

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 January 2022

Public Authority: General Dental Council
Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant has requested information from the General Dental Council ('GDC') about under-guise investigations. The GDC initially advised that it did not hold any relevant information. The GDC subsequently identified information within scope of the request that it *does* hold but which it has withheld under section 21(1) of the FOIA (information accessible to applicant by other means), section 31(1)(g)(law enforcement) and section 40(2) (personal data).
2. The Commissioner's decision is as follows:
 - The information the GDC is withholding is exempt information under section 21, section 31(1)(g) with subsections 31(2)(b), (2)(c) and (2)(d), and section 40(2) of the FOIA. The public interest favours maintaining the section 31(1)(g) exemption.
 - On the balance of probabilities, the GDC holds no other relevant information and has complied with section 1(1)(a).
 - The GDC breached section 17(1) as it did not provide the complainant with a refusal notice within 20 working days of the request.
3. The Commissioner does not require the GDC to take any remedial steps.

Background and context

4. In its submission to the Commissioner, the GDC has provided the following background.
5. The GDC is the UK-wide statutory regulator of around 114,000 dental professionals, consisting of approximately 42,000 dentists and 72,000 dental care professionals (ie dental nurses, clinical dental technicians, dental hygienists, dental technicians, dental therapists and orthodontic therapists). In accordance with the Dentists Act 1984 which defines the GDC's statutory function and powers, it registers qualified dental professionals, sets and enforces standards of dental practice and conduct, protects the public from illegal practice, assures the quality of dental education and investigates concerns.
6. The GDC is primarily funded through the Annual Retention Fee, which accounted for over 98% of funding in 2020. This is the fee all registered dentists and dental care professionals must pay each year to remain on the Dentists Register or Dental Care Professionals Register. The other sources of funding include examination fees and miscellaneous income such as bank interest, dividend payments and sales of assets.
7. In the event there are concerns about a dental professional's conduct or competence that are serious enough to put patients at risk, or damage public confidence in dentistry, the GDC will investigate. When appropriate it will take action to mitigate that risk. Concerns may arise directly (from a patient or another dental professional), by referral from another body (for example, a police notification of a criminal caution or conviction), or from other sources.

The Fitness to Practice process

8. A registrant being 'fit to practise' ('FtP') indicates they have the appropriate skills, knowledge, character and health to practise their profession safely and effectively. However, this is not just about a practitioner's clinical performance or health. It may also include any actions they have taken which affect public confidence in dentistry outside professional practice, for example, committing a criminal act.
9. The FtP process also includes any actions which affect public confidence in dental professionals and their regulation.
10. There are four stages within the FtP process. The first stage is the initial assessment of a concern about a registrant to determine whether the information received meets the threshold of an FtP concern. Following this assessment, the concern will either progress to the next stage, or

the GDC will not proceed and explain to the complainant why it is not progressing any further.

11. At the next stage (casework), the GDC notifies the registrant and collects further information relevant to the concerns under investigation. This may include information from various parties, such as the registrant for clinical cases (patient records, etc) or in relation to criminal cases, police reports or certificates of conviction. Further consideration will be given to information gathered at this stage to determine if there is sufficient evidence to raise an allegation that a registrant's FtP is impaired. If not, the GDC will close the case with no further action. If there is sufficient evidence, it will proceed to the next stage.
12. In the rare occasions where under-guise investigations (ie the use of undercover investigators/private detectives) are being considered, the registrant is not notified at the casework stage as this would undermine any under-guise investigation which was to follow.
13. At the next stage (case examiners), any allegations are considered by a case examiner along with any comments provided by the registrant and any further comments from the informant(s) who raised the initial concern. All parties involved will receive a copy of the paperwork with the exception of sensitive health or information pertaining to the private life of the registrant. Upon reviewing the case papers, the case examiner may determine to take no further action, provide a letter of advice, issue the registrant with a warning, propose a set of undertakings for which the registrant must agree to abide by, or refer the case to a practice committee for a substantive hearing.
14. The final stage of the process involves a hearing before an independent Practice Committee. These are generally public hearings where an independent committee hears evidence and submissions from all parties and makes a determination on whether a registrant's FtP is impaired. If so, the Committee may determine to take no further action, impose conditions of practice on a registrant, suspend their registration or, in the most serious of cases (where their conduct is fundamentally incompatible with registration), erase the registrant from the register, removing the right to practise dentistry. A registrant can appeal this decision.

