



Cayman Islands Human Rights Commission

promoting, protecting and preserving human rights

Ref: HRC-COMP-2015-002

Mr. Mervyn Conolly
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P.O. Box 132
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CAYMAN ISLANDS

VIA Email: mervyn.conolly@gov.ky

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Dear Mr. Conolly,

On 12 February 2015 the Commission received an allegation of a breach of a medical professional's ("**the Doctor**") human rights by the Health Practice Commission ("**the HPC**") and the Medical and Dental Council ("**the MDC**"). The Doctor alleged that members of the MDC and HPC abused their powers and acted unethically, unlawfully, corruptly and in bad faith. The Doctor further alleged a lack of due process by the MDC and HPC.

The Commission understands that a significant amount of time has passed, for various reasons, since the allegations occurred and the compositions of both the HPC and the MDC have changed. As a result, the Commission submits this correspondence to your attention as the Director of the Department of Health Regulatory Services ("**the DHRS**") with ultimate oversight of the HPC and consequently the MDC. The Commission has included below a summary of the complaint background, and the Commission's findings and recommendations in respect of it. In accordance with the Commission's constitutional mandate the Commission's findings, whilst not binding, are intended to assist with implementing necessary policies and procedures to ensure the actions and events described in this complaint are not repeated.

Background:

The MDC received complaints about the Doctor from three individuals ("**the complainants**") in August, September, and December 2013 ("**the Allegations**") respectively. These allegations fell into two broad categories, related either to the Doctor personally ("**the Personal Allegations**") or to the premises from which he conducted his practice ("**the Premises Allegations**"). To date, there appears to be no correspondence to the Doctor informing him of the receipt of a complaint from the third individual.

The Premises Allegations.

The first complaint was considered by the MDC at its 27 August 2013 meeting. Referred by the MDC, the Premises Allegations were received by the DHRS on 16 September 2013 with the suggestion that an Inspector visit the Premises. Following receipt of the second complaint, both complainants were interviewed by an Inspector and on 19 September a report of both complainants' Allegations was provided to the Chair of the HPC. The same day an inspection was conducted of the Doctor's premises however a Prohibition Notice was not issued until three weeks later. On 11 October 2013, and again on 14 October 2013, the Doctor filed an appeal against the Prohibition Notice in accordance with the Health Practice Law. The Doctor alleges that the HPC failed to acknowledge or process the appeal submission; however the HPC subsequently instructed that the Prohibition Notice be rescinded. The Doctor's premises were reopened on 18 October 2013 just over two months after the Premises Allegations were made. Conversely, although received by the MDC on the same date (August 2013), the Personal Allegations were dealt with considerably less efficiently and give rise to the bulk of the Doctor's current complaints to the Commission.

The Personal Allegations.

On 5 February 2014, nearly six months after the Personal Allegations were first received, the MDC decided, at a meeting, that the Doctor should be suspended immediately from practice and that he be required to obtain a Fitness to Practice certificate including a psychiatric and medical evaluation. On 18 February 2014, the Doctor received correspondence from the MDC confirming this. The MDC indicated that, prior to the renewal of his 2014 Licence to Practise, "*The Council requires that you provide a Fitness to Practice report which shall include an evaluation of your physical health and psychiatric health,*" and instructed him that he was "*to cease and desist from practising as a [medical professional] immediately until further written notice from The Council.*" The MDC's correspondence provided no explanation or basis for the requirement of a Fitness to Practice report or any reasons why the cease and desist notice had been ordered.

The Doctor subsequently engaged lawyers who wrote to the HPC on 24 March 2014 and having had no response, followed-up by telephone and in writing with the Attorney General's Chambers on 4 April 2014. The Doctor's lawyers explained that he had not been given any notification of the Allegations made against him. They further pointed out that the MDC had not conducted a hearing of any kind. It was pointed out that these actions were in breach of the rules of natural justice and the clear statutory requirements of s.36(1) and Schedule 3 of the Health Practice Law (2013 Revision) which mandates that the MDC can only act in this manner after a hearing has taken place.

