have been able to be more precise about exactly when they were discarded, we accept the GMC's explanation and are satisfied on a balance of probabilities that the notes were no longer held at the relevant date.

Is s36(2)(b)(ii) engaged in relation to the minute-like notes?

24. It was not disputed that the remainder of the withheld material is covered by the reasonable opinion of the Qualified Person. We must be satisfied that it is reasonable in substance and reasonably arrived at. The Qualified Person has been provided with a copy of the withheld material and has set out the reasons for his opinion. We are satisfied that it is in accordance with reason, it is neither irrational nor absurd. S36(2)(b)(ii) is therefore engaged.

The public interest test

25. S36(2)(b)(ii) is subject to the public interest test in s2(2)(b) FOIA. The GMC argues that having accepted the reasonableness of the Qualified Person's opinion that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation (the chilling effect), the Tribunal must give weight to that opinion in the assessment of where the balance of public interest lies. However, they accept that the Tribunal will need to form its own view upon to what extent, how often and how severely the free and frank exchange of views for the purposes of deliberation may be inhibited[7]. This is the same approach adopted by the Commissioner in the Decision Notice. We are satisfied that this is the correct approach.

26. The Tribunal gives limited weight to the chilling effect in this case. Whilst it may not have been the intention of Professor Greenaway to use the meetings in evidence, the

[7] Guardian Newspapers and Brooke v Information Commissioner and BBC EA/2006/0011

GMC have not provided any evidence that this had been communicated to the other participants and that this therefore could have informed their expectations. No undertaking of confidentiality was sought or given in relation to any of the meetings in the closed bundle. The evidence was that[8] at one meeting an individual sought an assurance that the minutes would not be published and his willingness to discuss matters freely was contingent upon getting this assurance. It was confirmed by the GMC that this individual was not one of those whose meetings were recorded in the disputed information. It strikes us as significant that these experienced politicians and civil servants neither sought nor were given any assurance as to confidentiality despite the fact that it must have been apparent that a note was being taken and they can be expected to have been aware of the existence of FOIA. Neither is there any evidence that they have asked to what use the notes were to be put.

27. The GMC stated that *"the individuals had no expectations that the notes taken by a GMC staff member at that time would be typed up into their present form let alone considered for disclosure under FOIA[9]"* however, this did not prevent their being typed up and the GMC did not provide any evidence as to why they felt it was appropriate to type up the notes if this was contrary to the expectation of the participants. The evidence implies that little thought had been given to the status of the meeting at the time rather than there being a clear expectation that it was informal.

28. Whilst the GMC state that their presence in the meeting was to provide secretarial support and that the purpose of the meetings was to inform the thinking of the Review; they also state that:

> *"... as the GMC develops policy in this space. It will use all the information gathered as part of the review (including the withheld information) to assist in this process*"[10] .

The GMC had control of the notes and they continue to use them for their own purposes in order to inform their response to the Review (which is separate from the purpose of the preparation of the Review). The GMC did not provide any evidence to

[8] the email correspondence dated 6.12.13 12.03 disclosed to Mr Dean pursuant to his second request.
[9] P87 OB
[10] P7 OB

explain why this was appropriate notwithstanding their assertions as to the sensitivity of the contents of the meetings and the expectations of the participants.

29. The GMC argue that it was understood that these meetings were informal:
    a) because of the vocabulary used. However, we have no evidence that any of the participants would have expressed themselves differently had they contemplated disclosure under FOIA.
    b) The type of meeting gave an expectation of informality (ie it took place before the formal evidence gathering process), however, we have no evidence from the participants to indicate that they made this distinction.
    c) there was no explicit indication that the notes would or could be disclosed.

    Whilst they rely on there being no previously agreed method of signing the minutes, we observe that it ought to have been apparent that notes were being taken and conversely no assurances were sought as to whether there would be the opportunity to sign the notes or what the notes were for.

30. Whilst we take into account the reasonable opinion of the Qualified Person for the reasons argued by the GMC, the evidence suggests to us that confidentiality of the exchanges at these meetings was not a priority to the participants at these meetings and that this reflects their actual level of sensitivity. The notes were assessed by the GMC as "*not revelatory of anything much"* and "*much of the material is hardly revelatory and the content relatively low risk if it were to be in the public domain"*[11] In our view that reduces significantly the severity of any inhibition to the free and frank exchange of views for the purposes of deliberation hence the limited weight that we afford it in the balancing test.