The GDC's use of under-guise investigations

15. Under-guise investigations are a legitimate means of investigating serious complaints when used properly. In very rare circumstances, the GDC may use under-guise investigators to investigate concerns where there is a potentially serious risk to the public, when there is no other way to investigate the concerns made against a registrant and it is both

reasonable and proportionate to do so. The GDC wrote in December 2019¹ that over the previous three years there had been only 12 undercover visits which equated then to 0.2% of new FtP concerns raised over the same period. Since then, there have been no undercover visits.

16. The GDC says that the complainant submitted three separate requests on 8 April 2021 and that the requests followed the publication of various articles relating to the outcome of an under-guise investigation in 2016. This had been determined by a Practice Committee not to be proportionate or justified in the circumstances. The Committee found that if it had been properly considered, the visit would not have taken place. In consequence of that, the GDC compensated the registrant and met their legal costs.
17. The complainant submitted three complaints to the Commissioner. The remaining two have been considered under IC-107651-B6J6 and IC-115123-T1Z4.

Request and response

18. On 8 April 2021 the complainant wrote to the GDC and requested information in the following terms:

“Regarding under-guise investigations/operations sanctioned by the GDC, either carried out internally or via external operators/companies, please answer the following questions:

1 - Were the FTP Panelist group briefed about the use of these investigations as a general occasional GDC tactic? If they were, was this prior or after the use was sanctioned by the senior GDC team?

2 - For individual FTP investigations, please divulge any/all occasions where FTP panelists expressed their formal disapproval of the use of under-guise investigations/operations by the GDC. Please also divulge the GDC response to these concerns if they did arise.

¹ <https://www.gdc-uk.org/news-blogs/blog/detail/blogs/2019/12/02/how-the-gdc-uses-undercover-investigators>

- 3 - Please divulge any/all occasions where FTP panelists resigned or asked to not hear a case where under-guise investigations/operations were part of said case and the reasons for the panelist issues related to said investigations/operations.”
19. The GDC responded on 7 May 2021 and advised that it had no records relevant to questions 1 and 2 of the request and that it followed that it therefore does not hold information relevant to question 3.
 20. The complainant requested an internal review on 8 May 2021. He referred to “3000 boxes” of files that the GDC holds and urged it to review the information contained in those boxes.
 21. Following an internal review the GDC wrote to the complainant on 20 May 2021. It explained that it had searched its electronic records going back to 2013 and confirmed that no information relevant to the request had been identified.
 22. With regard to its offsite archive [the “3000 boxes”], the GDC also advised that it considered it was required only to carry out reasonable searches for relevant information and that, in the circumstances, a search of its offsite archive would not be reasonable.
 23. As a result of this investigation and the Commissioner’s questioning, the GDC reconsidered its handling of the request. It then wrote to the complainant on 5 January 2022. It explained that it had interpreted question 2 of the request as a request related to FtP panellists disapproving of the GDC using under-guise investigations as a policy/tactic generally, rather than disapproving of its use in one specific case in 2016.
 24. The GDC went on to advise that if it was the latter, there was one investigation in which the GDC was criticised for using an under-guise investigation. This instance in 2016 was reported widely and, in its internal review response, the GDC had provided the complainant with a link to a related blog on its website.
 25. However, the GDC said, it also held information related to this instance which it had omitted to mention in its previous correspondence to the complainant; information generated through an Interim Orders Committee (IOC) in 2017 and a preliminary meeting of the Professional Conduct Committee (PCC) in 2019.
 26. The GDC confirmed that it was withholding the IOC and PCC determinations under section 31(1)(g) and section 40(2) of the FOIA, and that other relevant information was exempt under section 21(1) as it is already accessible to the complainant.

27. With regard to the part of question 2 which was for the GDC's response to concerns raised, the GDC advised that the legislation does not have any provision which allows parties to comment or respond to a Practice Committee's determination. The GDC had, however, advised the complainant of the steps it took as a result of the 2019 determination.
28. The Commissioner considers that the GDC's new interpretation of the request – that it includes the specific under-guise investigation case that has been discussed – is appropriate. He also considers that there was an opportunity for the GDC to check its original interpretation of the request when it received the complainant's request for an internal review².