On 7 April 2014 the MDC reinstated the Doctor's licence to practise (backdated to 1 January 2014) pending an investigation into the Personal Allegations. The Doctor was advised of this by the Chairman

of the MDC, on 17 April 2014, and told that the Attorney General's Chambers would supply details of the Allegations after 22 April 2014. The MDC meeting minutes dated 8 April 2014 included the following, reflecting an email sent on 7 April 2014 by the MDC's counsel to the Doctor's lawyer: "*an investigation will not proceed without copies of the relevant documents being made available to [the Doctor] and him being invited to furnish a written statement or explanation in accordance with paragraph 12(3) of the 3rd Schedule to the Health Practice Law*". Notwithstanding this, the Doctor states that he never received any further correspondence from the MDC regarding the details of the Personal Allegations.

A review of the (heavily redacted) minutes of the MDC's meetings does not indicate that any further consideration was given to whether the Personal Allegations should be progressed and it appears that no decision was taken by the MDC in respect of them. The Doctor alleges he was never informed of any final determination in respect of the Personal Allegations.

The 2015 Licence Renewal.

On 8 December 2014 the Doctor submitted an application to the MDC to renew his licence to practise for the 2015 calendar year. Having not received a response from the MDC over three months later the Doctor appointed an attorney to liaise with the MDC and follow-up on his application. On 13 March 2015, the lawyer wrote to the HPC seeking an update on the status of the application. The attorney did not receive a response from the HPC. Accordingly, on 22 April 2015, he emailed the HPC's Administrative Secretary seeking acknowledgement of his correspondence of 13 March 2015 and to ask when the Doctor's License would be ready for collection. The HPC's Administrative Secretary responded on 23 April 2015, acknowledging the attorney's initial correspondence and advising that the Doctor's renewed licence "*will be available once he has complied with the outstanding requirements for registration and further reviewed by the Council.*"

The Administrative Secretary further indicated "*that previous communication by registered mail from the Medical and Dental Council was sent to the address on file [Doctor's mailing address], and same was subsequently returned to this office.*" The secretary did not indicate the date that the correspondence was sent or returned. There was no indication that the MDC attempted to contact the Doctor via email or by telephone to advise that additional materials were required. The Doctor alleges that he did not receive the correspondence and that when he submitted an FOI Request no documentation relating to this was located.

The attorney contacted the Administrative Secretary again on 24 April 2015 providing the requested additional documentation. Having not received a response he wrote again on 30 April seeking an update on the status of the Doctor's application. On 1 May 2015, the Administrative Secretary confirmed that the renewed licence was ready for collection at the DHRS Customer Service. The minutes of MDC's meeting of 10 February 2015 indicate that the matter was deferred pending the receipt of the additional documents. It is of note, however, that both the date of the licence and the

date stamp on the license indicate that it had been issued three months earlier (on 10 February 2015) and backdated with effect from 18 January 2015. The MDC confirmed, in a letter to the Commission on 24 June 2015, that the license had been issued retroactively.

The FOI Request.

Having not received copies of, or any correspondence regarding, the Personal Allegations, the Doctor made an FOI request for them to the DHRS on 18 December 2014. On 25 February 2015 the request was partially granted following which a request for an internal review to be conducted by the Chief Officer responsible for DHRS was made by the Doctor's legal representative on 13 March 2015. The Doctor's FOI request became a long and protracted process and ultimately an appeal was made to the Acting Information Commissioner, on 8 April 2015, for release of the documents. A final report by the Acting Information Commissioner, dated 18 September 2015, found that the records were not exempt under either of the exemptions that had previously been claimed and the DHRS was ordered to disclose the records to the Doctor (with the complainants' contact information and dates of birth redacted but not their names). In breach of the Freedom of Information Law those records were not released to the Doctor by the DHRS within the 45 day deadline required by the law.

The Commission's Involvement.

