

Freedom of Information Act 2000 (Section 50)

Decision Notice

15 December 2006

Name of Public Authority: General Medical Council
Address of Public Authority: Regent's Place
350 Euston Road
London
NW1 3JN

Summary

The complainant requested details of the complaints histories of six named doctors from the General Medical Council (the "GMC"). The GMC refused this request under section 40 of the Freedom of Information Act 2000 (the "Act") on the basis that it constituted the personal data of the doctors in question and that to release the information would breach the data protection principles. It further argued that it would also breach their human rights and therefore a statutory prohibition applied under section 44 of the Act. During the course of the investigation, the GMC also submitted that it owed a duty of confidence to the doctors involved and that, as a result, an exemption under section 41 of the Act applied. It also submitted that a section 31 exemption may be applicable as disclosure of the requested information could harm the GMC's ability to effectively regulate doctors. Having considered both parties submissions and conducted a thorough investigation, the Commissioner found that the exemption under section 40 of the Act was applicable and that the GMC had therefore been right to withhold the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

The Request

2. On 1 February 2005 the following information was requested from the GMC in accordance with section 1 of the Act:
"Whether [any of six named] physicians [...] have been the subject of a complaint or other event indicating unsatisfactory conduct, and if so, the circumstances thereof."

3. Three of the doctors to which the information request related were named when the request was made, while the remaining three had been mentioned in an earlier letter to the GMC dated 30 November 2004.
4. In a letter dated 11 February 2005, the GMC stated that the information was exempt under sections 40(2) and 44 of the Act.
5. The exemption under section 40(2) was applied because it was felt that the information requested contains the personal data of a third party and it would breach the Data Protection Act 1998 (the "DPA") to disclose this information. The GMC contended that disclosure of the requested information would breach the data protection principles (the "principles"), specifically the First Principle which requires that the processing of personal data is fair and lawful.
6. The exemption under section 44 was applied because the GMC argued that disclosure of this type of information would be in breach of Article 8 Convention rights incorporated into the Human Rights Act 1998, which provides for the right to respect for privacy and family life, and therefore was prohibited by enactment.
7. The complainant asked the GMC to review this decision on 14 February 2005.
8. The GMC carried out the review and reported the decision to uphold the exemptions under sections 40(2) and 44, along with a further explanation, in a letter dated 18 February 2005.
9. Consequently, the complainant applied to the Information Commissioner on 22 February 2005 for a decision as to whether the GMC's decision to withhold the information was in accordance with the requirements of Part I of the Act.

The Investigation

Scope of the case

10. On 22 February 2005, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the exemptions had been applied appropriately and, consequently, whether the information should be released.

Chronology

11. The Commissioner contacted the GMC on 28 April 2005 to ask for a further explanation as to the reasons for applying the exemptions.
12. The GMC responded on 18 May 2005, providing a further explanation of the exemptions under section 40 and 44 of the Act, along with some further information about the GMC's complaint handling procedures. This included an explanation of the treatment of complaints under the old regime and the new rules (introduced in November 2004) under the Fitness to Practise system.

13. On 26 May 2005, the Commissioner wrote again to the GMC asking for clarification as to when information related to complaints received against doctors was released into the public domain and in what circumstances details of complaints would not be disclosed.
14. In its response of 31 May 2005, the GMC confirmed that details of complaints received against doctors which are closed at an early stage, namely when the GMC consider there is no case to answer, will not be placed in the public domain.
15. Following extensive analysis and consideration of both the GMC's and the complainant's submissions, as well as relevant background material, the Commissioner sought legal advice as to the applicability of the exemptions applied by the GMC.
16. Further analysis and consideration followed the receipt of this advice and the further investigation into the GMC's complaints procedures which had taken place. On 30 March 2006, the Commissioner contacted the GMC for some further information about the complaints procedure. In particular, the Commissioner requested some details as to when the GMC may refuse to look at a complaint. Upon receiving this information, the Commissioner consulted the GMC's website for more information about the Fitness to Practise system.
17. On 20 July 2006, the Commissioner issued a preliminary decision notice. This provided the parties with a set time limit within which to provide further arguments to the Commissioner if they were dissatisfied with this preliminary decision.
18. Both the GMC and the complainant took advantage of this, submitting their responses on 16 and 4 August 2006 respectively. These submissions were analysed and considered prior to the issue of this Decision Notice.

Analysis

Exemption

19. During the course of the request and the subsequent investigation by the Commissioner, the GMC has relied upon a number of exemptions under the Act in withholding the information. These are sections 40, 44, 31 and 41. The exemptions are dealt with in turn below.

Section 40

20. The exemption under section 40(2) of the Act is designed to prevent the disclosure of information to any member of the public which would breach the DPA. In this case, the GMC has submitted that the information held on the six doctors would breach the principles, specifically the First Principle which requires that the processing of personal data is fair and lawful. The full text of the relevant part of the section 40 exemption can be found in the Legal Annex at the end of this Decision Notice.