Scope of the case

29. The complainant contacted the Commissioner on 20 May 2021 to complain about the way his request for information had been handled.
30. In view of the GDC's subsequent response to the complainant, the Commissioner has considered whether the relevant information that the GDC holds is exempt information under section 21, section 31(1)(g) and section 40(2) of the FOIA, and the balance of the public interest where appropriate.
31. The Commissioner has also considered whether, on the balance of probabilities, the GDC holds any further information within scope of the complainant's request.
32. Finally, he has considered the timeliness of an aspect of the GDC's response.

Reasons for decision

Section 21 – information accessible to applicant by other means

33. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the
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² <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

information communicated to them if it is held and is not exempt information.

34. Section 21(1) of the FOIA says that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
35. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.
36. The information to which the GDC has applied section 21(1) is range of published articles and two blog posts about the 2016 investigation referred to above. The articles are published by a range of bodies, such as Dentistry Online and the New Law Journal and the GDC published the blog posts on its website.
37. The GDC has provided the complainant with links to this information in its correspondence to him.
38. It is not clear to the Commissioner that the GDC would itself hold the specific information published by the separate bodies; presumably those bodies drafted those articles themselves, albeit drawing on the facts of the investigation in question. However, the GDC published its two blog posts and could be said to hold that information itself.
39. Where the GDC holds the information that has been published, the Commissioner is satisfied that the complainant is able to access this information themselves and that the information therefore engages section 21(1) of the FOIA.

Section 31 – law enforcement

40. In its submission the GDC has confirmed it is relying on section 31(1)(g) in respect of both the IOC determination and the PCC preliminary meeting determination. It has provided this information to the Commissioner.
41. The Commissioner understands that the IOC and PCC are statutory Committees of the GDC, with the PCC being one of three Practice Committees. The role of IOC is to assess the nature and substance of any risk to the public in all the circumstances of a case and to consider whether it is necessary for the protection of the public, is otherwise in the public interest, or is in the registrant's own interests to impose an interim order on their registration. The role of the PCC is discussed in more detail below.

42. Under section 31(1)(g) of the FOIA, information which is not exempt from disclosure by virtue of section 30 (investigations and proceedings) is exempt information if its disclosure under the Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
43. The GDC has confirmed that it considers that the applicable purposes under subsection 31(2) are (b), (c) and (d) – respectively, the purpose of ascertaining whether any person is responsible for any conduct which is improper, the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise, and 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 they are, or seek to become, authorised to carry on.

The GDC's functions for the purposes of subsections 31(2)(b), (c) and (d)

44. For the exemption to be engaged, the Commissioner requires the functions identified by the public authority in relation to section 31(1)(g) to be functions which are specifically entrusted to the GDC to fulfil.
45. In its final submission to the Commissioner, the GDC confirmed that it is withholding copies of the IOC determination and the PCC determination under section 31(1)(g) and that the Dentists Act 1984 has conferred upon it the appropriate regulatory functions.
46. The Dentist Act 1984 defines the GDC's role and powers as follows. The GDC registers qualified dental professionals, sets and enforces standards of dental practice and conduct, protects the public from illegal practice, assures the quality of dental education and investigates complaints (see: <https://www.gdc.uk.org/about-us/our-organisation/statutory-functions>).
47. In this case the Commissioner is satisfied that the GDC has been formally tasked by the Dentists Act 1984 with the statutory functions under subsections 31(2)(b), (c) and (d).

Likelihood of envisioned prejudice occurring

48. From its submission to the Commissioner, it appears that the GDC considers the envisioned prejudice 'would be likely' to occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.

