

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2019

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

Decision (including any steps ordered)

1. Complainants against doctors are determined by the Medical Practitioners Tribunal (MPT). The decisions of the MPT can be appealed by the General Medical Council (GMC). The complainant has requested the ethnicity of the doctors about whom the GMC made such appeals. The GMC provided a copy of statistics which had been released following an earlier information request from a different applicant, but refused to provide the updated statistics on the basis that the information was exempt under section 40(2). During the course of the Commissioner's investigation the GMC also applied section 14(1) – vexatious, to the request. It also became apparent during the Commissioner's investigation that the GMC held more detailed statistics on the ethnicity of the doctors involved.
2. The Commissioner's decision is that the GMC were not entitled to rely on section 14 to refuse the request. It was however entitled to rely on section 40(2) to withhold both the updated statistics and the more detailed statistics that it holds.
3. The Commissioner does not require the public authority to take any further action this matter.

Background

4. The GMC has explained that its role is to investigate allegations about a doctor's fitness to practice. If, having completed its investigation, it concludes that a doctor's fitness to practise may be impaired, the matter

is referred to a hearing. Such hearings are conducted by the MPT. Although the MPT is part of the GMC it is operationally independent.

5. Any findings of impairment of fitness to practise by the MPT may lead to a doctor receiving a sanction on their registration, including erasure.
6. Since 31 December 2015 the GMC has had the power to appeal the determinations of the MPT to the High Court. This case concerns the ethnicity of the doctors' who were the subject of MPT decisions which the GMC subsequently appealed.

Request and response

7. On 20 June 2018 the complainant requested information of the following description:
 - "1: Number of doctors about whom the GMC made appeal against the decision of the MPTS and FTP in the last 14 years.
 - 2: Ethnicity of origin of those doctors"
8. On 9 July 2018 the GMC responded. The GMC provided some information for a period from 31 December 2015 (which is the date the GMC first gained the power to appeal the decisions of MPT) to 12 February 2018. The statistics identified that in that time decisions had been appealed in respect of twenty three doctors and broke the number of appeals down into five ethnic groups. These statistics had previously been released in response to an earlier information request (the request was actually complied with on 25 April 2018, but the statistics relate to the date the earlier was actually made, i.e. the request, 12 February 2018). The GMC went on to explain that it could not provide updated details because it had only appealed a very limited number of cases since 12 February 2018 and therefore there was a risk that the doctors involved could be identified and their ethnicity revealed. Although it is apparent that the GMC was relying on section 40(2) – personal information, to withhold the updated figures, it did not specify a particular exemption within the FOIA.
9. The complainant wrote to the GMC on 12 July 2018. His letter contained three points. At point 1 he asked who within the GMC decided the sanctions imposed by the MPT were less than those sought by the GMC. The GMC's handling of this enquiry does not form part of the Commissioner's investigation. At point 2 he asked the GMC to clarify which section of the FOIA the GMC was relying in to withhold the updated statistics. At point 3 he stated:

"I shall be grateful if you could provide a further breakdown and provide the information as detailed in the Colleague Questionnaire designed by the GMC (copy enclosed)."

10. The Commissioner understands that the 'Colleague Questionnaire' is a form produced by the GMC which doctors may choose to use for the purpose of obtaining feedback from colleagues as part of their revalidation and annual review process. The questionnaire collects information on the cultural background of the person completing it based on sixteen ethnic groups. The Colleague Questionnaire does not however form any part of the GMC's investigative process, nor is it used in relation to any appeals of MPT decisions.
11. On 27 July 2018 the GMC provided an informal response in which it clarified it was refusing to provide the updated figures under section 40(2) of the FOIA. In respect of the complainant's reference to the Colleague Questionnaire the GMC explained that it could not provide a further breakdown of the ethnicity of the doctors as this would also allow the individuals about whom the information related to be identified.
12. On 28 July 2018 the complainant wrote to the GMC. He again made three points. At point 1 he made a request for information relating to the GMC's power to appeal decisions of the MPT under the Medical Act 1983, the handling of which does not form any part of the Commissioner's investigation. At point 2 he essentially challenged the GMC's refusal to provide the updated statistics under section 40. At point 3 he emphasised that he had originally requested this information under the FOIA in his request of 20 June 2018 and went on to say:

