

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 February 2020

**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 the qualifications of a specific individual. The General Medical Council (the GMC) has refused to confirm or deny it holds this information, under section 40(5B)(a)(i) of the FOIA (personal data) as to do so would disclose two individuals' personal data.
2. The Commissioner's decision is as follows:
  - The GMC can rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny it holds the requested information as to do so would contravene data protection legislation. Confirmation or denial would release the personal data of one of the two individuals above.
3. The Commissioner does not require the GMC to take any remedial steps.

#### **Background**

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4. The GMC has provided a background to the request which the Commissioner will summarise as follows. The complainant submitted a complaint against a doctor in 2018. The GMC considered the complaint and decided that it did not need to act on it. A Triage Assistant Registrar closed the complaint in March and the complainant was advised as such.

5. The GMC received further correspondence from the complainant which it considered under Rule 12 of the Fitness to Practise Rules 2004. Rule 12 allows the GMC to review certain decisions if particular grounds are met. An Assistant Registrar (AR) is responsible for these decisions. In this case, it was decided in March 2019 that there were no grounds for a review, and this was communicated to the complainant.

## **Request and response**

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6. As part of a wider correspondence, on 8 February 2019 the complainant wrote to the GMC and requested information in the following terms:

*"As per below I have been asked to write to you under FOI to ask for the professional qualifications of the AR as per below?"*

7. The GMC responded on 4 March 2019. It relied on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny it holds the information the complainant has requested.
8. The GMC provided a review on 27 June 2019. It maintained its reliance on section 40(5B)(a)(i) to neither confirm nor deny it holds the requested information.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 19 April 2019 to complain about the way her request for information had been handled.
10. The Commissioner's investigation has focussed on whether the GMC can rely on section 40(5B)(a)(i) to neither confirm nor deny it holds the information that has been requested.

## **Reasons for decision**

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11. Under section 1(1)(a) of the FOIA anyone who requests information from a public authority is entitled to be told whether or not the authority holds the information.
12. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether the authority holds the information does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR')

13. For the GMC to be entitled to rely on section 40(5B)(a)(i) the following two criteria must be met:

- confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- providing this confirmation or denial would contravene one of the data protection principles.

*Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?*

14. Section 3(2) of the Data Protection Act 2018 defines personal data as "any information relating to an identified or identifiable living individual".

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. 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.

17. The request concerns the qualifications of an AR who made a particular decision. In its submission to the Commissioner the GMC has explained that, if it is held, the requested information would relate to both the AR and a specific doctor. It would relate to an AR as it is information about that individual's qualifications. But it would also relate to a doctor as it would indicate that a complaint had been submitted to the GMC about him or her.

18. The GMC considers that confirming or denying if the information is held would disclose to the world at large whether or not the GMC had received a complaint about a specific doctor. Confirming or denying would also indicate whether a specific AR did or did not have qualifications.

19. The Commissioner asked the GMC to confirm how a specific doctor and a specific AR could be identified if it was to confirm or deny it holds the requested information. The GMC re-stated its view that if it confirmed or denied it holds the information, this would indicate whether a doctor had had a complaint made about him or her. It said that the complainant appears to regularly use the WhatDoTheyKnow website (although not for the current request) and through that website a member of the public could then ask the complainant for the name of the doctor and she might give that name to that individual.

20. First, the Commissioner does not consider that, through its submissions to her, the GMC has made a convincing case that a specific AR could be identified. As such confirming or denying that the information is held would not, in the Commissioner's view, release the personal data of that AR. But nor does the Commissioner consider that the GMC's argument relating to the doctor is a strong one. This is because it is based on conjecture and a set of circumstances that the Commissioner does not consider is very likely to happen.
21. However, the Commissioner notes that the complainant names a doctor in her correspondence with the GMC associated with her request. This is a similar situation as in the Commissioner's decision in FS50808544, in which the Commissioner found that the GMC could rely on section 40(5).
22. In FS50808544 a doctor is named in the actual request for information. In the current request a doctor is not named in the request but in the complainant's preceding correspondence with the GMC. However, the Commissioner considers that the request of 8 February 2019 needs to be read as part of the wider email chain. In order to identify what information is being sought, it is necessary to read the request in the context of the earlier emails. This would involve identifying a doctor.
23. The Commissioner is therefore satisfied that the doctor in this case could be identified if the GMC confirmed or denied it holds the requested information; that is the qualifications of an AR who made a decision not to review how the GMC had handled a complaint. The Commissioner understands the doctor concerned to be alive, and whether he or she has had a complaint submitted about them is that doctor's personal data because such information is about them and is used to inform decisions about them.
24. As such, the Commissioner is satisfied that the first of the criteria above has been satisfied: confirming or denying the information is held would constitute disclosure of a third party's personal data, that of a doctor.  
  
*Would confirming or denying the information is held contravene one of the data protection principles?*
25. 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*".
26. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request or, as in this case, if the authority confirms or denies it holds the personal data. This means that the authority can only confirm or deny it holds the information if to do so would be lawful, fair and transparent.

27. 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.

28. The lawful basis most applicable is GDPR basis 6(1)(f) which states:

*"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".*

29. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject, that is the doctor in this case.

30. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

31. In considering any legitimate interest(s) in confirming or denying under the FOIA that the information is held, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

32. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

33. The information in this case, if it is held, has been summarised above: it is whether a named doctor has had a complaint submitted about them. The Commissioner accepts that the complainant's interest in how the GMC has managed any complaint to it about a doctor is a legitimate interest. As is the wider societal benefit of the GMC being open and transparent.

Is disclosure necessary to meet the legitimate interests?

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Confirmation or denial under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner accepts that confirmation or denial would be necessary in this case. The complainant is seeking to determine whether the AR who reviewed the GMC's handling of her complaint, and decided that no further action was necessary, was suitably qualified to make that decision.
36. Because the Commissioner has found that confirming or denying the information is held is necessary to meet the legitimate interests it is necessary to carry out the third test and balance the legitimate interests against the data subject's interests or rights and freedoms.

Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject, that is the doctor in this case?

37. In considering the above question, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, the data subject's interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
38. In its submission to the Commissioner the GMC has explained that information it publishes about a doctor's fitness to practise history is explained in its 'Publication and disclosure policy' (PDP). The GMC says that the PDP is clear as to what information it publishes, and this does not include details about complaints which do not result in investigations. This guides the expectations of all parties involved in a complaint.
39. From this - and because the complainant's complaint to the GMC did not result in an investigation - the Commissioner is satisfied that the doctor would have the reasonable expectation that their personal data would not be put into the public domain as a result of an FOI request. The personal data that would be released through confirmation or denial concerns that individual in their professional capacity. Nonetheless the Commissioner considers it is likely to cause that individual a degree of

distress if their personal data was released, through the GMC confirming or denying it holds the requested information.

40. While she recognises that the information, if held, is of interest to the complainant, the Commissioner does not consider it is of sufficient wider public interest such that it overrides the data subject's rights and freedoms. As such, the Commissioner has decided that the GMC can rely on section 40(5B)(a)(i) to neither confirm nor deny it holds the information the complainant has requested. This is also in line with her decisions in other similar cases involving the GMC such as FS50681982. The First-tier Tribunal (Information Rights) has also found that the GMC could rely on section 40(5) in similar cases on appeal: EA/2016/0178 and EA/2016/0249.

## **Right of appeal**

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41. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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**  
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**Information Commissioner's Office**  
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