

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 15 February 2010

**Public Authority:** General Medical Council  
**Address:** Regents Place  
350 Euston Road  
London  
NW1 3JN

### Summary

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The complainant made a request for information to the General Medical Council for copies of exhibits presented to the Professional Conduct Committee in the case of a named doctor. The request was refused under sections 40(2) and 41 of the Freedom of Information Act 2000 (the Act) and the application of exemptions was upheld at the internal review stage. The Commissioner considers the exemptions were correctly applied and therefore he requires no further action to be taken in respect of this case.

### The Commissioner's Role

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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.

### The Request

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2. On 5 March 2009 the complainant wrote to the General Medical Council (the "GMC") and requested the following information:
  - "1. the exhibits presented to the Professional Conduct Committee in the case of [named doctor] in 2004/2005.
  2. notes from the legal advisor to Counsel in the same case."
3. The GMC responded on 3 April 2009 and provided redacted copies of information from the doctor's 2004 hearing but withheld other information relating to this

hearing and all of the exhibits relating to the doctor's 2005 hearing. The GMC confirmed that the redactions had been made as section 40(2) of the Act was believed to apply to the requested information, and that the remainder of the information was exempt under sections 40(2) and 41 of the Act. In relation to the second part of the request, the GMC confirmed that it did not hold the requested information.

4. On 5 April 2009 the complainant requested an internal review of the decision to withhold information from him. The complainant argued that all of the information that had been put before the hearing (when not in camera) was in the public domain and therefore should be released to him.
5. The GMC responded on 23 April 2009. It provided further redacted copies of information but upheld the original decision to apply exemptions to the remaining relevant information. The GMC explained that it did not consider the exhibits to be in the public domain, as they did not form part of the public record for the hearing and were not distributed or available to those in attendance at the hearings.

## The Investigation

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### Scope of the case

6. On 13 May 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 GMC's application of exemptions to the information he had requested. The GMC explained that it did not hold the information at point 2 of the complainant's request. The complainant did not ask the Commissioner to consider this response and therefore it is not addressed in this Decision Notice.
7. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:

The GMC provided additional information to the complainant. The Commissioner has not, therefore, considered whether this information was exempt from disclosure at the time the response was provided.

### Chronology

8. On 24 August 2009 the Commissioner wrote to the GMC to begin his investigation. He asked the GMC to provide him with a copy of the information that had been withheld from the complainant and to explain why it considered the information should not be provided to him.
9. The GMC responded on 17 September 2009 and provided a copy of the withheld information. It referred the Commissioner to a letter it had sent to him of 16 September 2009 relating to a different, but substantially similar request to explain

- why it had withheld the requested information.
10. The Commissioner wrote to GMC on 1 October 2009 and requested some further clarification regarding its application of exemptions.
  11. The GMC responded on 26 October 2009 and provided the necessary clarification.
  12. On 6 November 2009 the Commissioner telephoned the GMC and asked to be provided with a copy of the Panel's decision in respect of the named doctor's case.
  13. The GMC provided the relevant document on 9 November 2009.
  14. On 13 November 2009 the Commissioner wrote to the GMC to discuss a way forward with the complaint. The GMC requested clarification of the Commissioner's position on 25 November 2009. The Commissioner provided the clarification on 10 December 2009; the GMC confirmed how it would like to proceed on 31 December 2009.

## Analysis

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15. All of the sections of the Act referred to in the notice are quoted in full in the legal annex to it.
16. The withheld information in this case constitutes over 400 pages of A4 paper. The Commissioner is therefore not able to describe in detail all of the withheld information. However, he has described the information in broad categories to assist the parties to this case in understanding the decision he has reached. Further, he has referred to specific examples where appropriate.

## Exemptions

17. The Commissioner has considered whether the GMC was correct to apply section 40(2) of the Act, by virtue of section 40(3)(a)(i).
18. Section 40(2) will apply where the requested information constitutes the personal data of a third party, as defined by section 1(1) of the Data Protection Act 1998 (the "DPA") and where disclosure of the requested information would breach one or more of the data protection principles as set out in schedule 1 of the DPA.
19. The information sought by the complainant is the exhibits put before the Professional Conduct Committee in the two hearings of a named doctor. The first hearing took place in January 2004 and the second in June 2005. The information comprises the following documents:  
  
allegations regarding the doctor's conduct;  
the doctor's responses to those allegations;

patients' medical records, clinical notes and other information about their care;  
and  
letters of support for the doctor.

