

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2016

Public Authority: General Medical Council
Address: 3 Hardman Street
Manchester M3 3AW

Decision (including any steps ordered)

1. The complainant has requested the names of particular individuals involved in considering a complaint submitted to the General Medical Council (GMC). The GMC says that under section 40(5)(b)(i) of the FOIA it is not obliged to confirm or deny that it holds the requested information. It says this is because to do so would disclose personal data of a third person which would breach the first principle of the Data Protection Act (DPA).
2. The Commissioner's decision is that the GMC is correct to neither confirm nor deny it holds the information that has been requested, for the reason it has given.
3. The Commissioner does not require the GMC to take any steps.

Request and response

4. On 21 December 2015, the complainant wrote to the GMC and requested information in the following terms:
"...in accordance with the Freedom of Information Act 2000 I request the names of all anonymous people referred to in correspondence as 'Case Examiner', 'Assistant Registrar', or persons having 'considered' or 'investigated' this matter."
5. The GMC responded on 12 February 2016. It said that section 40(5)(a) of the FOIA applies to the request and explained that this exemption applies where the information, if held, would be the personal information of the requester. The GMC confirmed that it had therefore considered the request under the DPA. The outcome of that consideration is not within the scope of this notice.

6. In its response, the GMC said that it had also considered the request under the FOIA and that section 40(5)(b)(i) of the FOIA applied to the request. Under this exemption, the GMC said it was not obliged to confirm or deny whether it holds the information the complainant has requested because to do so would breach the DPA.
7. Following an internal review the GMC wrote to the complainant on 30 March 2016. It confirmed that it refused to confirm or deny whether it holds the requested information, under section 40(5)(b)(i). The GMC explained that it considers it is not obliged to confirm or deny the existence of complaints about doctors that have been closed without referral to the Medical Practitioners Tribunal, or that are not associated with restrictions on a doctor's registration.

Scope of the case

8. The complainant contacted the Commissioner on 28 April 2016 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether the GMC is correct to neither confirm nor deny it holds the requested information, under section 40(5)(b)(i) of the FOIA.

Reasons for decision

The GMC's approach

10. The GMC has explained to the Commissioner its approach to requests from a complainant (or doctor who is subject to a complaint) for the identity of a case examiner in relation to a specific complaint. It says it considers such requests under the DPA as well as the FOIA as it considers this to be the most transparent and helpful way of dealing with them. The GMC says it considers such requests under the DPA because, if held, in addition to being the personal data of the case examiner involved, it considers this information to be the personal data of the complainant (and/or doctor) as it forms an integral part of the decision making process.
11. The GMC has explained that considering these requests in this way provides a route to disclosure where otherwise it would not be able to disclose the information. The GMC does not therefore consider it appropriate to confirm whether or not it holds the requested information under the FOIA, and therefore applied section 40(5)(b)(i).

Section 40(5) – neither confirm nor deny information is held

12. Section 1 of the FOIA provides two distinct, but related rights of access to information that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not requested information is held and, if so
 - b) the duty to communicate that information to the applicant.
13. However, in relation to personal information, section 40(5)(b)(i) of the FOIA says that a public authority is not obliged to confirm or deny that it holds information if, by confirming or denying that it is held, the authority would breach one of the data protection principles.
14. This subsection is about the consequences of confirming or denying whether the information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles, but whether the simple action of confirming or denying that it is held would do so.
15. The Commissioner's guidance on section 40(5) explains that there may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information about an individual can itself reveal something about that individual. To either confirm or deny that information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process.
16. For the GMC to have correctly relied on section 40(5)(b)(i) the following conditions must be met:
 - confirming or denying whether information is held would reveal personal data of a third person; and
 - confirming or denying whether information is held would contravene one of the data protection principles.
17. In order to reach a view regarding the application of this exemption, the Commissioner has first considered whether confirming or denying relevant information is held would reveal personal data of a third person as defined by the DPA.

Is the information personal data?

18. The DPA says that for data to constitute personal data, it must relate to a living individual, and that individual must be identifiable.