On 9 April 2015 the Commission wrote to the Chairman of the MDC expressing its concerns in detail and noting:

"...the actions of the Council, as portrayed by [the Doctor], may amount to breaches or infringements of his human rights. Following a review of the correspondence provided by [the Doctor] it appears that the actions of the Council may have been unlawful and did not take into account the principles of natural justice. These actions may constitute a violation of section 19 – Lawful Administrative Action – of the Cayman Islands Constitution Order 2009."

The Commission requested "*that the Council provide the relevant information to answer [the Doctor's] allegations*" so that it could determine whether there had been any breaches of his human rights. A four line response was received on 20 April 2015 denying any breaches or infringements of the Doctor's human rights and stating that the Commission's letter had been passed to the Attorney General's Chambers for advice.

Having received no substantive response from the MDC in the following 2 ½ months the Commission wrote again on 10 July 2015. That letter noted that the MDC had failed to address any of the issues and concerns raised. The Commission indicated that it would be writing and publishing a report on the complaint. The Commission made its position clear:

“In the absence of any meaningful response to our questions, we would like to give you another chance to comment upon the allegations being made. In the absence of any response from you the complaints filed by [the Doctor] are unchallenged and may result in a finding that the Council has infringed his human rights. We respectfully request a response to the points raised in our earlier letter within 14 days.”

The MDC responded, again in very brief terms, on 15 July 2015. Regrettably, it chose not to provide a substantive response or answer any of the Commission’s questions. The MDC stated:

“...we accept that there was a procedural error in relation to the suspension of [the Doctor’s] licence. Upon acknowledging the same, we sought to remedy the error as expeditiously as possible.

In our opinion, notwithstanding our procedural error we do not accept that there was a breach of [the Doctor’s] Human Rights under the circumstances.”

The Failure to Gazette.

As previously indicated, the Doctor’s legal representative was informed on 1 May 2015 that the MDC had approved the Doctor’s Licence to Practise for the 2015 calendar year on 10 February 2015 (backdated to 18 January 2015). Notwithstanding this the Doctor’s name was not included in the Gazetteing List for 2015 Practitioners found on the DHRS’ website on 22 June 2015. The Commission asked why and the MDC responded on 24 June 2015 indicating that *“the current list included in the website is the “Gazetting List” which is constantly being updated; as all practitioners have different expiration dates.”*

In accordance with s.29(2) of the Health Practice Law (2013 Revision), which was in force at the time;

“The registrar shall, at least once in every year, publish in the Gazette the names and registered addresses of the practitioners appearing in the Councils’ lists of licensed practitioners and the names of practitioners who have been approved by the Councils as being specialists.”

This requirement remains in the Health Practice Law (2017 Revision). The Commission’s searches on www.gazettes.gov.ky do not yield a gazetted list of practitioners after that found in Issue No. 10/2013 dated 21 May 2013.

The Commission makes the following findings:

The Personal Allegations.

- 1) In a meeting held on 5 February 2014, the MDC decided that the Doctor should complete a fitness to practice assessment in order to have his licence to practise renewed. At the same meeting MDC decided to order the Doctor to cease practice as a medical professional. No explanation has been given for why this immediate action was regarded as necessary, particularly after the MDC had taken no action against the Doctor in respect of the Personal Allegations in the preceding six months when it first became aware of them.
- 2) By ordering the Doctor to complete a fitness to practice assessment and issuing an immediate cease and desist order without affording him a hearing, or the chance to make representations on the allegations against him, the MDC breached the Health Practice Law and Regulations in force at the time, acted unlawfully, and failed to have regard for the requirements of section 19 of the Constitution – Lawful Administrative Action or section 7 – Right to a Fair Trial, and the principles of natural justice.

The 2015 Licence Renewal.

- 3) The MDC failed to communicate properly with the Doctor regarding his 2015 application for a license to practice. The Doctor and Commission have never been provided with a copy of the letter which the MDC claimed to have sent requesting additional documents. In addition, the Commission is unsure of, from reading the documents, the manner in which the license was ultimately renewed. Whilst the minutes of MDC’s meeting of 10 February 2015 indicate that the matter was deferred pending the receipt of the additional documents, the license was date stamped 10 February 2015 and backdated with effect from 18 January 2015.

