

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 January 2017

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

#### Decision (including any steps ordered)

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1. The complainant has requested a deceased individual's medical records. The General Medical Council (GMC) says the requested information is exempt from disclosure under section 21 of the FOIA as it is already reasonably accessible to the complainant through other means, namely the Access to Health Records Act 1990.
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 21(1) of the FOIA. She does not require the GMC to take any steps.

#### Request and response

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3. In his initial complaint letter to the Commissioner dated 10 May 2016, the complainant provided the Commissioner with a background to his requests. The complainant's partner ('A') complained to the Parliamentary and Health Service Ombudsman (PHSO) and the GMC about care she received from particular doctors at Fowey River Practice during 2010. PHSO concluded its investigation in 2013.
4. The complainant's partner died in 2012. She had given her written consent for the complainant to access her medical records. In this document, which the complainant has provided to the Commissioner, A also gave the complainant full authority to represent her and her estate on all matters.
5. In August 2014 the PHSO appears to have advised the complainant that, as part of its investigation, it had received two sets of A's medical notes from Fowey River Practice and that the second set had additional entries.

6. The complainant referred the Commissioner to a letter dated 14 June 2014 that he had received from the GMC. The complainant has provided the Commissioner with a copy of this letter. In the letter the GMC confirms that it had also received two sets of notes: one dated 23 February 2011 which it received from Fowey River Practice and another dated 27 April 2011 which it received from Royal Cornwall Hospital.
7. In his 10 May 2016 letter to the Commissioner, the complainant names two doctors and says they provided the two sets of records to the GMC. The Commissioner understands this to be a reference to two doctors at Fowey River Practice who provided treatment to A during 2010. However, while it is correct that Fowey River Practice provided one set of the records, according to the GMC, Royal Cornwall Hospital provided the second.
8. The complainant goes on to say that he is concerned that, because the two sets of records are different, they may not be the official medical notes. He considers it irregular that two sets of medical notes, with differences between them, appear to have been submitted as evidence.
9. On 16 February 2016, the complainant wrote to the GMC and requested information in the following terms:

*"I wonder if I may request two further Freedom of Information Requests.*

*From your copy of [A's] medical records the page beginning 24-02-2010 and the "out of hours" SERCO consultation from 9th May 2010."*
10. On 18 February 2016, he requested information of the following description:

*"[A], please send the copy of the medical records that you received from Fowey River Practice and the OOH-SERCO Report for the 9th May 2010".*
11. The GMC responded to both requests on 15 March 2016. It said it was not able to provide these medical records or notes to the complainant and that the route to obtaining medical notes of a deceased person is via the Access to Health Records Act (AHRA) 1990. The GMC said it is not subject to the AHRA and advised the complainant to contact Fowey River Practice or the Hospital concerned, directly.
12. The GMC said the information the complainant has requested is exempt from disclosure under the FOIA, under section 21 (information reasonably accessible to the applicant by other means).
13. Following an internal review the GMC wrote to the complainant on 20 April 2016. The GMC maintained its position that the information the

complainant has requested is exempt from disclosure under section 21 of the FOIA. It confirmed it is not the 'holder' of the information and advised the complainant to contact Fowey River Practice.

14. In his correspondence with the Commissioner, the complainant has referred to three items of correspondence he has received. He has provided these to the Commissioner. On 9 May 2016, Fowey River Practice wrote to the complainant. It explained that patient profiles are print outs from patient records and that these can vary depending on what is chosen to be printed. This was why the two sets of medical records were not quite the same.
15. On 13 July 2016, PHSO wrote to the complainant. From this correspondence PHSO appears to have sent to the complainant copies of two sets of medical records from its file. It said that the first set was sent in by A and the second set was sent to it by Fowey River Practice. PHSO told the complainant that it appeared to it that the discrepancy between the two records was due to the operator using different print options. PHSO notes that a particular doctor's appointment should have appeared in both versions of the records, as other medical appointments do, but does not appear in either set.
16. On 27 July 2016, Caroline Gamlin, the Medical Director of NHS England Region South – South West wrote to the complainant. Dr Gamlin confirmed that the PHSO's report had fully investigated the care A received and that she had reviewed the reason for the missing clinical note referred to at paragraph 15. She advised him that the slight difference in the copies of the medical records in question was explained by the operator using different print options, which was the reason given to him by Fowey River Practice.

