



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2020/0150V**

**Before**  
Judge Stephen Cragg Q.C.

**Between**

**Sylvia Rushbrooke**

Appellant

and

**The Information Commissioner  
The General Medical Council**

Respondents

**Heard via the Cloud Video Platform on 18 December 2020**

The Appellant represented herself

The Commissioner was not represented

The General Medical Council was represented by Mr Kosmin

**DECISION AND REASONS**

## DECISION

1. The appeal is dismissed.

## MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
4. The Tribunal considered an agreed open bundle of evidence comprising 184 pages.

## INTRODUCTION

5. On 2 February 2018 the Appellant submitted to the General Medical Council (GMC) a complaint in respect of a named doctor ("the Doctor") which related to the treatment the Appellant's mother had received in hospital. This was considered by a Triage Assistant Registrar, on 5 March 2018 the GMC decided not to commence an investigation in respect of the fitness to practise of the Doctor and the Appellant was informed of this decision.
6. Following further correspondence from the Appellant, the GMC considered whether the original decision should be reviewed under Rule 12 of the relevant procedures for dealing with fitness to practice (the Fitness to Practice Rules 2004).
7. As part of the correspondence relating to the review (set out more fully below), the Appellant asked for details of the professional qualifications of the Assistant Registrar who would be determining whether to review the decision. (Ultimately the Assistant Registrar upheld the decision not to

commence an investigation against the Doctor). The Appellant was asked to direct this question to the GMC's Information Access Team (IAT).

8. Continuing the email correspondence, on 8 February 2019 the Appellant thus made a request under the FOIA for the professional qualifications of the Assistant Registrar, stating: -

“As per below I have been asked to write to you under FOI to ask for the professional qualifications of the AR as per below?”

9. On 4 March 2019 the GMC responded to the Appellant's FOIA request to say that it could not confirm whether or not the information was held as this would breach data protection legislation, relying on the exemption in section 40(5B) (a)(i) FOIA (see further below).
10. The GMC said disclosure would breach the principles relating to the processing of personal data listed in Article 5 of the GDPR, specifically that processing would not be fair, lawful or transparent and that none of the legal basis for processing in Article 6 GDPR were met.
11. In a nutshell the GMC's case was that if it confirmed or denied whether it held the information then this would reveal in public whether a complaint against the Doctor had been received, and this would amount to an unjustified disclosure of the Doctor's personal data.

#### THE LAW AND COMMISSIONER'S DECISION

12. Section 1(1)(a) FOIA gives an applicant the right to know *whether* a public authority holds the information that has been requested.
13. Section 40 (2) FOIA reads as follows: -

(2) Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which does not fall within subsection (1) (personal information of the applicant], and
- (b) the first, second or third condition below is satisfied.

14. Section 3(2) of the DPA 2018 defines personal data as “any information relating to an identified or identifiable living individual”.

15. The relevant condition (as referred to in s40(2) FOIA) in this case is found in s40(3A) (a):

- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –
  - (a) would contravene any of the data protection principles.

16. Under s40(7) FOIA the relevant data protection principles in this case are to be found in Article 5(1) of the GDPR. Materially, Article 5(1)(a) reads: -

Personal data shall be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’).

17. Further, by Article 6(1) GDPR: -

Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

...

- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data...

18. The issue in this case is whether on the basis of section 40(5B) FOIA, the GMC is entitled to refuse to confirm or deny whether it holds the information sought because to do so will disclose the personal data of an

individual. S40(5B) reads, materially: -

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies –  
(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) –  
(i) would (apart from this Act) contravene any of the data protection principle

19. Thus s40(5B) (a)(i) FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the data protection principles to provide that confirmation or denial.

20. The Commissioner's decision notice is dated 20 February 2020. The Commissioner noted (paragraph 21) that the Appellant 'names a doctor in her correspondence with the GMC associated with her request' and that: -

22... the Commissioner considers that the request of 8 February 2019 needs to be read as part of the wider email chain. In order to identify what information is being sought, it is necessary to read the request in the context of the earlier emails. This would involve identifying a doctor.

23. The Commissioner is therefore satisfied that the doctor in this case could be identified if the GMC confirmed or denied it holds the requested information; that is the qualifications of an AR who made a decision not to review how the GMC had handled a complaint. The Commissioner understands the doctor concerned to be alive, and whether he or she has had a complaint submitted about them is that doctor's personal data because such information is about them and is used to inform decisions about them.

24. As such, the Commissioner is satisfied that ..confirming or denying the information is held would constitute disclosure of a third party's personal data, that of a doctor.