"Therefore, please provide me Up to date the Information as detailed in the Colleague Questionnaire designed by the GMC and oblige."
13. On 1 August 2018 the GMC confirmed that it would undertake an internal review of its decision to withhold the updated statistics under section 40. In respect of the complainant's request for the statistics to be provided in the same level of detail as set out in the Colleague Questionnaire, the GMC advised him that it had not understood his previous reference to the questionnaire to be a request under the FOIA, but that it would now treat it as such. However before doing so, it required clarification as to which part of that questionnaire he was referring to.
14. The complainant wrote to the GMC on 2 August 2018. He reiterated that he was still seeking the information he had requested on 20 June 2018 and again referred to the Colleague Questionnaire in the following terms:

"Please provide me Up to date information as detailed in paragraph 26 of the Colleague Questionnaire designed by the GMC."

15. It is clear that by the 28 July 2018 at the latest that the complainant had requested an internal review of the GMC's decision to withhold the updated statistics under section 40. The Commissioner considers an objective interpretation of the complainant's references to the Colleague Questionnaire to be clarification of the level of detail which the complainant was seeking the statistics he had originally requested to be presented in. The Commissioner notes that the GMC disagrees with this interpretation and maintains that it was, in effect, a fresh request.
16. On 7 August 2018 the GMC responded. It provided a response to the complainant's requests for information about the GMC's powers under the Medical Act 1983 and confirmed that it was conducting an internal review of its decision to withhold the updated figures under section 40. It went on to say that it would be dealing with his request for more detailed breakdown of the statistics, in line with the Colleague questionnaire, as a fresh request.
17. On 16 August the complainant wrote to the GMC to again complain about how it dealing with his request.
18. On 3 September 2018 the GMC wrote to the complainant in response to, what it considered to be the, the new request for a breakdown of the figures on the ethnicity in line with the Colleague Questionnaire. The GMC refused to provide this information under section 40(2) on the basis that it was personal data. This was in effect a fresh refusal notice.
19. On 10 December 2018 the GMC provided the outcome of the formal internal review of the original, 20 June 2018, request. It should be remembered that the original request first sought the total number of cases in which the GMC had appealed the decisions of the MPT. The GMC now provided a full response to this part of the request and advised the complainant that in total twenty six cases had been appealed, from which it is clear that only three cases had been appealed since the GMC had last compiled the statistics. In light of this the GMC maintained that it had been correct to withhold the updated statistics under section 40(2). In respect of the request for a more detailed breakdown of the figures on ethnicity, it is clear that the GMC continued to treat this as a separate request and simply reminded the complainant of his right seek an internal review of the refusal notice it had provided him on 3 September 2018.
20. On 24 June 2019, during the course of the Commissioner's investigation, the GMC also advised the complainant that it was refusing his request under section 14(1) on the basis that the request was vexatious.

Scope of the case

21. The complainant originally contacted the Commissioner on 5 September 2018 to complain about the way his request for information had been handled. However it was only after the complainant had exhausted the GMC's internal review procedure on 10 December 2018 that the Commissioner accepted the complaint as being eligible for investigation.
22. The Commissioner considers that the matters to be decided is whether the GMC has dealt with the request of 20 June 2018 in accordance with the FOIA. Firstly the Commissioner will consider whether the request can be refused under section 14(1) on the basis that it is vexatious. If the Commissioner finds the request is not vexatious she will consider whether the GMC is entitled to withhold the updated statistics under section 40(2) and whether the request as originally phrased captures the more detailed breakdown of ethnic groups.

