

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 August 2009

Public Authority: The General Medical Council (The GMC)
Address: 5th Floor
St James's Building
79 Oxford Street
Manchester
M1 6FQ

Summary

The complainant requested information about the internal correspondence that was held by the public authority about individuals who had breached the GMC's code of conduct in relation to the non-declaration of a relevant interest. The public authority confirmed that it did hold information that was relevant to the request but that it was exempt from disclosure under section 40(2) (by virtue of section 40(3)(a)(i)) and section 41(1). It provided a small amount of further information within the internal review but maintained that the remainder was exempt. The Commissioner has considered the withheld information and has determined that section 40(2) (by virtue of section 40(3)(a)(i)) was correctly applied to all of the information. This was because it is the personal information of the two individuals and it would be unfair to both of them for the information to be released. He has also considered in detail whether the information could be anonymised and has concluded that this would not be possible. The Commissioner therefore does not uphold the complaint.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. Due to the nature of the withheld information, the Commissioner's notice cannot refer specifically to it in this case in order to maintain its integrity.

Background

3. The complainant has made a series of information requests to the above public authority. As a result of an earlier information request the public authority confirmed that there had been two breaches of its Code of Conduct in relation to the non-declaration of interests. It had also said that the matter was discussed with one of those individuals and no further action was taken. It said that the other resulted in the termination of the individual's contract. The new request was to find out further information about the action the public authority had taken in relation to these two breaches.

The Request

4. On 1 April 2009 the complainant made the following request for information to the public authority by email and it was also acknowledged by the public authority:

'Please provide internal and external communications (e.g. letters, emails, faxes, memos, minutes, etc) in respect of the two breaches of your code of conduct concerning non-declaration of interests.'

'I am aware that these documents may need to be redacted in order to protect the identity of individuals, in compliance with the DPA.'

5. On 28 April 2009 the public authority provided a response to this request for information. It confirmed that it held the requested information. However, it said that it believed that two exemptions applied to it. These were section 40(2) (by virtue of section 40(3)(a)(i)) [third party personal data] and section 41 [information provided in confidence]. It said that it believed that section 40(2) applied to the information as to disclose it would contravene the first data protection principle because it would not be lawful or fair to the data subjects. It said that it believed that section 41 also applied to the information as it was supplied to the public authority in such a way that disclosure would be an actionable breach of confidence. It also said that it had considered whether it could redact the information so that the individuals would remain anonymous but that it did not believe that this was possible for either individual. It also provided detail about its internal review procedure.
5. On 7 May 2009 the complainant requested an internal review. He thanked the public authority for its response and said that he wanted to challenge the public authority's view that it was not possible to provide any information even after redacting the personal details. He wrote a second email where he said that 'surely the documents can be redacted by simply removing the names (and other personal details such as addresses or telephone numbers) of the individuals involved.' These emails were acknowledged by the public authority on the same day.

6. On 25 June 2009 the public authority provided the complainant with the result of its internal review. It said that for one of the individuals all the information it held continued to be exempt under section 40(2) and section 41. This is because information in the public domain when combined with the withheld information would enable individuals to be identified. In relation to the second individual the public authority varied its position in its internal review. It said that this issue relates to an Interim Orders Panel (IOP) and that the letter to that panellist from the public authority could be provided, albeit without the personal data of the panellist and third parties. It then provided the complainant with a redacted copy of this letter. In relation to the remainder of the information that it held about this breach it believed that section 41 would apply to all of it as well as section 40(2). It finally provided the details of the Commissioner to whom its verdict could be appealed.

The Investigation

Scope of the case

7. On 29 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - That the Commissioner considers whether there is the possibility of the public authority releasing a redacted copy of the withheld information to show the internal process of the public authority. He indicated that he believed that the only necessary redactions were 'identifying information' (such as names and addresses).
 - That he believed that every request should be considered in isolation and the reasoning that information previously released to the public under previous requests would enable individuals to be identified would not be a relevant consideration.
8. On 20 July 2009 the Commissioner wrote to the complainant to set the scope of his investigation as the handling of the request dated 1 April 2009. On 22 July 2009 the complainant confirmed that he was satisfied with the scope of this case. He also asked the Commissioner to consider the following point:
 - That the Commissioner should ensure that the public authority considered this request 'applicant blind' and that he did not believe it had done in this case.