21. Applying the statutory framework explained above, the Commissioner went on to say that the Appellant had a legitimate interest in how the GMC had managed a complaint to it about a doctor, that there was a wider interest in the GMC being open and transparent, and that confirming or denying that the information was held would be necessary to meet those interests. However,

the Commissioner decided that this legitimate interest did not override the fundamental rights and freedoms of the Doctor in this case. Taking into account the GMC's policy of not publishing details about complaints which do not result in investigations, the Commissioner decided that the Doctor would reasonably expect that their personal data would not be placed in the public domain, and that a degree of distress would be caused if this happened. On that basis the Commissioner upheld the GMC's reliance on s40(5B) (a)(i) FOIA.

### THE APPEAL AND RESPONSES

22. The Appellant filed an out of time appeal dated 9 April 2020. She explained that she had been abroad during the Covid-19 crisis.
23. Her grounds of appeal describe her complaint against the Doctor, and the basis for the complaint which related to the alleged wrongful prescription of a drug to the Appellant's mother. The Appellant emphasises that she wanted to know whether the Assistant Registrar had the right qualifications and professional knowledge to make the decision not to investigate on the specific facts of the case. She made it clear that she was not seeking details of the Assistant Registrar that would identify that person.
24. The Commissioner's response to the appeal supported the conclusions in the decision notice. The Commissioner pointed out that the GMC has a statutory duty under the Medical Act 1983, subject to exceptions, to publish various forms of decisions by the Medical Practitioners Tribunal, Interim Orders Tribunals, Investigation Committees and undertakings agreed between the GMC and an individual doctor. However, that duty does not extend to publication of investigations which do not progress to the taking of enforcement action or the imposition of any sanction, and that is reflected in the GMC's 'Publication and Disclosure Policy: Fitness to Practise'. The January 2019 version was in place at the time of the request, which states:

“The fact that a doctor is the subject of an investigation will not be routinely disclosed to general enquirers (apart from current or new employers/responsible officers) or the media unless and until a warning is issued, undertakings are agreed, or a hearing takes place. The exception to this is where it is necessary for the MPTS to impose an interim order to restrict the doctor’s practice as a precautionary measure”.

25. The Commissioner argues that it is ‘fundamentally unfair to the doctor to have their reputation undermined, to the world, when the complaint has not been established or proven under the statutory process’. The Commissioner states that: -

‘.....the Commissioner understands that it is the established practice of the GMC to neither confirm nor deny whether information is held about a particular medical practitioner where that information is not already in the public domain through the regulatory and publication processes. It must maintain that approach because – as is usually the case with a neither confirm nor deny context – if it denied information was held in some cases, and neither confirmed nor denied in others, the inference would inevitably be drawn that the use of neither confirm nor deny was in fact a confirmation. That would result in the same unfairness’.

26. The GMC also filed a Response which reiterates the points made by the Commissioner and explains that: -

The GMC’s consistent approach has been that it is reasonable for doctors to expect that complaints made against them are to be kept confidential unless and until the matter progresses to a MPTS hearing or the doctors is subject to a disciplinary sanction.

27. The Appellant has filed a reply in which she explains the background to the original complaint to the GMC, also explains that she has not sought any personal information as a result of her request and was only asking for the qualifications of the decision maker which she argues are important to know when decisions on specific issues are made. She points out that the GMC

neither confirming nor denying that this information is held is 'ludicrous' as it is obvious that the GMC must know the qualifications of its staff members. After summarising the points of her complaint against the Doctor, the Appellant states her view that: -

I believe the above is enough for the GMC to trigger an investigation and any person who made the decision not to – is either not qualified – fails to have the proper knowledge of the above multiple breaches and legal matters – or just did not want to investigate another Dr who made errors that resulted in the death of an innocent victim subjugated to death by being ignored as an individual human being subjected to another Drs whim and subjective opinion based on not much it seems.

### THE HEARING

28. At the hearing of the appeal, the Appellant again emphasised that she did not want the personal information of the Assistant Registrar and went over the points she has made in her various written documents. She expressed the view that only her last email of 8 February 2019, which does not name the Doctor, needs to be considered when understanding her request for information.

29. Mr Kosmin on behalf of the GMC supported the points previously made by the GMC in writing and argued that the email correspondence as a whole had to be considered to understand the request, and this included the name of the Doctor and the relevant hospital.

### DISCUSSION

30. An important question in this appeal is whether the request for information dated 8 February 2019 can be read in isolation or whether it can only be understood in the context of wider correspondence. As was said in *Independent Parliamentary Standards Authority v Information Commissioner &*



*Leapman* [2014] EWCA Civ 388; [2015] 1 WLR 2879 at paragraph 57 by Richards LJ, the interpretation of a request “depends on the objective meaning of the words used, read in their context and in the light of relevant background facts”.

