

PROFESSIONAL REGULATORY BAR ASSOCIATION

DISCLOSURE AND PRODUCTION IN REGULATORY INVESTIGATIONS AND PROSECUTIONS

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INTRODUCTION

1. This paper is concerned with an overview of the legal principles which relate to disclosure and production in the context of Regulatory investigations and prosecutions. This is not a matter which has generated much case law to date. However it would appear that Regulators have generally approached these matters aware of the requirements of constitutional fair procedures and conscious of the jurisdiction specifically conferred on each Regulator by statute.
2. Nonetheless it seems that issues of production and disclosure are being ventilated on a more regular basis by Counsel and Solicitors appearing before disciplinary bodies and investigators. Questions surrounding disclosure and production and the relationship between the same and issues of privilege and confidentiality are therefore more likely to arise in the High Court in the near future.

FOUR QUESTIONS

3. Discovery and / or production can of course arise in different contexts and at different stages in the regulatory or investigatory process. For the purposes of this paper and by way of overview, therefore, I have considered the area from the following four particular standpoints:-
 - (i) What are the duties owed by the Regulator to the regulated individual [*The Registrant*] in the context of an investigation and/or prosecution for alleged breach for example of a regulatory code?

- (ii) What are the powers of the Regulator to seek the production and/or discovery of documents or other information from a registrant or indeed a third party?
- (iii) In what circumstances might a Regulator deploy otherwise confidential material in the context of the regulatory investigation and/or prosecution?
- (iv) Are there any duties or obligations on a third party to make disclosure of relevant information to a Regulator?

(A) DUTY OWED TO REGISTRANT BY REGULATORY BODY

4. The overriding requirement here is that the Regulatory Body act at all times in accordance with the requirements of constitutional justice and fair procedures. The Regulator therefore clearly owes a duty to make full disclosure to a registrant in advance of a disciplinary hearing. The disciplinary body is after all making a decision which, if adverse to the Registrant, will affect his or her good name and livelihood.
5. There is, therefore, a duty on the Regulator to make full disclosure of all material which the disciplinary body relies upon or intends to rely upon in making its decision. In the case of *O'Brien v. Moriarty* [No. 3] [2006] 2 IR Quirke J. put this duty as follows:-

'The duty [of the decision maker] can be summarised as comprising the principle identified and unreservedly accepted by Hamilton CJ in Georgopolous to the effect that a breach of fair procedures occurs when a decision maker acts on the basis of information which has been obtained outside of the hearing and which is not disclosed to the party adversely affected ...'.

6. I would further suggest that, given the serious consequences which may flow from a finding adverse to the Registrant, a Disciplinary Body should approach its obligations here by applying a test similar to that applied by the Director of Public Prosecutions in criminal cases. The DPP accepts that, when prosecuting criminal offences, she is under a duty to disclose any non-privileged material which might assist the Defendant in casting doubt on the prosecution case or which might reasonably allow a Defendant advance a line of defence to the charges.

7. In broad terms, therefore, a regulatory body should disclose the following to the Registrant who is being prosecuted:-
 - (i) All material relied on by the disciplinary body/Regulator in arriving at its decision; and

 - (ii) All other material which has come into its possession in the context of carrying out its investigation into the complaint which is not privileged and which is or might be relevant to the Defendant.

8. It is of course necessary that the regulated individual obtain disclosure in sufficient time to make use of any such material. If, therefore, a disciplinary body were to make late disclosure and the Defendant were thereby for example disadvantaged in following a potential line of defence then it is reasonable to assume that a Court would interfere and quash a decision reached as being in breach of fair procedures. Indeed this is what occurred in the English case of ***Rajah v. GMC*** [2000] Lloyds Law Reports Med 153 where a crucial diary entry was only disclosed on the morning of a disciplinary hearing. The doctor in question was therefore considered to have been deprived of the opportunity of investigating a potentially crucial matter which might go to his defence and the decision was therefore quashed by the Privy Council as being arrived at in breach of fair procedures.

(B)POWER OF REGULATORS TO OBTAIN DOCUMENTS OR INFORMATION

9. It is the case that Regulators have no inherent power to obtain production or discovery of documents. In order to compel a person to disclose such material, the Regulator must have the power to obtain discovery and/or production set out in the Statute which governs its activities. Each Regulator in this regard must therefore look to its parent statute in order to see what precise power of production/disclosure has been given by the Oireachtas. In the case of ***Phillips v. Medical Council*** [1992] Carroll J set aside an Order for Discovery by the then Fitness to Practice Committee of the Medical Council on the basis that it only had the statutory power to order production and not discovery.

10. It is therefore necessary, when considering this issue in relation to the individual Regulator, to look at the parent statute and examples are as follows:-

(i) ***Solicitors Acts***

(a) Section 10 of the Solicitors (Amendment) Act, 1994 allows the Complaints Committee of the Law Society, whilst investigating a complaint within its jurisdiction, to require the production of inter alia documents and other material. It is a criminal offence under the Act to fail to produce the same and other provisions in the Act deal with ancillary matters such as for example the power to have any such Notice set aside or varied;

(b) Section 15 of that Act then gives the Disciplinary Tribunal of the Society the powers of a Judge of the High Court to order the attendance of witnesses to compel the production of documents and to make discovery on oath.

