

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 July 2020

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

#### Decision (including any steps ordered)

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1. The applicant has requested expert reports related to a hearing in 2018.
2. The Commissioner's decision is that the General Medical Council (GMC) has correctly applied section 31 of the FOIA to the withheld information, and that the public interest lies in favour of maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 10 February 2020 the applicant made a request for information via 'what do they know' in the following terms:

*"I wish to request information regarding an Expert Witness report. I request this information as being in the public interest to disclose the requested information.*

*The specific information I request is as follows:*

*The Expert medical witness report produced by [redacted] and submitted by him prior to The General Medical Council/MPTS Fitness to Practice Tribunal case against [redacted] held in Manchester 25th June 2018-29th June 2018."*

5. On 9 March 2020 the GMC responded and refused to confirm or deny if it held the requested information. It cited section 40(5B)(a)(i) of the FOIA as its basis for doing so.
6. The applicant wrote to the GMC again on 13 March 2020 explaining why he believed the decision was wrong. The GMC provided an internal review on 14 May 2020 in which it maintained its position.

## **Background**

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7. The applicant originally requested the information on 4 October 2018. The GMC did not consider this under the FOIA, but under section 35(b)(2) of the Medical Act 1983. Having done so, it maintained that it was not in the public interest to disclose the information.
8. The role of the GMC 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 Medical Practitioners Tribunal (MPT). Although the MPT is part of the GMC it is operationally independent.
9. Any findings of impairment of fitness to practise by the MPT may lead to a doctor receiving a sanction on their registration, including erasure.

## **Scope of the case**

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10. The applicant contacted the Commissioner on 10 February 2020, the same date as his request to the GMC. Following further correspondence it was established that the applicant had been attempting to obtain the information since 2018.
11. The Commissioner wrote to the GMC on 17 April 2020 and advised that having reviewed all the information available it was clear that a public Fitness to Practise (FTP) hearing had been held in this case, where references were made to the requested information. The fact the reports existed was already in the public domain at the time of the original request in 2018 and as such it was unlikely that the exemption cited would apply.
12. During the course of correspondence with the GMC the Commissioner accepted that the reports themselves were not in the public domain at the time of the request, only the fact of their existence and the authors of those reports.

13. The GMC provided its final submissions to the Commissioner on 10 July 2020 in which it amended its position. The GMC stated that it considered section 40 applied to a limited amount of the applicant's personal data which he would be entitled to as part of a subject access.
14. However, it was of the view that section 31(1)(g) by virtue of section 31(2)(d) is applicable to all the information requested and so led with that argument.
15. It is therefore the scope of this case to determine if the GMC has correctly cited section 31(1) in order to withhold the information.

## Reasons for decision

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### Section 31 – law enforcement

16. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to be engaged it must be at least likely that disclosure would prejudice one of the law enforcement interests protected by section 31 of FOIA.
17. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.
18. The GMC has applied section 31(1)(g) together with section 31(2)(d) to withhold the requested information.
19. The relevant parts of section 31 of the FOI provide that:

*"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

*(2) The purposes referred to in subsection (1)(g) to (i) are –*

*(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,"*
20. The Commissioner will therefore consider whether the GMC exercises a relevant function for the purposes specified in this subsection, the likelihood of prejudice to any of the functions if the requested

information were to be disclosed and whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*The GMC's functions for the purposes of Section 31(2)(d)*

21. For the exemption to be engaged, the Commissioner requires the function identified by the public authority in relation to section 31(1)(g) to be a function which is specifically entrusted to that public authority to fulfil.
22. The statutory basis which allows the GMC to conduct fitness to practise investigations is contained at section 35 of the Medical Act 1983: [http://www.gmc-uk.org/about/legislation/medical\\_act.asp](http://www.gmc-uk.org/about/legislation/medical_act.asp). GMC's fitness to practice investigations have been specifically designed to fulfil the purpose of ascertaining a person's fitness or competence in relation to a profession. They are not incidental to the existence of the GMC and its role, they are a core function.
23. In this case the Commissioner is satisfied that the GMC has been formally tasked with ascertaining a person's fitness or competence in relation to any profession or other activity which he is authorised to carry on and that this function was specifically designed to fulfil this purpose. Consequently the exemption is engaged.

*Likelihood of prejudice occurring*

24. The GMC argued that disclosing the information requested would be likely to prejudice its regulatory function as specified above.
25. It referred to a previous decision notice which was also signposted in the subsequent Tribunal decision which found in favour of the GMC with regard to the application of section 31 in relation to the names of deceased doctors undergoing GMC investigations at the time of their death.
26. Although this request is in relation to a specific investigation, the GMC considers that it usefully summarises its concerns about disclosure, even if the focus of the paragraph is employers rather than complainants:

*'The Commissioner understands that, with the GMC's formal powers, there is no question of a doctor, or any other party, refusing to co-operate with an investigation. However, the Commissioner further understands that the GMC will be at its most effective when a party, including a doctor's employer, has faith in the confidentiality of the preliminary investigation process and thus are willing to participate fully in the investigation. This effectiveness would consequently be placed at risk through disclosure, the upshot of which is that the GMC would be likely to be hampered in carrying out its functions in a timely fashion.'*

27. The GMC explained that it interacts with parties to a complaint on a confidential basis. It would usually only disclose the details of a complaint (and the fact a complaint had been made) to the doctor's employers and to the doctor as part of its investigation process. Only the doctor receives a copy of expert opinion as part of the investigation.
28. It went on to explain that information it publishes about a doctor's fitness to practise history is explained in its 'Publication and disclosure policy' (PDP) which was introduced on 26 February 2018 following a consultation which ran between 1 July 2015 and 23 September 2015, into which the ICO provided valuable input.
29. The PDP is clear as to what information it publishes, and this does not include expert reports to complainants. This guides the expectations of all parties involved in a complaint. In line with this policy at the time of the request, while there was some information available to the public which included information confirming the existence of the reports requested it did not include the reports themselves.
30. However, the GMC considered the most important factor is that disclosing this material publicly, outside its publication and disclosure policy, would be likely to reduce the number of complaints made by the public to the GMC, limit voluntary cooperation with it if a complaint was made and in general terms decrease public confidence in its ability to deal with matters on a confidential basis with the privacy of personal data at the forefront of its mind.
31. The GMC further considered that releasing this information would make it more likely that members of the public would be deterred from making a complaint about doctors who have provided care to adult family members who have sadly died. This is because their opposition to the health details of their adult children being made public wholesale would override their desire to report the doctor in question. This would be likely to prejudice the GMC's ability to effectively regulate doctors as opportunities to consider their fitness to practice would be lost.
32. Furthermore, even if complaints were made, it may be voluntarily provided with less information and may have to use its formal powers more to obtain the information needed to investigate complaints. The GMC consider that this effect in and of itself is likely to prejudice its ability to regulate doctors as it would increase the time taken and costs of investigations.
33. The GMC's powers to compel disclosure of information to it are under Section 35A of the Medical Act 1983, as amended. It allows the GMC to require disclosure of information in certain circumstances where it is considered necessary for the purpose of assisting it or any of its committees in carrying out functions in respect of fitness to practise.

However, this focuses on ongoing investigations where information is required to further those investigations. The GMC cannot compel individuals to raise matters with it in the first place and that is at the centre of its concerns.

34. The Commissioner is not persuaded that disclosure of the information would necessarily deter members of the public from making complaints about doctors. However, the Commissioner does consider that complainants may provide less information which would impact on the costs and time taken should the GMC have to resort to using its formal powers.
35. Therefore the Commissioner is satisfied that disclosure of the requested information would be likely to prejudice the GMC's ability to ascertain 'a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on'.
36. As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

*Public interest test*

37. The GMC were of the view that the public interest falls strongly in favour of withholding the information. It understands why the applicant wants to see the requested information. It also accepts that there will always be public interest in being open and transparent regarding its regulatory activities and such transparency helps promote public awareness of our regulatory functions.
38. However, it went on to explain that the issues connected to the expert reports were fully ventilated at a public hearing which the applicant attended. He has been provided with a copy of the transcript of the hearing. He has requested all expert opinion, however the GMC submit that all bar the joint opinion is not particularly relevant in any event.
39. Proportionate information was made available under the publication and disclosure policy noted above. The public interest is most strongly served by maintaining an environment where complainants in particular, but all parties generally have good reason to maintain confidence in the GMC and have faith that it is going to abide by its disclosure policy.
40. This is particularly relevant in relation to creating an environment where members of the public can feel confident that they can provide information about deceased adult relatives (where the usual data privacy protections do not apply) which will only be disclosed as necessary under a considered and appropriate disclosure regime. This

applies to making the initial complaint as well as any further information the GMC may request. If individuals were less than fully candid and unwilling to make complaints or share information the GMC's ability to identify and investigate deficient doctors would be compromised and this is not in the interests of the public at large.