Reasons for decision

23. Section 14(1) states that a public authority is not obliged to respond to a request for information if the request is vexatious.
24. In its initial submission to the Commissioner the GMC said that in the event that she did find the information was not exempt under section 40(2), it would wish to rely on section 14 to refuse the request on the basis that it was vexatious. The application of section 14 is based on the character of the request itself rather than the sensitivity of the actual information that is the subject of the request. It is therefore possible to determine the application of section 14 without a public authority having to access and then consider the sensitivity of the information. It is therefore more common for a public authority to consider the application of section 14 before looking at the use of the exemptions contained in Part II of the FOIA which are dependent on the nature of the actual information .
25. Although the term 'vexatious' is not defined in the FOIA the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:
 - Abusive or aggressive language
 - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance

26. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
27. The Commissioner's guidance goes on to suggest that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. To answer this question it is necessary to weigh the impact of the request on the public authority and balance this against the purpose and value of the request.
28. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
29. In support of its application of section 14 the GMC has identified thirteen previous requests that it had received from the complainant going back to 2013 which seek information on ethnicity of either the doctors about whom the GMC had considered complaints against, or the GMC's staff and expert witnesses involved in making decisions in respect of those complaints. A number of those requests relate to specific cases and it would appear the complainant disagrees with the decisions made by the GMC in those particular cases. Some of the requests target named individuals or the staff involved in those decision making processes. It is clear that the complainant believes the GMC is bias against doctors from a particular ethic and religion background.
30. The impartiality of any regulator is important and therefore it can be argued that there is a serious purpose behind a request which seeks information which may identify some form of discrimination. The Commissioner is also aware, from basic internet searches, that around the time the request was made in June 2018 there was controversy around the GMC's role in a high profile case involving a doctor from a minority ethnic background. The GMC itself acknowledges that doctors from black or minority ethnic backgrounds are over represented in its fitness to practise procedures, however this reflects the cases referred to it by public bodies such as employers and the police, rather than decisions taken by the GMC. The Commissioner wishes to emphasise that she is not suggesting there is any evidence which supports allegations of discrimination, it is simply that at the time of the request, the issue was one of genuine public debate.
31. In light of the above it could be argued that there is a serious purpose behind the request. However, the Commissioner is not persuaded that the request can be considered in isolation from the complainant's previous pattern of request making. Viewed in that context, the request appears to be a continuation of his attempts to challenge decisions, in

which he has a private interest, going back sometime. It can be argued therefore that rather than relating to a matter of public interest, the request can be better characterised as being the unreasonable persistence in the pursuit of a private matter which the GMC has already determined.

32. Although the GMC has not developed this point explicitly, it has presented arguments by reference to the indicators that a request is vexatious contained in the Commissioner's guidance (and listed in paragraph 23 above). It first argues that the request demonstrates the complainant has personal grudges. The scenario envisaged by the guidance is where the complainant's request targets individual employees or post holders. The Commissioner accepts that some of the previous requests submitted by the complainant, particularly the earlier ones going back to 2013 and 2014, do concern the ethnicity of specific individuals. However this feature is absent from the later requests including the request of 20 June 2018.
33. Rather than contending the complainant is pursuing a personal grudge against particular individuals, the GMC has argued that the complainant believes the GMC discriminates against the doctors of a certain race and that this reflects a personal grudge against the GMC. The Commissioner does not accept the fact that the complainant wishes to obtain information which he considers may support his view that GMC discriminates on grounds of ethnicity, would render the request vexatious. The Commissioner therefore gives no weight to this argument.
34. The second indicator that a request is vexatious identified by the GMC is that the request demonstrates intransigence. It believes that its response to the request is reasonable in the circumstances and that having provided the complainant with statistics on twenty three of the doctor's whose cases it appealed, the complainant failed to explain why it is critical to have details relating to the remaining three. The Commissioner considers this misses the point. The GMC is in effect arguing that the complainant is demonstrating intransigence by challenging its decision to refuse to provide all the requested information; it does not relate to the nature of the actual request.
35. Thirdly the GMC has argued that the applicant makes frequent or overlapping requests. In support of its position, the GMC said that although it recognised the complainant had not made the request of 12 February 2018 which resulted in the disclosure of statistics up to that date, he had been provided with the same information together with an explanation that only three further cases had been appealed since those statistics were released.