Nature of envisioned prejudice

49. The GDC has explained that the purpose of the PCC preliminary meeting (associated with the PCC determination information) is for the Committee to make directions to the parties as to the progress of a case. These meetings are a pre-cursor step to final proceedings before a FtP Practice Committee are undertaken under rule 51 of the GDC's Fitness to Practice Rules 2006. This clearly states that these meetings are to be held in private.
50. PCC meetings are conducted as part of the GDC's regulatory proceedings to determine whether a registrant's fitness to practise as a dental professional is impaired. Under its governing legislation, such meetings can only be attended by the panellists or Chair of the Practice Committee and parties to proceedings. Preliminary meetings are not open to the public and, unlike other hearings such as IOC hearings, resumed hearings or substantive hearings, where there is a public interest in these determinations being published, the GDC is not legally required under either its primary or secondary legislation to publish the details of any decisions made during a preliminary meeting.
51. Although the GDC's submission has confirmed it is relying on section 31(1)(g) in respect of both the IOC determination and the PCC determination, its section 31 discussion focusses on the PCC meeting determination. However, in a discussion of its reliance on section 40 elsewhere in the submission, the GDC states that in cases where the IOC meeting resulted in a 'no order' outcome, such as the specific case discussed, the fact of the 'no order' (if the Commissioner understands the submission correctly) would be included on the Hearings page of the GDC website for one month but would not be included against the registrant's online registration. The IOC determination itself would not be disclosed in line with paragraph 28 of the GDC's Disclosure and Publication Policy, despite the IOC meeting having been held in public.
52. The Commissioner has gleaned from the GDC's fresh response to the complainant and the public interest arguments in its submission that the prejudice that it envisions through disclosing the two determinations is the erosion of industry and public confidence in the GDC as the dental profession's regulator.
53. The GDC's view is that disclosing the information would be likely to erode public and industry confidence in it as the regulator because disclosing the information is contrary to legislation and its Disclosure and Publication Policy. It would be likely to deter individuals from raising concerns in the future if they felt there was the possibility that the GDC might release information into the public domain, contrary to its policies (with regard to the IOC determination) or the legislation (with regard to the PCC determination).

54. The matter with which the withheld information is associated has concluded. It could therefore be argued that because the matter was no longer 'live' at the time of the request, disclosing the information would not prejudice the GDC's functions in that specific case. However, the Commissioner accepts that disclosing the information may have the more general effect of dissuading individuals from bringing concerns to the GDC in the future, if they thought there was the chance that related information would be disclosed.
55. Having considered all the circumstances of this case, the Commissioner has decided that the GDC was correct to withhold the information under section 31(1)(g), by reference to subsections 31(2)(b), (2)(c) and (2)(d), because disclosure would be likely to prejudice its ability to exercise its statutory functions. He has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

56. In its submission to the Commissioner, the GDC has acknowledged that there is a public interest in knowing about the GDC's use of private investigators and the 2016 case discussed in this notice. There is also a public interest in transparency and accountability of the GDC as the regulator of dental professionals.
57. In correspondence to the Commissioner, the complainant has argued that if FTP panellists expressed reservations about under-guise investigations as a general tactic employed by the GDC, this is extremely pertinent information that should be in the public domain.

Public interest in withholding the information

58. The GDC notes that information about its FtP procedures, which the GDC publishes, discusses both the stages which are considered in private and those that are held in public. In the 2016 case associated with the withheld information, this was a hearing held in private between only those parties entitled to be present. The GDC considers that releasing this information into the public domain outside of legislative obligation and the GDC's Disclosure and Publication policy would be likely to erode industry and public confidence in the GDC as the profession's regulator. By nature, the GDC says, these meetings are intended to discuss the preparations ahead of a public hearing. They may include sensitive information such as which parts of the hearing should be discussed in public and private and special measures for vulnerable witnesses. The GDC argues that disclosing the information would deprive the relevant parties of a safe space to enter these discussions.

Balance of the public interest

59. With regard to the complainant's argument, the GDC has stated that its use of under-guise investigations is extremely rare. The Commissioner has not been presented with evidence to suggest that that is not the case. Indeed, it is supported by the fact that the GDC has not been able to identify any other information relevant to this request or the request considered under IC-107651-B6J6.
60. The Commissioner agrees with the GDC that any wider public interest that there is in the GDC's use of under-guise investigations, generally and in one specific case in 2016, has been met through the information already in the public domain. There is greater public interest in the public and the dental industry having confidence that the GDC will not disclose information such as the information in this case and that they will have a safe space in which to discuss their concerns. This in turn contributes to the GDC's ability to carry out its functions robustly. As such, the Commissioner finds that the public interest favours withholding the information to which the GDC has applied section 31(1)(g) of the FOIA.

Section 40 – personal information

61. 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.
62. In this case the relevant condition is contained in section 40(3A)(a)³. 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 UK General Data Protection Regulation ('UK GDPR').
63. The first step for the Commissioner is to determine whether the withheld information 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.
64. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

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

67. 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.

68. 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.

69. In this case, both the 2017 IOC determination and the 2019 PCC determination name the registrant, give their registration number and discuss the specifics of their case throughout. Other individuals are also named in the material.