<u>In favour of disclosure</u>

31. It is not our role to determine whether the conclusions of the Review were right or not or whether the proposals are harmful or compromise safety. The GMC accept that the Review will have a significant impact on the future of postgraduate medical education, this in turn impacts the future provision of medical services in the UK and impacts upon the future quality and safety of UK medical services. Mr Dean argues

[11] Email of 6.12.13 at 12.03

that the conclusions are radical and the evidence suggests that there is disquiet within the medical community about these proposals. We are satisfied that it is strongly in the public interest that these proposals are made on the basis of sound criteria and any political influence or otherwise needs to be transparent. There should be transparency relating to the process that led to the conclusions.

32. The GMC invited the Tribunal to consider the balance of public interest at the date of the internal review (9th January 2014) by which time the Shape Review had been published and the responses and ongoing policy were being formulated. Mr Dean did not disagree with this approach and we therefore proceed on that basis. We are satisfied that by January 2014 there was no longer a need for a "safe space" to explore ideas without the pressure of immediate publication which would draw those involved into the public debate at a time when it might prove a distraction from the process of conducting and completing the Review because the Review had been concluded and published.

33. Disclosure of the withheld material would inform public debate and further the public ability to engage in constructive debate around whether the Review was properly weighed. It would shed light on the extent, if any, of government influence upon the direction of the Review.

34. The GMC argue that there is sufficient information already in the public domain to enable the debate as to the whether the proposals will impact on quality and safety in the Review and the annexes. The conclusions are publicly available and can be debated; the evidence that supports the findings is summarised. However, we take into consideration that those who feature in the meetings are civil servants and ministers, these meetings were not part of the evidence and are not reflected in the summary of evidence. To the extent that they have or have not influenced or impacted the direction of the report this cannot be assessed from the material in the public domain.

35. That the GMC will continue to use the notes to inform their response to the Review increases the public interest in transparency, scrutiny and accountability through knowing what was said at those meetings. This evidence suggests that the impact of these meetings will continue to be felt as the post review policy is formed.

36. Mr Dean argues that disclosure would encourage organisations to publish "up front" which is in the public interest, the inference being that it is inappropriate for there to be private meetings with ministers and civil servants prior to the conduct of a review without public scrutiny to ensure that this access is not abused. The Tribunal would not go that far and accepts that there is a need at times for a "safe space" in which to deliberate, but does accept that scrutiny and accountability is a strong public interest.

Against disclosure

37. Disclosure of the withheld information is not the complete picture as it only relates to ministers and civil servants not to any other people from whom soundings were taken. However, we do not consider this significant because from the phrasing of the request we are satisfied that it would be clear the category of person being considered and that this disclosure relates to a specific element of the soundings.
38. The minutes may not accurately reflect what was said: they were not agreed, they do not have the accuracy of a transcript and they were typed up later. However, we accept the GMC evidence that they were typed up when the conversation would still be expected to be fresh in the memory of the scribe, and that they are considered reliable enough for the GMC to continue to use them in the formulation of their response to the review in giving this factor little weight.

39. It is accepted that the withheld material is attributable and in this respect differs from the way evidence is presented in the report of the Review and the annex of evidence (which apart from reference to the authors of published articles tends to summarize and anonymize comments). It is argued that this would be unfair putting the participants in the spotlight when others were not and drawing them into the public debate which would be a distraction from the formulation of policy at the relevant date. The Tribunal observes that the participants are senior and experienced politicians and civil servants who should expect to be held accountable for their views if they are given the opportunity to influence or inform the agenda or direction of the Review.

40. The Chilling effect. We do accept that disclosure in this case is likely to make individuals more cautious as they may wish to seek clarity as to the status of meetings and notes taken. At times this is likely to inhibit the free and frank

exchange of views for the purposes of deliberation. Whilst it is in the public interest that the status of a meeting is clearly understood by all the participants; we do accept that free and frank debate can be an important part of decision making and it is in the public interest that it is not undermined. However, as set out above we give this limited weight on the facts of this case.

41. The GMC is the statutory regulator of the Medical Profession in terms of professional conduct and fitness to practice. It maintains the register of Doctors who are fit to practice and has a role in maintaining high standards in medical education. The chilling effect to the extent that we have found it applies, would impact upon all its roles and not just future reviews of education.

42. The GMC argue that the content of the information is not sufficiently informative to warrant the negative consequences of disclosure. We disagree and are satisfied that transparency and scrutiny are not dependent upon content alone but upon seeing the full picture.

43. Having weighed the factors in favour and against disclosure and given them the weight as indicated above we are satisfied that the public interest is in favour of disclosure.

Conclusion

44. For the reasons set out above this appeal is allowed and we direct that the GMC disclose the withheld information to the Appellant within 35 days. Our decision is unanimous

Dated this 3rd day of December 2014

Fiona Henderson
Tribunal Judge