Chronology

9. On 15 July 2009 the Commissioner called the public authority to ask to be provided a copy of the withheld information in this case and any further arguments that it wanted to submit at this stage about its application of sections 40(2) and 41(1).

10. On 27 July 2009 the public authority sent the Commissioner a copy of the withheld information. It also detailed its arguments about section 40(2) and 41(1) for each of the individuals. These arguments will also be considered in the analysis part of the Decision Notice.
11. On 29 July 2009 the Commissioner presented his preliminary findings to the complainant and enquired whether he would withdraw the case or required a Decision Notice. On 30 July 2009 the complainant informed the Commissioner that he would require a Decision Notice.

Findings of fact

12. This decision is based on the following:
 - The information in paragraph 3 has been disclosed to the public through a previous request by the complainant and is now in the public domain.
 - The names of both the individuals who breached the Code of Conduct and who are the data subjects in this case are not currently in the public domain.

Analysis

Exemption

13. It is important to note under the Act that all information disclosed as the result of a Freedom of Information request is treated as though it is released directly into the public domain. Therefore the Commissioner considers earlier information released under the Act as being in the public domain (irrespective of who requested the information initially).

Section 40(2)

14. Section 40(2) provides an exemption for information which is the personal data of a third party. Section 40(2) is contingent on two conditions and the public authority has informed the Commissioner that it is withholding the recorded information under section 40(2) by virtue of section 40(3)(a)(i) of the Act. This condition requires firstly for the information to be personal data under the Data Protection Act (DPA) and secondly that the disclosure of it would contravene a data protection principle.
15. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

Is the information 'personal data'?

16. In order to rely on the exemption provided by section 40(2), the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as:

*'...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'*

17. The Commissioner has viewed the information that was requested and is satisfied that all of the information relates to the two identifiable living individuals. The Commissioner accepts that information about potential internal disciplinary action taken against these two individuals is those individuals' personal data as defined by the DPA.
18. The Commissioner has explored the question of whether it would be possible to anonymise any of the information to such an extent that individuals would be not identified by releasing the information. The public authority informed the complainant that such a result was not possible.
19. The Commissioner has carefully considered the complainant's arguments that more information could be disclosed without identifying the individuals. He has also considered whether information released in relation to previous requests can be considered on the basis that it may be possible to read across and identify individuals or whether such information should be ignored. His view is that information that is released under the Act is released into the public domain. Therefore it is correct for a public authority to take previously released information into account when determining whether to release the requested information.
20. The Commissioner has referred to his guidance on personal data when considering whether any further information could be provided in a redacted form. This publicly available specialist guidance can be found at the following link:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf
21. From his guidance there are two questions that need to be answered in the affirmative when deciding whether the information if disclosed to the public would constitute the personal data of individuals:
 - (i) *Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, members of the public?*
 - (ii) *Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?*
22. It is clear that the information requested, if linked to identifiable individuals, is the personal data of those individuals. The question to be determined is whether it is

possible to provide a redacted version of any of the withheld information without identifying those individuals.

23. The Commissioner considers that truly anonymised data is not personal data and thus there is no need to consider the application of the data protection principles. The Commissioner consider that even where the data controller holds the additional 'identifying' information, this does not prevent them from anonymising that information to the extent that it would be possible to identify any living individual from that information alone and thus would no longer be personal data. The test of whether information is truly anonymised is whether a member of the public could identify the individuals by cross-referencing the data with information or knowledge already available to the public. This approach is supported by paragraphs 24 and 25 of Lord Hope's judgement in the House of Lords' case of the *Common Services Agency v Scottish Information Commissioner (2008) UKHL 47*,

"..Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection."

24. The Commissioner has decided that any way of redacting the withheld information in this case would not stop that information from providing information about identifiable individuals and that it would remain personal data. The Commissioner notes that his guidance states that the point of reference when considering identifiability is whether it is above a slight hypothetical possibility that a very determined individual could identify the individuals involved. He believes that the chance is significantly above a hypothetical possibility in this instance.
25. The Commissioner has considered the withheld information and any possible redaction and his view is that the public authority was correct that no further part of the withheld information could be provided without exposing personal data in this particular case.

Does the disclosure of the information contravene any data protection principles?