36. The Commissioner does not accept this argument is relevant. At the time the complainant made his request it is not clear that he would have known of the previous disclosure. If he had, it may have been possible to argue that he should have recognised there would have been very few appeals since that time. It could also have been argued that, in light of his previous experience of request making, he should also have realised that where statistics relate to small numbers, the information is likely to have refused under section 40. However such arguments are rather speculative and in any event the Commissioner is cautious of accepting an argument that a request is necessarily vexatious because an applicant could anticipate that it would be refused.
37. Under the heading of 'frequent or overlapping requests', the GMC also developed its argument in respect of the number of other requests the complainant had made. It stated that the complainant had submitted thirteen pieces of correspondence since 2013 which between them contained thirty one questions on the ethnicity of either its staff, or the doctors it regulated. It argued that his latest request was simply a continuation of that theme. The Commissioner certainly accepts that the number of requests made during a period of just over five years raises the potential that the latest request is vexatious.
38. The final point raised by the GMC is that the request is frivolous. It contends that in light of its earlier disclosure of statistics up to 12 February 2018, the complainant is in effect seeking statistics in respect of just the three additional doctors. It therefore argues that as no meaningful inferences can be drawn from such a small sample, the request can have no serious purpose.
39. As discussed earlier, it has not been demonstrated that the complainant would have recognised that the request would capture statistics on only three additional doctors. The Commissioner notes that it was only on 10 December 2018, when informing the complainant of the outcome of the internal review, that the GMC clarified that just three additional cases had been appealed since the statistics had last been compiled. Therefore the Commissioner is not satisfied that it would have been apparent to the complainant that the figures he requested would add little of consequence to the information already in the public domain.
40. The Commissioner recognises that the GMC's main argument for refusing to provide the requested information in full is that an updated version of the statistics would be risk identifying the individuals concerned and so be exempt under section 40. The focus of its submissions have been on that exemption and section 14 has, to some extent, only been cited as a back-up. However the Commissioner can only consider the arguments presented by the public authority. Having considered those arguments the Commissioner is not satisfied that the GMC has demonstrated that the request was vexatious.

41. In reaching this decision the Commissioner has had regard for the number of previous requests made by the complainant which relate to the ethnicity of different individuals or groups of individuals. This may be indicative of the complainant is continuing to pursue an old grievance he has against the GMC. However the GMC has not developed this point and, at the time of the request, the issue of discrimination within the procedures for referring complaints against doctors to the GMC and how such complaints were then dealt with, was a topic of public debate. A number of the other arguments presented by the GMC are of little relevance and the GMC has not explained the impact either the latest request, or the cumulative effect of the requests made by the complainant, would have on its staff or resources in order to demonstrate the request would cause an unjustified or disproportionate level of disruption, irritation or distress.
42. The Commissioner concludes that the GMC is not entitled to rely on section 14 to refuse to comply with the request.
43. Therefore the Commissioner will now go onto to look at whether the GMC is entitled to rely on section 40(2) refuse to provide any of the requested information.

Section 40(2) – personal information

44. The GMC has withheld the updated statistics under section 40(2). For avoidance of doubt the term 'updated statistics' is used to describe the statistics updated to incorporate information on the three additional doctors who cases were appealed since the statistics were last compiled, i.e. 12 February 2018, and which are presented in the same level of detail as the statistics previously disclosed, i.e. with ethnicity broken down in to five broad categories.
45. This information was withheld on the basis that a comparison of the statistics previously released and the updated statistics would show which cohorts had increased since the statistics were last compiled on 12 February 2018. As this information could only relate to the three doctors whose cases had been appealed by the GMC during that intervening period, the GMC argues there is a risk that the ethnicity of each of these three doctors would be revealed. The Commissioner will consider whether GMC is entitled to withhold this information under section 40(2).
46. The Commissioner accepts the GMC's argument that contrasting the figures already disclosed with the updated statistics would reveal only three doctors' cases had been appealed in the intervening period. The GMC has already informed the complainant that this is the case.
47. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

48. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
49. The first step for the Commissioner is to determine whether the information that would be revealed by the updated statistics constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
50. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

51. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

52. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
53. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
54. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
55. Clearly information about the ethnicity of an individual is information that relates to them. The real issue in this case is whether it would be possible to identify the three additional doctors whose cases had been appealed since the statistics were last compiled and whether this would reveal of the ethnicity of each of those doctors.
56. The updated statistics in isolation do not identify individuals, however account has to be taken of what other information is available, or is likely to become available, which would make identification possible.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

57. The GMC has explained that the names of the doctors whose MPT determinations it had appealed are effectively matters of public record. The appeals are made to High Court and, in the vast majority of cases, such civil proceedings are heard in public. The decisions of these court cases are published and the GMC has directed the Commissioner to where these are available on line. The GMC has also explained that it is legally required to publish information about a registered doctor's qualifications on the medical register. These details include the school or organisation where their qualification was obtained. The Commissioner has accessed the GMC's website and confirmed that such information is included on the GMC medical register. Although the GMC recognises that it would be wrong to claim that an individual who obtained their qualification from a certain geographical location must be of a certain ethnic background, the Commissioner considers that it would provide one piece of the jigsaw that may allow an individual's ethnicity to be deduced.
58. Disclosing the updated statistics would allow comparison with the statistics previously disclosed and this would reveal the ethnic groupings for which the figures had increased. These could only relate to the three additional doctors. If that information was then considered alongside the public domain information discussed above, there would be a real risk that the ethnicity of each doctor could be deduced. The Commissioner is therefore satisfied that the information in the updated, statistics relates to identifiable individuals, i.e. the three doctors whose cases had been appealed since the statistics were last compiled.
59. As the Commissioner is satisfied that the information relates to three identifiable doctors, she is satisfied that this information falls within the definition of 'personal data' in section 3(2) of the DPA.
60. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
61. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

62. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

63. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

64. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
65. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

66. Information relating to special category data is given special status in the GDPR.
67. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
68. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information clearly constitutes special category data as it explicitly relates to the racial background of the three additional doctors.
69. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
70. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
71. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
72. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
73. The Commissioner has therefore decided that the GMC was entitled to withhold the updated statistics under section 40(2), by way of section 40(3A)(a).

Is any other, more detailed, information captured by the request?

74. It became apparent during the Commissioner's investigation that the GMC also holds more detailed statistics, the Commissioner will now consider whether that information is captured by the original request of 20 June 2018 and, if so, whether any of this information can also be withheld under section 40(2).
75. When responding to the request on 9 July 2018 the GMC provided statistics for a period up to 12 February 2018. Those statistics were based on five ethnic groupings. From the exchange of correspondence between the two parties it is clear that the complainant not only challenges the GMC's refusal to provide up to the date statistics, but also expects that the GMC would hold a more detailed breakdown of the statistics. He has specifically referred to the Colleague Questionnaire which seeks information based on sixteen ethnic groupings. The Commissioner considers that when referring to the questionnaire the complainant was intending to make it clear to the GMC that he expected the GMC to provide him with the statistics in the same (or a similar) level of detail as in the questionnaire, when responding to his original request. The GMC has interpreted his references to the Colleague Questionnaire as being a fresh request and informed the complainant that it would be treating it as such on 7 August 2018 (see paragraph 16).
76. The Commissioner put it to the GMC that if it did hold more detailed statistics at the time of the request, this would be the information captured by the request and asked it to explain why, if such information was held, it had not considered this information when responding to the original request.
77. The GMC's explained the Colleague Questionnaire's role in the revalidation process for doctors and that it was totally unconnected with the fitness to practice procedures. The GMC therefore considered it was correct to treat a request that referred to the questionnaire as being a fresh request. It went on to argue that if a requestor wished to receive the information in a particular format they were obliged to do so when initially making the request and they were not free to submit a preference after the request had been dealt with.
78. The Commissioner accepts that Colleague Questionnaire does not form part of the fitness to practice process.
79. In respect of the need for a requestor to express a preference for the format in which they wish to receive the information, the Commissioner recognises that under section 11 of the FOIA, the requestor is required to express any preference at the time they make their request. She notes that the GMC has not referred directly to section 11 and would not wish to risk misinterpreting the GMC's position. However the Commissioner considers it appropriate to clarify that she would not

accept that the level of detail in which the requested information is provided to be a matter of form or format in this case. In broad terms, form and format relates to how any copy of the requested is provided, for example whether it is provided as hard copy or in a particular electronic format.