## **Scope of the case**

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17. The complainant initially contacted the Commissioner on 11 May 2016 to complain about the way his request for information had been handled. His complaint became eligible for consideration by the Commissioner on 26 July 2016.
18. The complainant has advised the Commissioner that he has also requested the medical notes from the 'holder' of the information (which the Commissioner understands to be Fowey River Practice) so that he can compare the three copies (it is not clear which 'three' copies the complainant is referring to). The complainant is concerned that two different sets of medical records exist for one individual and he wants to determine which version(s) of the records the GMC received.

19. The Commissioner's investigation has focussed on whether the information the complainant has requested from the GMC is exempt from disclosure under section 21 of the FOIA.

## Reasons for decision

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20. Section 21 of the FOIA says that information is exempt from disclosure under section 21 if it is already reasonably accessible to the applicant. It is an absolute exemption and is not subject to a public interest test.
21. In its response to the complainant, the GMC said that access to the medical records of deceased individuals is governed by the AHRA, to which it is not subject. It advised the complainant to contact the Practice or Hospital directly.
22. The GMC also said the FOIA section 21 exemption applied because the AHRA provides a right of access, where a patient has died, to the patient's personal representative.
23. The Commissioner has produced guidance on information about deceased individuals<sup>1</sup>, which refers to the AHRA. The guidance says that the AHRA give a right of access to health records of the deceased to the personal representatives of the deceased. The reference to "personal representative" is very specific; the right of access can only be granted to such a person, rather than any surviving family members or next of kin.
24. In order to gain access to the records under the AHRA, it is for the applicant to prove to the public authority that they have the right of access as a personal representative.
25. If the applicant does have access rights under the AHRA, the information to which they are entitled in this way will be exempt from disclosure to them under the FOIA by virtue of section 21, because it is reasonably accessible to them by other means. Access to the records should therefore be dealt with under the AHRA.
26. The 'NHS Choices' website describes a 'personal representative' as the executor or administrator of the deceased person's estate or someone who has a claim resulting from the death.

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<sup>1</sup> <https://ico.org.uk/media/1202/information-about-the-deceased-foi-eir.pdf>

27. The Commissioner has noted that A gave the complainant authority to represent her and her estate. It therefore appears to the Commissioner that the complainant is A's personal representative.
28. Consequently, the Commissioner considers that the requested information is exempt from disclosure under section 21 of the FOIA as the information is already reasonably accessible to the complainant through the AHRA legislation. Using the AHRA, the complainant can request it from the 'holder' of the information: that is, Fowey River Practice or the Royal Cornwall Hospital.
29. The Commissioner appreciates that the complainant wants to be provided with the specific copy of the records held by GMC so that he can determine which version(s) of the records were provided to the GMC in the course of the GMC's investigation.
30. The Commissioner has noted that Fowey River Practice, the PHSO and NHS England South West have told the complainant that the most likely reason for the apparent discrepancy between the medical records submitted by Fowey River Practice and those submitted by A and Royal Cornwall Hospital is that the operators chose different print options when the two sets were printed out. The three authorities appear to be satisfied with this explanation.
31. The Commissioner also considers this would explain what she understands to be a slight discrepancy between versions of the medical records in existence. She has noted the correspondence she has received from the complainant during her investigation and nonetheless is prepared to accept that, although it may appear in a slightly different format, the version of the records that the complainant could obtain under the AHRA is fundamentally the same as the version held by the GMC. She therefore remains satisfied that the requested information is exempt from disclosure under section 21.
32. If, however, the complainant is not A's personal representative, and therefore not eligible to obtain the information through the AHRA, section 21 would not apply. In these circumstances, the GMC would have to consider the request as a request for a deceased person's medical records from a member of the public.
33. The Commissioner has noted her decision in FS50071069<sup>2</sup>. In that case she upheld the authority's decision to withhold the requested

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2006/382914/DECISION\\_NOTICE\\_FS50071069.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2006/382914/DECISION_NOTICE_FS50071069.pdf)

information under section 41 of the FOIA. This provides an exemption for information provided in confidence, the disclosure of which would be an actionable breach of confidence.

34. If the circumstances described at paragraph 32 were to apply, the Commissioner considers it likely that the information the complainant has requested from the GMC would be exempt under section 41, and possibly section 44 of the FOIA. Section 44 of the FOIA provides an exemption for information for which there is a statutory bar on disclosure. In such cases as these the Commissioner considers it likely that Article 8 of the Human Rights Act 1998 (right to privacy and family life) would provide such a statutory bar.
35. To clarify, the Commissioner is satisfied that the requested information is exempt under section 21. However, she also considers that if section 21 of the FOIA did not apply, it is likely that the information would still be exempt from disclosure under the FOIA – which is disclosure to the world at large – under section 41 and/or section 44 of the Act although she makes no formal finding on these exemptions.

## Right of appeal

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36. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**