70. In its final submission, the GDC has argued that other information contained within the documents such as details of the investigation and facts pertaining to it would be likely to make it possible to identify the individual if the information was to be put into the public domain under FOIA. The Commissioner considers that it is possible that individuals known to the registrant concerned, or who work in the dental industry, for example, may be able to identify who the information concerns by piecing together information in the released documents with information already in the public domain and what they themselves may already know.

71. In the circumstances of this case and having considered the withheld information, the Commissioner is therefore satisfied that the information relates to a specific registrant, and other individuals. He is satisfied that this information both relates to and identifies the individuals' concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

72. The fact that information constitutes the personal data of identifiable living individuals 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.

73. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

75. 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.

76. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

77. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

78. The Commissioner considers that the lawful basis most applicable is 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"⁴.

⁴ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second

79. In considering the application of Article 6(1)(f) of the UK GDPR 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 subjects.
80. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

81. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

Is disclosure necessary?

82. '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. Disclosure under

sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

83. The complainant has an interest in the GDC's use of under-guise investigations and that is a valid interest for them to have. To gain more insight into issues surrounding an example of one such under-guise investigation, disclosing the withheld information would be necessary.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

84. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

85. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

86. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

87. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

88. The Commissioner is satisfied that the registrant concerned would have the reasonable expectation that information that discusses a GDC investigation about them, in detail, would not be put into the public domain. He considers that disclosure would be very likely to cause that individual unwarranted damage or distress.

89. The investigation associated with the individual and the GDC's use of under-guise investigations has concluded and been resolved. The public interest has, in the Commissioner's view, been addressed by that

investigation and through published comment and articles, including the GDC's own blogs on the matter.

90. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
91. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
92. The Commissioner has therefore decided that the GDC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 1 – general right of access to information held by public authorities

93. As noted, under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
94. And as has been discussed, during the course of this investigation the GDC widened its interpretation of the request and confirmed it did hold some information which it considers to be exempt information, and which has been discussed above.
95. The Commissioner has considered whether, on the balance of probabilities, the GDC holds any further information within scope of the complainant's request.
96. Question 1 of the request is for any briefing the FtP panellists received about the use of these under-guise investigations as a general GDC tactic and when the panel received this.
97. In its initial submission, the GDC says that it undertook various searches for information within the scope of the request, and liaised with long-term members of staff, but was unable to locate any information in relation to FtP panellists being briefed (or resigning or asking not to hear a case where under-guise visits were part of the process).
98. Because under-guise investigations make up such a small proportion of all investigations that it undertakes, the GDC believed it was unlikely that there would be specific information relating to it formally advising

FtP panellists of this process, or briefing them on what is an investigative, and therefore operational, decision. FtP panels are independent of the GDC and, while training is provided, the panel does not cover operational decisions or concerns at such a granular level.

99. Following the three requests it received from the complainant (ie the request in this case and the two separate cases), the GDC says it liaised with various teams and team managers across the GDC. The Hearings team, who oversee the FtP panellists, and the In-house Legal Advisory Service were asked if they held any information which fell within the scope of his request[s]. The members of staff were long serving and were not aware of any information the GDC held. A search through all of the training agendas for FtP panellists was carried out. Training had been provided but this was broader and covered entrapment and registrants working out of scope. The training did not cover the GDC's use of under-guise investigators as it was an organisational decision which did not require the input of FtP panellists.
100. The GDC says that, because it was unable to locate any information relating to FtP panellists being advised of the GDC's use of under-guise investigators, and was unable to advise the complainant when the use of under-guise investigators was sanctioned, it was unable to answer the second part of question 1, namely: '...was this prior or after the use was sanctioned by the senior GDC team?'
101. The Commissioner is satisfied that the GDC carried out appropriate searches for any information within scope of question 1 and that, on the balance of probabilities, does not hold this information.
102. Question 2 of the complainant's request is for (i) all occasions when FtP panellists expressed disapproval at the use of under-guise investigations and (ii) the GDC's response to any concerns.
103. With regard to the first part of question 2, the GDC noted that, as it had explained in its background information, FtP panellists are involved at the final stages of the process, when the case goes to a public hearing. limited number of cases which use under-guise investigations, even fewer reach the final stage of the FtP process. To identify what information was held the GDC says it carried out the following searches:
 - The published determinations where under-guise investigations were used to check whether the panel or panel members had objected or expressed their formal disapproval; and
 - An electronic search of panellist feedback that pertains to hearings using the search term 'under-guise' and 'underguise'.