20. The Commissioner has considered whether the requested information constitutes personal data.
21. Information will be personal data where it relates to a living individual who can be identified from that information.
22. The Commissioner is satisfied that the requested information constitutes the named doctor's personal data. This is because the information was requested by reference to the doctor's name and therefore disclosure of the requested information would inevitably link the doctor with the information, it being the exhibits presented to the Panel during the course of the hearings into his conduct.
23. The Commissioner also considers the requested information to constitute the personal data (at times the sensitive personal data) of other individuals, for example the doctor's patients and their families and of others in the medical profession. The GMC 'blacked out' the names of individuals in the bundle provided to the Commissioner (and presumably the information that was put before the Panel). However, given the documents' narrative and descriptive nature, the Commissioner considers that it would not be difficult for those who have some knowledge of the individuals to recognise them from this data. The doctor in this case was working in a particularly specialist area and therefore this increases the likelihood of identification. The Commissioner does not believe it would be pertinent to redact the personal data from the documents as to do so would render the remaining information meaningless.
24. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the DPA. The Commissioner considers the most relevant principle in this case is the first principle, which provides:

"...personal data shall be processed fairly and lawfully..."

*Fairness to the doctor*

25. The Commissioner has considered whether, as the complainant has suggested, the information can be said to be in the public domain. The Commissioner accepts that, at the time of the hearings, information about the doctor and the allegations against him were in the public domain. However, as the GMC explained, the requested information in no way formed part of the public record of the case, the information having been provided only to those involved in the Panel hearings. The Commissioner is satisfied that the information to which this Decision Notice relates cannot be described as being in the public domain.
26. The Commissioner has considered whether the doctor would have expected information about the case to be made available some years after its conclusion. The Commissioner believes it would be reasonable for the doctor to expect that

information about the case would not be made available, beyond that which was required to be disclosed for the purposes of the hearing. By way of example, the Commissioner refers to the doctor's responses to the allegations against him. Respondents to such allegations must be able to respond candidly to them without fear that the information may later be disclosed.

27. The Commissioner considers that a significant period of time had passed between the doctor's final hearing (June 2005) and the date of the request (May 2009). Details of the Panel's findings were no longer available on the GMC's website at the time of the request. The Commissioner is of the view that the more time that has elapsed between the information being provided to the GMC (and the subsequent hearings) and the request, the less likely the doctor would expect the information to be made available. It would seem particularly unfair to disclose information that could potentially refocus the public's attention on the issues raised, some time after the GMC had concluded the matter. This view was supported by the Information Tribunal (the "Tribunal") in the case of London Borough of Camden v Information Commissioner (EA/2007/0021). The case concerned a request for a list of individuals who had received an Anti-Social Behaviour Order, whether current or expired. The Tribunal indicated that disclosure of this data would be unfair on the grounds that "...publicity long after the making of an order...is quite different from identification and denunciation when or shortly after the order is made..." (para 28).
28. The Commissioner has considered whether, despite the doctor's expectations, there are any overriding reasons why disclosure would nevertheless be fair. He has not been presented with any convincing arguments by the complainant and does not believe there to be any.
29. In view of the above, the Commissioner has decided that to disclose the remaining withheld information would be unfair to the doctor in question.
30. Whilst he is not obliged to do so (as he considers all of the information to be exempt from disclosure), the Commissioner has gone on to consider whether disclosure of the information would breach one or more of the data protection principles as regards the other individuals (ie not the named doctor in question).