80. The level of detail in which the statistics should be provided is not one of format. It is a more fundamental question of what information the GMC actually holds that falls within the scope of the request. The original request of 20 June 2018 simply asks for the:

“Ethnicity of origin of those doctors [whose cases the GMC appealed]”

It would capture any and all of the statistics that were held in respect of the ethnicity of those doctors, including any more detailed breakdown of ethnicity than that originally provided by the GMC. If a more detailed breakdown of the statistics was available, the GMC would not be entitled to choose to consider only the high level set of statistics.

81. During the course of the Commissioner’s investigation it transpired that the GMC did hold a more detailed version of the statistics and provided her with a copy of this information. The more detailed statistics use the same broad categories of ethnicity as the high level statistics, but then breaks those categories down in to a further six sub categories. This inevitably means that the figures the subcategories contain are smaller than those in the high level statistics, or identify with greater precision the ethnicity of the doctors whose cases were appealed.
82. The copy of the statistics provided to the Commissioner relate to only the twenty three doctors whose cases had been appealed by 12 February 2018. The Commissioner was provided with a copy of these more detailed statistics in a letter from the GMC dated 3 July 2019. These statistics will be referred to as the ‘more detailed statistics’ to distinguish them from the high level statistics that have already been disclosed. The Commissioner understands that the more detailed statistics were produced by the GMC when considering its response to, what it is was treating as, the complainant’s fresh request for statistics in line with the Colleague Questionnaire (see paragraph 13). Although this means that the statistics would not have been compiled at the time of the complainant’s request of 20 June 2018, the Commissioner is satisfied that the GMC would have held the necessary information from which they could have been compiled. This would be in line with the Commissioner’s published guidance ‘Determining whether information is held’. The section on ‘Extracting and compiling information to meet a request’ is of particular relevance here; it explains that if a public authority holds the basic building blocks required to compile the requested information, the information is deemed to be held.

83. The GMC has said that it does not hold more detailed information for the three additional doctors whose cases it has appealed since 12 February 2018. However it went on to say that it would be happy to obtain that data if the Commissioner required it. This strongly suggests to the Commissioner that even though the GMC may not have already compiled updated statistics at this more detailed level, it does hold the source material from which such statistics could be produced and if this was so, the Commissioner again considers the GMC would be deemed to hold an updated version of the more detailed statistics.
84. Although it seems likely that the GMC does hold more detailed information on the ethnicity of the three additional doctors, the Commissioner has not pursued the matter. This is because the Commissioner is satisfied that even if the GMC did hold the basic building blocks from which such information could be compiled, the information would be exempt under section 40(2). Regardless of the number of ethnic subcategories to which any individual could potentially belong, it would still be possible to identify the higher level, broad category, to which they belonged, in the exact same way as described above in paragraphs 57 and 58. Therefore disclosing the information would still allow someone to deduce the, broad, ethnic group to which the individual doctors belonged and, as already explained, there would be no lawful basis for disclosing this special category data.
85. The Commissioner finds that any more detailed information the GMC holds on the ethnicity of the three additional doctors whose cases were appealed since 12 February 2018 would be exempt under section 40(2).
86. However, it is still necessary to consider whether the GMC is required to disclose the more detailed statistics on the twenty three doctors cases had been appealed by 12 February 2018, in other words, the more detailed version of the statistics that have already been disclosed to the complainant.
87. The Commissioner notes again that the GMC argues that these statistics are not captured by the current request. However the Commissioner reasserts that she is satisfied that they are for the reasons set out in paragraphs 75 to 80 above.
88. The Commissioner has started by considering whether this information is personal data. As before the main issue to be determined is whether someone could identify the ethnicity of individual doctors if the more detailed statistics were disclosed.