(ii) ***Medical Practitioners Act, 2007***

Section 66 of the 2007 Act gives the Fitness to Practice Committee of the Medical Council all the powers, rights and privileges vested in a High

Court Judge to order inter alia the production and discovery of documents;

Section 66 (9) provides that the medical records of a patient can only be sought for these purposes with either the consent of the patient or following a direction by the Committee itself.

(iii) *The Nurses and Midwives Act, 2011*

Section 64 of the 2011 Act is in similar terms and allows the relevant committee to order production and discovery

(iv) *The Dentists Act, 1985*

Under Section 38 (6) of the 1985 Act the relevant Disciplinary Body can only compel the production (but not discovery) of documents.

(v) *Pharmacy Act, 2007*

Section 43 of that Act provides for inspection and production of documents but not discovery.

(C) USE OF DOCUMENTS WHICH ARE '*CONFIDENTIAL*'

11. The power of a Court to order the discovery or production of documents and/or information of course includes the power to acquire by way of production and discovery documents which are received by their holder in circumstances of confidentiality. From the above it can be seen that, given that the powers of the High Court generally apply with relevant modification to such bodies in the question of discovery/production, the same general principle applies to regulatory bodies.

12. It is critical to distinguish confidentiality in this regard from privilege. This is something which clients and Regulators often fail to appreciate. A person cannot of course be compelled to produce documents which are privileged but can be required to produce documents which were received in circumstances of

confidentiality if such documents are relevant and/or if it is necessary in the public interest that these documents are received by the regulatory body for the purposes of carrying out its investigation or prosecution. Generally the public interest in the proper regulation and discipline of the statutory professions is sufficient to override any confidentiality or expectation of confidentiality to allow access be given to relevant documents.

13. There are two conflicting Judgments of the High Court re use of documents / material garnered in in camera hearings. Laffoy J held in case of **MP v AP** [1996] 1 IR 144 that such documents could not be deployed in disciplinary hearings. Barr held otherwise in **Eastern Health Board v FTPC of Medical Council & Others** [1998] 3 IR 399. The issue is now resolved in favour of the use / disclosure of such material if relevant and necessary by Section 40(6) of the Civil Liability Act 2004.

14. In the interesting UK case of **Saha v GMC** [2009] EWHC 1907, the Court there rejected a claim of medical confidentiality which a doctor sought to raise in resisting disclosure. The Court referred to the statutory obligation on the regulator to ensure patient safety and care. It said that medical confidentiality is not an absolute right and must, in the circumstances under review, be balanced against another public interest. That public interest in permitting and assisting the regulator to properly carry out his statutory duty meant that the balance lay in favour of ordering disclosure of confidential documents

(C) POINT 4 - POWER OR DUTY TO MAKE DISCLOSURE

15. Obviously the usual person to make disclosure is the person who has been affected by the alleged misbehaviour or poor performance of the regulated person. There are also of course circumstances where there is now a duty imposed by law to make disclosure e.g. suspected harm to children etc.

16. In general terms however Mr Justice Kelly in **O Connor v Power** [2008], reflecting the views of Cazelet J in the UK case of **ReA**, was of the view that any

body or person in authority may refer a complaint to a Regulator where it is clear a person manifestly failed in professional duties.

17. Indeed there is some UK authority which suggests that a doctor could be in breach of professional duties if failed to bring egregious conduct to attention of Regulator
18. Another interesting angle on this question concerns the right of the Gardai, for example, to disclose documents or information received by them whilst carrying out their duties in investigating crime, to other public bodies including Regulators. When the Gardai receive information on foot of say a search warrant then such information cannot be disseminated to the world at large.
19. There is strong UK authority which confirms that the Police are entitled (indeed possibly obliged) to give a Regulator material gathered in course of a criminal investigation where this is considered necessary to allow a Regulator carry out his duties. In *Woolgar v Chief Constable of Sussex* [2000], the Court stated that the police were entitled to hand over relevant material gathered in the course of a criminal investigation to a regulatory authority then conducting an inquiry into wrongdoing by a professional person (a nurse in that case). The public interest in the proper regulation of the nursing profession overrode any duty of confidentiality which might be owed by the police.
20. An interesting Irish case which looked at analogous questions is *Desmond v Glackin (No 2)* [1993] 3 IR 67 where O'Hanlon J, having referred to English authorities, stated that it was in the public interest that various agencies of the State should be entitled to pass material between each other where this information was relevant to the duties and functions of the various bodies. He rejected the notion of the State bodies operating in 'watertight compartments' which would somehow preclude the free flow of information which would assist in the enforcement of the law.

CONCLUSION

21. As note already this is an area which has not to date given rise to much by way of authority. There are however questions which will undoubtedly give rise to difficulty in the future given the ever greater appreciation of the importance of disclosure to ensure disciplinary bodies act in accordance with fair procedures and given the interaction which might arise between investigations and actions taken by various regulators and other agencies of the State such as An Garda Siochana.

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