*Fairness to other individuals*

31. Again, the Commissioner has considered whether it would be fair to the other individuals to disclose the requested information.
32. The withheld information that relates to other individuals can be categorised as follows:  
  
patients' medical records, clinical notes and other information about their care;  
and  
letters of support for the doctor.
33. With regard to information about patients' care, the Commissioner considers this information constitutes the patients' sensitive personal data, as defined by section

- 2 of the DPA. The information relates to their physical and/or mental health or condition.
34. The very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The Commissioner considers that there is a clear expectation in our society that medical information will remain confidential to preserve the relationship between doctor and patient and because disclosure is likely to be damaging or distressing to the individual. There is evidence within the withheld information of the parents of a child patient explicitly refusing to give consent to the processing of their child's medical records. The Commissioner therefore considers it would be unfair to the individuals concerned if information about their care was to be disclosed.
35. The withheld information also includes letters of support for the doctor that were sent to the GMC prior to his hearings. Again, the information contained within these letters is intrinsically linked to the patients' health information. The letters describe the background to their conditions and how the doctor helped them. The Commissioner considers this information constitutes sensitive personal data and therefore he believes it would be unfair to the individuals concerned to disclose the information. He does not consider it may be redacted in any useful or meaningful way.
36. In summary, the Commissioner considers section 40(2) to apply to the requested information by virtue of section 40(3)(a)(i). The requested information constitutes personal data and it would be unfair to the individuals concerned to disclose it. The Commissioner has not gone on to consider whether section 41 of the Act applies to the same information.

## The Decision

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37. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## Steps Required

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38. The Commissioner requires no steps to be taken.

## Right of Appeal

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39. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 15<sup>th</sup> day of February 2010**

**Signed .....**

**David Smith**  
**Deputy Information Commissioner and Director of Data Protection**

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

## Legal Annex

### The Freedom of Information Act 2000

#### General Right of Access

##### Section 1(1) provides that –

“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 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

##### Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

##### Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”



**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

**Personal information**

**Section 40(1)** provides that –

“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.”

**Section 40(2)** provides that –

“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.”

**Section 40(3)** provides that –

“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 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 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the 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).”

**Section 40(5)** provides that –

“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) he 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 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 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).”

**Section 40(6)** provides that –

“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 Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the 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.

## Information provided in confidence

**Section 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 41(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

## The Data Protection Act 1998

### Interpretative provisions

**Section 1(1)** provides –

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, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“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

“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.

**Section 1(2)** provides –

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.

**Section 1(3)** provides –

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 operation 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.

**Section 1(4)** provides –

Where personal data are processed only for the 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.

**Section 2** provides –

In this Act “sensitive personal data” means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, such as the disposal of such proceedings or the sentence of any court in such proceedings.

**Schedule 1**

**The Data Protection Principles**

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data shall be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

## **Schedule 2**

### **Conditions relevant for purposes of the first principle: processing of any personal data**

1. The data subject has given his consent to the processing.
2. The processing is necessary –
  - (a) for the performance of a contract to which the data subject is a party, or
  - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by the contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary –
  - (a) for the administration of justice,
  - (b) for the exercise of any functions conferred on any person by or under any enactment,

- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
  - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
- (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

### Schedule 3

#### Conditions relevant for purposes of the first principle: processing of sensitive personal data

1. The data subject has given his explicit consent to the processing of the personal data.
2. (1) The processing is necessary for the purposes of exercising or performing any right of obligation which is conferred or imposed by law on the data controller in connection with employment.
- (2) The Secretary of State may by order –
  - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
  - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also specified.
3. The processing is necessary –
  - (a) in order to protect the vital interests of the data subject or another person, in a case where –
    - (i) consent cannot be given by or on behalf of the data subject, or
    - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or
  - (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld,

4. The processing –

- (a) is carried out in the course of its legitimate activities by any body or association which –
  - (i) is not established or conducted for profit, and
  - (ii) exists for political, philosophical, religious or trade union purposes,
- (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
- (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
- (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

6. The processing –

- (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
- (b) is necessary for the purpose of obtaining legal advice, or
- (c) is otherwise necessary for the purposes of establishing, exercising, or defending legal rights.

7. (1) The processing is necessary –

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under an enactment, or
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or government department.

(2) The Secretary of State may by order –

- (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
- (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.



8. (1) The processing is necessary for medical purposes and is undertaken by –
  - (a) a health professional, or
  - (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.
- (2) In this paragraph, “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provisions of care and treatment and the management of healthcare services.
9. (1) The processing –
  - (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
  - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be maintained, and
  - (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.
- (2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.
10. The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.