Is the information personal data?

89. As a responsible regulator of both the FOIA and DP legislation the Commissioner has considered the risk of the more detailed information disclosing personal data based, based on the arguments the GMC

provided in respect of the three additional doctors (as set out in paragraphs 57 and 58 above).

90. When explaining how disclosing the updated, high level statistics would disclose personal data the GMC was only considering how the three additional doctors, whose cases had been appealed since the previous disclosure, could be identified. The means of identification involved obtaining the names of those who had been the subject of an appeal from recent, or soon to be published, High Court decisions, then using those names to search the GMC medical register and to then match that information with the ethnic groups for which the figures had increased since the previous disclosure. The Commissioner was satisfied that because of the small number of doctors concerned (just three) and the fact that the High Court decisions were recent, or imminent this process would allow the ethnicity of the three doctors to be identified from the high level statistics.
91. The situation is rather different in respect of the more detailed statistics. Identification would involve matching publicly available records, with the statistics on ethnicity for twenty three doctors. At first this appears to be a far more speculative task. However the Commissioner has accessed a publicly available website of High Court decisions and has found it easy to identify at least nine of the cases to which the statistics relate. Using the names obtained from these judgements, it was a simple case of searching the medical register and then comparing the biographical details from the register with the more detailed statistics.
92. By their very nature the more detailed statistics break the main categories of ethnicity into subcategories. This has two consequences. It means that the some subcategories contain lower numbers than the broad categories used in the high level statistics. Some of those subcategories contain very small numbers. The Commissioner considers this would make it more likely that someone could match the statistics to the name of an individual doctor. Furthermore the subcategories define ethnicity more precisely and this aids the process of matching the biographical details from the medical register to the information in the statistics. This not only aids someone to place a particular doctor in one of the ethnic groups, it also helps the process of elimination through which the ethnicity of other doctors could be determined.
93. Therefore the Commissioner is satisfied that even though the more detailed statistics relate to a larger number of doctors, the very fact that they are more detailed raises risks of identification that were not present with the disclosure of the high level figures already disclosed. The Commissioner is satisfied that the disclosure of the more detailed statistics would allow the identification of at least some of the doctors. Even though it may not be possible to identify all the doctors, it would be necessary to withhold the more detailed figures in their entirety to

avoid the identification of some of those doctors. The Commissioner is satisfied that the more detailed statistics do constitute personal data.

94. It should be noted however that if the pool of doctors to which these statistics relate grew significantly, or if it became more difficult to access a substantial proportion of the relevant High Court decisions, it would become difficult to argue that identification of individuals would be a realistic prospect.

Would disclosure contravene principle (a)?

95. Having concluded that the information is personal data the Commissioner has then gone on to consider whether disclosing the information would contravene principle (a).

96. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

97. As previously explained personal data can only be disclosed in response to a FOIA request if to do so would be lawful, fair and transparent. And in order for the disclosure to be lawful it would have to comply with one of the lawful bases listed in Article 6(1) of the GDPR. In the case of special category data, which clearly the more detailed statistics are, the disclosure also has to comply with an Article 9 condition for processing.
98. As before, the Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
99. Again the Commissioner is satisfied that none of the conditions required for processing special category data are satisfied and that therefore there is no legal basis for disclosing the more detailed statistics.
100. The Commissioner has therefore decided that the GMC is entitled to withhold the more detailed statistics under section 40(2), by way of section 40(3A)(a).

Other matters

101. Although not forming part of the formal decision notice the Commissioner uses 'Other matters' to raise issues of concern to her. During the investigation of this case the Commissioner was disappointed

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with the GMC's initial reluctance to provide copies of the information, which was potentially captured by the request.

Right of appeal

102. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

103. 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.

104. 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

Rob Mechan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF