

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 May 2021

Public Authority: General Dental Council
Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant requested information relating to the lease of a building. The General Dental Council ("the GDC") provided some information and relied on section 43 of the FOIA (commercial interests) to withhold some information.
2. The Commissioner's decision is that the GDC has correctly relied on section 43(2) of the FOIA to withhold information.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 2 July 2020, the complainant requested information of the following description:

"[1] Please confirm the current yearly rental value for your offices within the sixth floor of the aforementioned property owned by LGIM Real Assets (Legal & General).

"[2] Please confirm the rent the GDC has paid per accounting year for said rental property.

"[3] Please confirm the rateable value for your offices and the rates paid by the GDC per accounting year to date.

"[4] Please release advisory written (including emailed) communication between the GDC and GVA (your advisors on said property rental), pertaining to the market rental value of

your Birmingham offices, and any reduction in said rental valuation negotiated for or by the GDC for their occupation (15 year lease) of the site.

"[5] Please state whether attempts were made to secure a below market rental agreement for your Birmingham offices.

"[6] Please state whether any rental or rates relief has been attained by the GDC, due to the COVID-19 crisis, for this office."

5. On 30 July 2020, the GDC responded. It confirmed that it held information within the scope of each element of the request with the exception of element [6]. The GDC provided the information it held in respect of elements [1], [3] and [5]. In respect of elements [2] and [4], it withheld the requested information and relied on section 43(2) of the FOIA (commercial interests) to do so. In relation to element [4], the GDC also relied upon section 41 of the FOIA (information provided in confidence) to withhold information.
6. The complainant requested an internal review on 30 July 2021. The GDC sent the outcome of its internal review on 27 August 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 27 August 2020 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the GDC revised its response to element [4] of the request. It noted that the correspondence with GVA had been made via telephone and therefore the only material it held in recorded form was a copy of a report that GVA had prepared on the property in question. Given the passage of time, the GDC, having consulted GVA, now took the view that the material was no longer sensitive. It disclosed this information to the complainant on 26 May 2021.
9. However the GDC continued to rely on section 43 of the FOIA to withhold information within the scope of element [2] which comprised the terms of its lease for the property.
10. The Commissioner considers that the scope of her investigation is to determine whether the GDC is entitled to rely on section 43(2) of the FOIA to withhold the remaining information.

Reasons for decision

Section 43 – Commercial Interests

11. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

12. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
13. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

The GDC's position

14. The GDC argued that disclosure of the terms of its rent would be likely to prejudice both its own commercial interests and those of its landlord.
15. The GDC explained that it had negotiated what it considered to be a good deal for the lease of the property in question. It further noted that its annual accounts are open for inspection and that the National Audit Office provided an extra level of assurance.
16. If it were to disclose the terms on which it had agreed, the GDC argued, it would be undermining its ability to negotiate similar deals in future as potential landlords would be able to use that information to deduce the GDC's true negotiating position. That would undermine the GDC's ability to achieve good value for money for the dental profession which largely funds the GDC's work through Annual Retention Fees.
17. Furthermore, it argued that disclosure could alter the behaviour of potential landlords. Landlords might be less likely to offer preferential

terms if they considered that any terms they offered would be made public. That in turn would make it more difficult for the GDC to obtain best value for money through negotiation as they may be unable to secure the same terms as other organisations who do not have to meet the same transparency standards.

18. In addition, the GDC argued that disclosure would also be likely to prejudice the commercial interests of its landlord.
19. The GDC noted that its current landlord was not the landlord with which it negotiated its lease. Although the new landlord remained bound by the terms of the GDC's lease, it may not wish to offer similar terms to other tenants.
20. Disclosure of the terms of its lease would be likely to, the GDC argued, create an expectation amongst other potential tenants that they would be offered similar terms, by the landlord, to those offered to the GDC. This would be likely to affect the landlord's ability to maximise the rental value it can achieve from leasing out other properties it owns – particularly those within the same building the GDC occupies part of.
21. The GDC's position was backed up by correspondence from its landlord (a copy of which was provided to the Commissioner) confirming that the landlord considered that disclosure would be harmful to its interests.

The Commissioner's view

22. The Commissioner accepts that the GDC has identified potential harms and drawn an appropriate link between disclosure and the harm occurring.
23. The GDC has relied on the lower bar: that prejudice "would be likely to" occur. The Commissioner agrees that, in the circumstances of the case, prejudice wouldn't be more likely than not to occur.
24. Firstly, the length of the GDC's lease is such that it is unlikely to be negotiating similar deals in the immediate future and thus the withheld information may well be out of date by that point.
25. Secondly, the fact that the GDC's lease was negotiated by a different landlord will limit the extent to which the current landlord might be expected to offer similar terms.
26. Nevertheless, the Commissioner does still consider that there is a prospect of prejudice occurring that is more than remote or hypothetical.

27. If the GDC were to disclose information showing that it was paying above market rate, its ability to negotiate more preferential rates in the future would be harmed – as potential landlords would calculate that the GDC would be willing to do so again in future and negotiate accordingly.
28. Conversely, if the GDC were to disclose information showing that it had obtained preferential terms, that might dissuade potential landlords from doing business with the GDC, as they might calculate that they would only be able to agree a deal by accepting a substantially lower rent.
29. Either way, potential landlords could be dissuaded from doing business with the GDC if the information were to be disclosed as it would set a precedent that the details of any lease with the GDC would be placed in the public domain. This in turn would make it more difficult for potential landlords to negotiate with their existing tenants and potential new tenants.
30. Similarly, the Commissioner also accepts that disclosure would be likely to prejudice the commercial interests of the GDC's current landlord.
31. The Commissioner accepts that, were the terms of the GDC's lease to be placed into the public domain, that would frame the expectations of potential tenants in engaging with, or choosing not to engage with, the landlord. That in turn would impede the ability of the landlord to maximise the rental incomes it is able to achieve from other properties – particularly those within the same building.
32. The Commissioner is therefore satisfied that section 43 is engaged and has gone on to consider the public interest test.

Public interest test

33. For the GDC to rely on section 43, it must also demonstrate that the public interest in maintaining the exemption outweighs the public interest in disclosure.
34. Both the complainant and the GDC drew attention to the public interest in transparency to show that the GDC was achieving best value for the payers of the Annual Retention Fee.
35. However, weighed against that, the GDC also pointed to the strong public interest in preventing harm both to its own commercial interest and that of its landlord.
36. Having considered the circumstances of this case, the Commissioner is satisfied that the balance of the public interest lies in favour of maintaining the exemption.

37. The potential harm that might occur, both to the GDC's commercial interests and its landlords commercial interests is significant and not trivial. Any public interest in transparency and accountability can be met by the GDC having its annual accounts published and in allowing the NAO to audit as it sees fit.
38. Disclosure would therefore do little to make the GDC more accountable for deals it had already entered into, whilst simultaneously making it harder for the GDC to achieve good value for money in the future.
39. The Commissioner is therefore satisfied that the GDC was entitled to rely on section 43 to withhold the requested information.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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