104. The GDC said that these searches brought back no information which highlighted FtP panellists' disapproval of the use of under-guise investigations.
105. With regard to the second part of question 2 which was for the GDC's response to concerns raised, the GDC advised in its final submission to the Commissioner that the legislation does not have any provision which allows parties to comment or respond to a Practice Committee's determination. The GDC had, however, advised the complainant of the steps it took following that determination.
106. The Commissioner again considers that the GDC has carried out adequate searches for information relevant to the first part of question 2 and could not hold any information within scope of the second part. He is therefore satisfied that, on the balance of probabilities, the GDC does not hold any further information within scope of question 2 of the complainant's request.
107. The GDC had subsequently identified further information within scope of question 2 because it had widened its interpretation of this part of the request, not because it had carried out inadequate searches initially.
108. Question 3 of the request is for all occasions where FTP panellists resigned or asked to not hear a case where under-guise investigations were part of said case, and the reasons the panellists gave not to hear such cases.
109. In its submission the GDC has confirmed that it was unable to find any recorded information or incidents recollected of panellists resigning or refusing to hear a case where under-guise investigations took place. It asked the member of staff responsible for overseeing FtP panellists and hearings. They carried out an electronic search of panellist feedback using the term 'under-guise' and 'underguise' and found no information within the scope of the request in the directory. The staff member also reviewed the hearing determinations for relevant information. The GDC says that FtP panellists may comment on evidence provided but not the use of under-guise investigators.
110. In addition, the GDC says, emails in its system are only held for one year before being automatically deleted and as it has not carried out any under-guise investigations over recent years it is highly unlikely to have been raised by FtP panellists over the period.
111. The Commissioner accepts the GDC's reasoning and the searches it has carried out and, given the specifics of the question, he is satisfied that the GDC does not hold any information relevant to question 3.

112. More generally, in its submission the GDC advised that all the individual questions from the three requests it received from the complainant were combined and forwarded to the following teams or team Managers/Heads:

- In-House Appeals and Criminal Enforcement
- In-house Legal Advisory Service
- Finance
- External Communications
- Policy
- Hearings

113. The GDC says it asked long-standing members of staff from the areas of business who would be most likely to hold relevant information and whether they recalled FtP panellists being advised about the use of under-guise investigators. Searches were made on their system for any information held, including training information and with regards to the legal team, any briefings given. No information within the scope of the request was identified. As under-guise investigations are used as a last resort and are not used for the vast majority of cases, this would not have had a high priority for training or briefing for FtP panellists as a general communication, so the GDC considered it was unlikely there would be information within the scope of the request.

114. Because under-guise investigations are very rarely used, the responses from the various teams the GDC consulted mainly raised the low probability that any information was held other than in relation to the specific case which is discussed above.

115. Due to the low likelihood of the information being held electronically, the GDC next considered whether anything relating to the requests was in off-site storage. Initially, the Records Manager was contacted and asked to carry out an electronic search of the boxes in on-site storage and whether any information within the scope of the request[s] may be labelled to particular boxes. Of the 3,000 boxes, none could be specifically identified so any further work would require a 'lift the lid' search of all boxes which would have fallen outside the £450/18 hour cost/time parameter provided by section 12(1) of the FOIA.

116. Subsequently, the Records Manager provided further information which allowed the discounting of some of the boxes. However, there would still be 1,356 boxes to search which would still fall outside the cost limits of the FOA. The GDC was therefore unable to advise the complainant whether relevant information was held in offsite storage. The matter of the GDC's offsite storage and its reliance on section 12 of the FOIA has been considered under IC-115123-T1Z4.

117. The GDC has identified some information that it holds that is relevant to the request in this case and to which it has applied various exemptions. The Commissioner considers that the GDC has undertaken satisfactory searches for any further relevant information – with regard to this request and the separate but related requests and investigations - and has consulted appropriate staff members. He is persuaded that, on the balance of probabilities, the withheld information is all the information that the GDC holds that is relevant to the request, and that the GDC has complied with section 1(1)(a) of the FOIA.

Section 17 – refusal of request

118. Section 17(1) of the FOIA requires a public authority to inform a complainant of any exemptions it wishes to apply to withhold information within 20 working days of receiving a request. In this case, the complainant submitted their request on 8 April 2021 and the GDC did not issue a refusal notice until 5 January 2022, thereby breaching section 17(1).

Right of appeal

119. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

120. 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.

121. 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

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