19. The GMC has confirmed to the Commissioner that its position is that, at the time of the request, confirming whether or not it holds information about particular case examiners and an assistant registrar would disclose information about a doctor, namely whether or not a particular doctor had been the subject of a complaint.
20. As far as the Commissioner is aware, the doctor in question is alive. The Commissioner considers that whether that doctor has been the subject of a complaint relates to that doctor and that he or she could be identified from this information. Consequently, the Commissioner is satisfied that the information that would be revealed if the GMC confirmed or denied that it holds the requested information, is the personal data of a third person. She has gone on to consider the conditions under section 40(3) of the FOIA, which concern the release of personal data.

Would confirming or denying whether information is held contravene one of the data protection principles?

21. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of the DPA.
22. The Commissioner has considered whether the GMC is correct when it argues that confirming whether or not it held the requested information at the time of the request would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...'. When assessing whether disclosure would be unfair and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to the individuals public or private life, what their reasonable expectations might be and whether or not the individual has consented to the disclosure of their personal information.
23. The Commissioner has noted that the information concerns the individual's public life ie their role as a doctor. The GMC has told the Commissioner that consent to disclosure has been refused or not provided.
24. The Commissioner has finally considered what reasonable expectation the individual would have about what will happen to their personal data.
25. The GMC has summarised its complaint process. When it receives a complaint about a doctor, an initial decision is made as to whether an investigation should be conducted. Once this investigation is complete, two case examiners (one medical and one non-medical) will consider the

complaint. They can conclude the case, issue a warning, agree undertakings with the doctor or refer the case to a Medical Practitioners Tribunal (MPT) for a hearing. MPT hearings are usually held in public, although may be held in private if discussing a doctor's health or any confidential matter. It is at this hearing stage that details about the case may be made publicly available. Outcomes of MPT hearings are also published on the GMC's website. Details of any warnings or current restrictions on a doctor's registration are also made publicly available.

26. The GMC says it will only therefore publicly disclose the existence of a complaint against a doctor if they have any warnings or restrictions on their registration, or if the complaint progressed to an MPT. The expectation of all parties involved in the GMC's complaint process is that information will only be published in line with these disclosure points.
27. The GMC has referred the Commissioner to her decisions in a number of separate, but similar, cases including [FS50619296](#) and [FS50597418](#).
28. In these cases, the Commissioner was prepared to accept that any doctor relevant to the request in question would not expect the GMC to confirm or deny that it holds information about a complaint about them, if that complaint did not lead to any warnings or restrictions on their registration, or if the complaint did not progress to a MPT. The Commissioner also considered that the doctor(s) may well be distressed if the existence of such information was confirmed or denied.
29. As in those cases, in the present case the Commissioner has taken account of the doctor's reasonable expectations, and the potential impact on them if the existence of a complaint was confirmed or denied. The Commissioner considers that confirming or denying the requested information is held would be unfair to the doctor concerned because it would disclose their personal data; namely whether or not they had been the subject of a complaint. To confirm or deny the requested information is held would therefore breach the first data protection principle and the Commissioner is satisfied that the GMC has correctly applied section 40(5)(b)(i) of the FOIA to the request.

Balancing the individual's rights and freedoms against the legitimate interest in confirming or denying information is held

30. Despite the factors above, the GMC may still confirm or deny it holds the requested information if there is compelling public interest in doing so that would outweigh the legitimate interests of the particular doctor. Although the Commissioner recognizes that the information is of interest to the complainant, confirming or denying the information is held under

the FOIA would effectively disclose the doctor's personal data to the world at large.

31. The Commissioner considers that there is a legitimate public interest in openness and transparency. However she has also considered the nature of the requested information, the fact that, if held, the doctor concerned would not expect their personal data to be disclosed and that, if held, disclosure could cause damage and distress to the doctor concerned. The Commissioner acknowledges that the requested information is of interest to the complainant but does not consider it is of sufficient wider public interest such that it would outweigh the doctor's legitimate interests.
32. The Commissioner is therefore satisfied that the GMC has correctly applied the exemption under section 40(5)(b)(i) of the FOIA to the request, because to confirm or deny it holds relevant information would release the personal data of a third person and would contravene the DPA.

Right of appeal

33. 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
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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