31. In this case the relevant email chain begins with an email from the Appellant dated 21 November 2018 to the GMC in which there appears to have been pasted the Appellant’s complaint about her mother’s treatment. This contains specific allegations about the Doctor (who is named) at a specific hospital and the prescription and administration of a drug which the Appellant believes was the cause of her mother’s death.
32. The GMC replied on 23 November 2018 and it can be seen that there is reference is to the review process under rule 12 from the Fitness to Practice Rules 2004. There is a response from the Appellant, the date of which is difficult to determine, in which she sets out her reasons why a rule 12 review should be successful. As part of the response she asks for ‘the professional qualifications of the reviewer’ and also makes further comments about her belief that her mother died as a direct result of the drug being given with no consent.
33. The Appellant chased up a response on 12 January 2019 in an email which again names the Doctor and hospital and makes allegations about the administration of the drug. On 17 January 2019 the GMC responded to say that her comments had been noted, but that the professional qualifications of the Assistant Registrar (AR) cannot be disclosed, and that a request would need to be made to the Information Access Team (IAT) (and an email address was provided for the team).

34. On 8 February 2019 the Appellant responded to say, 'As per below I have been asked to write to you under the FOI for the professional qualifications of the AR as per below'.
35. In my view this request is referring to two different things when the phrase 'as per below' is used twice. The first usage is clearly a reference to the GMC's email of 17 January 2019 in which the Appellant is advised to contact the IAT if she wants to ask for the AR's qualifications, and the GMC's email is then attached to the Appellant's request.
36. However, it seems to me that the second use of the phrase 'as per below' must be a reference to the email chain as a whole. It is only by reading the email chain as a whole that the IAT would know which Assistant Registrar was being asked about, by reference to the name of the Doctor and hospital further down the email chain. It would not be possible to respond to the request without doing this, and on that basis, it seems to me that the email chain must be seen as an integral part of the request for information, in which is named the Doctor complained about and the hospital at which they work.
37. In any event, even if the email of 8 February 2019 could be viewed in isolation, there would be nothing to stop the Appellant (if she so wished) publishing the whole email chain and any response in relation to the request for information (or confirmation that it is or not held) which would immediately identify whether a complaint had been made against the Doctor (who would be named), which had been considered by the GMC. There is nothing in the FOIA or the Tribunal Rules which would allow the Tribunal, for example, to direct that information should be disclosed to the requester only if the requester undertakes not to disclose the information to anyone else, or to withhold it from a particular description of person. Thus, in *Office of Government Commerce v Information Commissioner [2010] QB 98* Stanley Burton J said at paragraph 72 that: -

72 Disclosure under FOIA is always to the person making the request under section 1 . However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure.

38. On that basis it is my view that the Commissioner reached the correct view that confirming or denying whether the information is held would amount to disclosing personal information about the Doctor. Public confirmation as to whether the information is held would equate to a public disclosure that the GMC had received and considered an allegation against the Doctor identified (as I have found) in the Appellant's request, and that would entail the processing of the personal data of the Doctor. To be clear, it is not the personal data of the Assistant Registrar that is in issue, but the personal data of the Doctor.

39. Moving through the relevant statutory framework, I agree with the Appellant and the Commissioner that there is a legitimate interest in disclosure in examining how the GMC deals with complaints and the qualifications of those who make decisions, and that that legitimate interest could only be met by confirming or denying whether the information is held.

40. However, in my view, and in agreement with the Commissioner, fulfilling this legitimate interest does not override, as it must, the fundamental rights and freedoms of the Doctor. As the GMC argues, confirming whether or not the requested information is held would amount to a breach of the GMC's publication and disclosure policy and therefore breach the Doctor's reasonable and fair expectations that the fact that they had been subject to a complaint would remain private and confidential. Agreeing with the Commissioner it is my view that it is reasonable to infer that the Doctor may suffer distress in the event of disclosure. The Doctor in my view is entitled

to have their professional reputation protected in circumstances where the complaint against them is not to be further investigated.

41. In these circumstances confirming whether or not the requested information is held would not be compliant with Article 6(1)(f) GDPR and would be unlawful for the purposes of the FOIA.

42. I understand that conclusion will be upsetting to the Appellant, but where there are competing interests, as there are in this case, a judgement has to be made as to which will prevail. The choice in this case is that the weighty expectation of privacy of the Doctor outweighs the understandable concern of the Appellant that the GMC employs suitably qualified personnel to make decisions on complaints.

43. I would note two other matters. I accept the Appellant's reasons for making an out of time appeal and note the very difficult circumstances that faced everyone in March/ April 2020 during the Covid-19 especially where people such as the Appellant found themselves abroad at the time.

44. I would also note that the Appellant makes a further request in her Grounds of Appeal that the Tribunal disclose "if possible" the name of the Assistant Registrar. The Tribunal does not have the power to consider that issue as it did not form part of the request made by the Appellant in February 2019.

## CONCLUSION

45. For the reasons set out above the appeal is dismissed.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 7 January 2021.