26. Having concluded that the information falls within the definition of 'personal data', the Commissioner must then consider whether disclosure of the information breaches any of the eight data protection principles as set out in schedule 1 of the DPA.
27. In this case the public authority has informed the Commissioner that it is the first data protection principle that it believes would be contravened by releasing the withheld information.
28. The first data protection principle requires that the processing of personal data should be fair and lawful and that at least one of the conditions in Schedule 2 of the DPA must be met. The term 'processing' has a wide definition and includes disclosure of the information under the Act to a third party.

29. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account (although the description of his analysis below is limited in order not to compromise the withheld information):
- The individuals' reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - Whether this expectation would be removed by the seniority of the individuals and accompanying expectation that this sort of information would be available;
 - Whether the information in the public domain reduces the expectation of privacy in this case;
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals and whether either individual has refused to consent to disclosure; and
 - Legitimate interests of the public in knowing about the process that is in force is and the necessity for the public to have confidence in Fitness to Practise panellists.
30. The public authority stated that disclosure of the withheld information would be unfair. It informed the Commissioner that it believed that the release of the withheld information would be unfair to the data subjects. It does not think that the data subjects would have had a reasonable expectation of the withheld information being released in this case. Instead there was an expectation of confidentiality and privacy. The Commissioner having looked at the withheld information is convinced that the reasonable expectations are a persuasive factor in indicating that the release of this information would be unfair.
31. The Commissioner's guidance on the application of section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:
- 'Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position, and whether they have a public facing role. The more senior a person is, the less likely that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people.'*

32. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act. This approach is supported by the Information Tribunal decision (*House of Commons v Information Commissioner and Norman Baker MP* EA2006/0015 and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:
- 'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'* (at paragraph 78).
33. The Commissioner also believes that a distinction can be drawn between the information which senior staff should expect to have disclosed about them compared to what information junior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds. In relation to this part of the investigation, the Commissioner notes that the request is for information about two relatively senior figures – two panellists in Fitness to Practice hearings. This must be considered as a factor that suggests that the release of the information might not be unfair.
34. In addition the Commissioner has considered the contract of service and notes that it imposes an obligation for panellists to declare any interests. The Commissioner acknowledges that any failure to declare interests implies improper conduct and there is a clear public interest in knowing whether or not people in significant public roles act with probity. This factor also suggests that the release of the information might not be unfair.
35. The Commissioner has considered in detail the submissions of the public authority and in particular whether it felt that the release of the information would cause unnecessary or unjustified damage to the individuals involved. Having considered the information the Commissioner is satisfied that the release of it could potentially cause unnecessary and unjustified damage and distress to both in this case. The Commissioner cannot specify this damage and distress further without compromising the information. His view is that while it is right that individuals in such a role should be subject to a degree of public scrutiny, the Commissioner believes that the potential detriment to the data subjects outweighs this interest in this instance.
36. The Commissioner has considered the information in the public domain and has determined that the information available does not affect the fairness or otherwise of releasing the withheld information in this case.
37. In finally considering the legitimate interests of the public, the Commissioner notes that the public authority has released information about the number of breaches and the actions that were taken as well as a redacted version of the letter it wrote to the panellist who remained in post. The Commissioner

appreciates that it is important that the public authority can be seen to be taking transparent action when issues become apparent but does not see this factor as favouring further disclosure that would outweigh the individuals' privacy interest in this case.

38. In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to both of the data subjects. The central reason for this conclusion is that the legitimate expectations of the individual are that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
39. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
40. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to all of the withheld information.
41. As the Commissioner has upheld the application of section 40(2), he has not gone on to consider the application of section 41(1) in this case.

The Decision

42. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act and that section 40(2) (by virtue of section 40(3)(a)(i)) was applied correctly to the withheld information.

Steps Required

43. The Commissioner requires no steps to be taken.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 25th day of August 2009

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1 - General right of access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

...

Section 40 – Personal information

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
- (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).
- (5) The duty to confirm or deny—
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either—
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
 - (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means data which relate to a living individual who can be identified—

- (a)
from those data, or
 - (b)
from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
 - “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a)
organisation, adaptation or alteration of the information or data,
 - (b)
retrieval, consultation or use of the information or data,
 - (c)
disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d)
alignment, combination, blocking, erasure or destruction of the information or data;
 - “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.
- (2) In this Act, unless the context otherwise requires—
- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
 - (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.
- (3) In determining for the purposes of this Act whether any information is recorded with the intention—
- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or
 - (b) that it should form part of a relevant filing system,
- it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.
- (4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.