The Gazetting Failure.

- 4) The MDC’s explanation of why the Doctor’s name did not appear on the 2015 Gazetting List of licensed practitioners was that “*[the list] is constantly being updated and all practitioners have different expiration dates*”. The Doctor’s Licence to Practice had been issued/released/provided to him on 1 May yet his name was not on the “*constantly updated*” website almost 2 full months later.
- 5) In addition, there appears to have been no formal gazetting, in accordance with s.29(2) of the Health Practice Law (2013 Revision), which was in force at the time. Searches have not yielded a gazetted list of practitioners after that found in Issue No. 10/2013 dated 21 May 2013.

The FOI Request.

- 6) By failing to provide the Doctor with the disclosure ordered by the Acting Information Commissioner within the 45 days required by law, the MDC breached the Freedom of Information Law and, again, failed to have regard for the requirements of section 19 of the Constitution – Lawful Administrative Action.

The Allegations of Bad Faith, Corruption and Abuse of Power.

- 7) The Doctor alleges that the repeated breaches of Cayman Islands’ laws and lack of regard for his rights under the Constitution are clear evidence of bad faith, corruption and abuse of power.

The Commission has considered these allegations and submissions carefully. Notwithstanding the weight of the Doctor’s submissions the Commission does not find that it has sufficient evidence to conclude that there was corruption or bad faith in the MDC or HPC’ actions as opposed merely to a lack of due regard for the legal and Constitutional requirements the MDC and the HPC must adhere to in the performance of their duties.

Recommendations:

Pursuant to s.116 of the Constitution the Commission makes the following recommendations:

- 1) The MDC and HPC should issue a formal apology to the Doctor for the complete mishandling of the Personal Allegations against him, his license renewal application and subsequent Gazetting List, and his FOI requests.
- 2) The Ministry of Health should ensure that all persons appointed to the statutory bodies for which it has responsibility fully understand their duties and obligations in accordance with the Constitution. Members of these bodies should be provided with training to assist them in complying with the Constitution, principles of natural justice and relevant enabling legislation.

Addendum:

The Commission notes the terms of s.116(7) of the Constitution which reads:

“...any public official to which the Commission addresses a recommendation must respond in writing within a reasonable time, and such responses shall be published by the Commission unless there is a good reason to withhold publication.”

As such, this correspondence will be published to the Commission’s website in ten business days.

Throughout the investigation of this complaint the responses that the Commission received from the MDC were terse, unhelpful and evasive. The MDC repeatedly failed to address the Commission's concerns and, on occasion, requests for information were simply ignored.

Whilst the MDC eventually grudgingly accepted that it had made a "procedural error" in relation to the suspension of the Doctor's license, it continued to deny a breach of his Constitutional and other legal rights. The characterization of such an extended catalogue of errors as a mere procedural error demonstrates a complete failure to grasp how far the MDC actions fell below the standards that the public have the right to expect. Disappointingly, notwithstanding being offered repeated opportunities to rectify its mistakes or provide a proper explanation for its actions, the MDC remained wholly unwilling to assist in remedying the situations which it had created until compelled to do so.

The Commission regards the way in which the MDC and the HPC dealt with this case, both in their interaction with the Doctor and the Commission, as deeply regrettable. The MDC and HPC's actions and responses were quite contrary to the constructive and positive engagement which the Commission has invariably been grateful to receive from other government bodies and public officials. The Commission notes that the membership of MDC and the HPC have changed significantly since it dealt with this case and is hopeful that in the future both the MDC and the HPC will strive to uphold the principles of natural justice and the Constitutional rights of individuals in the manner required by the law.

Yours sincerely,



James Austin-Smith
Chairman

cc: Chief Officer, Ministry of Health
Ombudsman
Chairman, HPC
Chairman, MDC
The Doctor