21. In dealing with this case, the Commissioner would like to make it clear that discussing the complaints histories of the six doctors in question does not necessarily mean that any of the six doctors are or have been the subject of a complaint or complaints.
22. In order to rely on this exemption, the information requested must constitute personal data. The Commissioner has therefore considered whether information about the number of complaints and the details of any such complaint received against a particular doctor constitutes personal data of the doctors. To establish this, section 1(1) of the DPA which contains the definition of personal data has been considered. Section 1(1) of the DPA provides the definition of personal data which is data that relates to a living individual and from which that person can be identified. Again, the relevant text of this section of the DPA is reproduced in the Legal Annex.
23. Taking into account the definition of personal data, the Commissioner has considered whether the information requested could constitute an individual's personal data. The conclusion is that the information requested by the complainant is the personal data of the six doctors in question, as the information would relate to a living individual who could be identified from the substance of the complaint. The information contained within any complaint would also be likely to provide some significant and biographical information about a living individual.
24. In addition, the Commissioner finds that the number of complaints received against any of the six doctors would also constitute their personal data. As above, details as to whether a complaint had been received against a particular doctor or not would also constitute significant and biographical information about a living individual. The GMC holds information concerning complaints against doctors by recording it against the register of doctors. Therefore, the information is recorded in such a way that it is positively recorded that no complaints have been received against a doctor and this therefore constitutes his/her personal data.
25. Having established that the information requested does constitute personal data, the Commissioner has therefore gone on to consider whether its disclosure would breach the DPA, in particular the First Principle which provides that disclosure must be fair and lawful. This is examined in detail below.

Potential disclosure of details of complaints

26. In coming to this decision, the Commissioner has reviewed the GMC's complaints handling functions. It has the power to investigate complaints in its statutory remit, including any complaint that a doctor's fitness to practise may be impaired by virtue of misconduct, ill-health, deficient performance, a conviction or as a result of a decision from another regulatory body. This means the GMC deals with a variety of complaints against doctors which cover both their professional performance and their private lives. Not only can the GMC investigate complaints about a doctor's professional judgment and treatment of patients, but it can look

at complaints about allegations of criminal activity for example, as well as looking into health issues such as mental illness and addiction.

27. The Commissioner is satisfied that disclosure of this type of information would breach the DPA in that it would be contrary to the first data protection principle. It would be unfair and unlawful to release the details of any complaints that may have been received against the six doctors. The disclosure of any such complaints would be likely to infringe the Data Protection rights of the doctor, as well as potentially the complainant and any relevant third party. As any complaint will necessarily be focussed on the doctor in question, it would be impossible to redact the details of the complaint in such a way as to satisfy the First Principle.
28. While doctors are acting in a public capacity in discharging their duties (whether in the private or public sector), the Commissioner recognises that complaints received and investigated by the GMC can involve details of a doctor's private life. Further, allegations regarding their professional performance may also be unfounded and/or malicious. Were such details publicly available, this may harm a doctor, even if it were subsequently found that there was no case to answer and this fact had been explicitly stated upon disclosure of the information.
29. The GMC's Fitness to Practise procedure's are divided into two separate stages, namely 'investigation' and 'adjudication'. During the investigation stage, it investigates cases to assess whether they need to be referred to adjudication. The adjudication stage consists of Fitness to Practise panel hearing those cases which are referred forward.
30. Upon receiving a complaint, the GMC decides whether there are issues which require further investigation and, if so, what form this should take. If the issues raised in the complaint do not directly relate to the doctor's fitness to practise then the complaint can be referred for investigation at a local level, for example by the doctor's employer. Where concerns potentially raise questions about a doctor's fitness to practise, the complaint will be investigated further and the doctor and his/her employer will be provided with details of the complaint. Further investigation is dependent on the complainant's consent.
31. At the end of the investigation, there are a number of actions that can be taken, including issuing a warning to the doctor or referring the case to a Fitness to Practice Panel. This is the final stage of the procedure which takes the form of a hearing which is held in public, unless it is hearing confidential information about a doctor's health. A fuller explanation of these procedures can be found on the GMC's website.
32. It has been noted from the above outline of the GMC's procedure that disclosure of a complaint to a member of the public under the Act may create an anomaly whereby the doctor is not yet aware that a complaint has been lodged. Until the complainant provides consent for the doctor to be notified, the doctor would be unaware that a complaint had been made. It would clearly be unfair for a member of the public to be able to access details of complaints made against a doctor before the doctor was him/herself aware of a complaint being made.

33. Once the GMC has determined that there is a case to answer under its Fitness to Practise regime, details of the complaint would usually enter the public domain following the public hearing. However, where the GMC feels that it would be in the public interest to do so, it can exceptionally release details of the complaint into the public domain at an earlier stage. The Commissioner is satisfied that this is a proportionate approach. It should prevent malicious or unfounded complaints from reaching the public domain and unfairly prejudicing the ability of a doctor to attract and treat patients, while similarly allowing those complaints which warrant investigation to be publicised in due course.
34. At present, the doctors in question have no expectation that details of complaints would be made public if the complaint has been closed off at an early stage. In view of this, it would be unfair for details of the complaints to be released without first notifying the doctors of this.