*The applicant's position*

41. The applicant argued that the public interest in anything must have a start point. In this case it is that it (the public) is protected from harm from the medical profession and its faith in that same profession maintained; this all upheld by the GMC and its FTP procedures, which hold doctors to account should they err.
42. The GMC is withholding experts reports singular and joint because it believes its ability to test the FTP of future erring doctors will be prejudiced by the release of experts reports compiled during a 'Publicly held Tribunal'.
43. The publicly held tribunal in question did not test the FTP of the doctor because the experts reports were deemed to prevent it from doing so and did so behind closed doors and thus excluding the public.
44. This act alone prejudiced the public's right to have the FTP of a doctor tested. It further prejudiced the public's right to know within a publicly held tribunal.
45. If a FTP complaint is regarded serious enough to be brought by the GMC to the MPTS to convene a hearing then that act triggers the public's interest and thus its right to know and have its faith in the medical profession upheld and maintained.
46. If as in this case the compilation, and discussion of experts reports behind closed doors contains only relevant information regarding the medical decision making, and other actions which took place and which originally resulted in the GMC believing the FTP of a doctor required testing then unless the GMC can prove without reasonable doubt the existence of exempt information ie personal information third party information then clearly on the public interest test can be no exemption as the public has a right to know why a doctor has not had his/her FTP tested.
47. It is not enough to satisfy the public's faith in the medical profession to state a behind closed doors private agreement between two experts removed both the public's right to know and the public to have erring doctors held to account.
48. To uphold this exemption destroys at a stroke the GMC's much published statement: 'Transparency Drives Improvement'.

49. The applicant also provided a letter from Dame Caroline Swift (Chair MPTS) dated 16 July 2018 which states quite clearly that the doctor in question did not have his FTP tested. It also states why that was, including, the charges being dropped at the outset, which were dropped entirely as a result of the clandestine behind closed doors meeting and agreements of the two experts.
50. In addition the applicant also provided a totally independent medical report into the actions of the doctor and the very clear indications this report (based primarily on medical records) reveals that the doctor's FTP required testing within that tribunal but which were not.
51. The applicant considered that the tribunal therefore failed to provide any of the features the GMC would have us believe it upholds to safeguard us from erring doctors.
52. He also argued that the GMC must stop this approach of holding 'public hearings' and at the same time exclude the public purely on the grounds that doing so allows the GMC to decide entirely its own narratives and outcomes to the detriment as shown of the public's interest, future safety or any hope of transparency or inclusion.
53. Therefore this relies on the belief that the ability of the GMC to test the FTP of a doctor would be prejudiced if this information was supplied to the complainant and therefore that prejudice outweighed the public interest in disclosure.

### **The Commissioner's decision**

54. The Commissioner notes the applicant's argument above that the GMC is withholding the reports because it believes its ability to test fitness to practise will be prejudiced. However, neither the GMC nor the exemption focus on the ability to test an individual, but rather to 'ascertain' if it is necessary to do so:  
  
*'ascertaining a person's fitness or competence in relation to .... any profession or other activity which he is, or seeks to become, authorised to carry on'*
55. This covers a wide range of activities from cognitive function to understanding of the English language, whether that be in the form of a formal test or other method such as an interview.
56. Given all the circumstances of the case the Commissioner finds there is an inherent weight to the public interest in withholding the information as it would not be in the public interest to disclose information which may have a prejudicial impact on a public authority's ability to carry out its regulatory functions.



## **Other matters**

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57. The Commissioner's guidance makes clear that it is not necessary for an applicant to specify the FOIA when making a request. Therefore the GMC should consider the appropriateness of dealing with similar requests under the Medical Act 1983 in the future.

## Right of appeal

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58. 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)

59. 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.

60. 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**