Potential disclosure of numbers of complaints

35. The Commissioner has given some consideration as to whether the numbers of complaints received against the six doctors could be disclosed, even where this number may be zero. Firstly, the Commissioner has studied whether the information on the doctors' complaints histories, namely the details of any complaints and the numbers of complaints received, can be separated.
36. Having considered the evidence, the Commissioner believes that it is possible to separate the number of complaints from the details of any complaints received. As stated above, it has been established that the number of complaints received against a doctor is the personal data of that doctor. So, the Commissioner has gone on to consider whether to disclose this information would breach the First Data Protection Principle. In considering this point, the Commissioner has again taken into account the wide range of complaints which the GMC can investigate and the information that is already in the public domain as regards doctors.
37. The GMC currently only places certain information about doctors into the public domain. This information is listed as being a doctor's name, medical qualification and date of registration, with a recent change meaning that the number of public domain complaints and their outcomes are also now publicly accessible. This implicitly creates an expectation that other information, such as complaints which are closed before they reach a public hearing, will be treated as confidential.
38. In reaching a decision in this matter, much thought has been given as to whether the disclosure of a bare number, in this case to represent the number of complaints received, could be unfair. The deliberations have considered whether the situation involving a doctor's complaint history is analogous to other statistical information which has been released into the public domain. Currently, only complaints which have proceeded to a public hearing are routinely made a matter of public record, but the total number of all complaints received is not disclosed to the public.
39. In particular, the Commissioner has studied whether the number of complaints received against a physician is similar to the mortality rates for surgeons, details

of which are published in some circumstances. Having studied the publication of such statistics, the Commissioner is aware that the relevant public authorities provide some context when disclosing this information. For example, an explanation of the reasons for a high mortality rate could be provided where a surgeon works with a high risk group, such as the elderly or infants. These mitigating circumstances allow the public to develop a much clearer picture of the situation rather than assuming that a particularly high mortality rate means that a surgeon or hospital is underperforming.

40. Having investigated some possible comparisons with other potentially similar types of statistical information, the Commissioner is not satisfied that the requested information can be categorised in the same manner. While there are some similarities between a surgeon's mortality rates and the numbers of complaints received by a doctor, the statistics do not cover identical fields.
41. On the one hand, mortality rates are essentially factual and can be contextualised relatively easily. On the other hand, complaints to the GMC are not necessarily grounded in fact and could therefore be malicious or vexatious. There could also, for example, be multiple complaints about the same issue. Providing the number of complaints received by a particular doctor could therefore provide a misleading impression of the doctors without any context.
42. Having established this, the Commissioner has gone on to consider whether it would be possible to provide an appropriate context for the information. However, given the wide remit of the GMC in dealing with complaints about doctors, the Commissioner has concluded that it would be extremely difficult to provide any kind of context for the information without revealing the nature of the complaint. Having already decided that disclosure of the details of the complaints would breach the first principle, the Commissioner could not accept this as a potential solution.
43. The Commissioner has gone on to consider whether it would be possible to provide some sort of generic context, detailing the types of complaints that it can investigate and providing reasons why individual doctors might have particularly high numbers of complaints against them. However, providing such details when disclosing numbers of complaints would be entirely artificial as it would not be providing a suitably accurate context. In other words, any explanation would, by the nature of the anonymising process, be largely hypothetical and not always based on the facts of the matter. Such conjecture would not provide a useful, factual basis for patients to assess the competence of a doctor and, in considering the potential consequences for the doctors of any such disclosure, the Commissioner does not believe that it would be fair.
44. In assessing the fairness of disclosing the information, the Commissioner has also taken into account the fact that the GMC are the body for regulating doctors. The complainant has submitted that the GMC's procedures are flawed. The Commissioner is aware of the recent criticism of the complaints handling procedures of the GMC, and that steps are being taken to remedy this. While there is a legitimate public interest in making sure that the public are protected from any malpractice by doctors, the Commissioner does not believe that the First

Principle rights of the doctors should be breached in order to make available information which would not particularly assist the public in assessing their competence. Notwithstanding the complainant's allegations of the flawed nature of the current complaints handling system, there is a clear mechanism in place

45. Taking into account all of the above, the Commissioner is satisfied that it would breach the First Data Protection Principle to disclose the bare numbers of complaints received against the six doctors in question.
46. As a result, release of this information to the complainant or the general public would not only be unfair, but would also be unlawful as it would amount to a breach of section 6 of the Human Rights Act 1998, which provides that it is unlawful for a public authority (in this case the GMC) to act in a way which is incompatible with a Convention right (in this case Article 8 ECHR).
47. Upon deciding that the section 40 exemption is a valid reason with which to withhold the requested information, the Commissioner has not therefore gone on to consider whether the exemption cited under section 31, 41 or 44 are valid.

The Decision

48. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

49. The Commissioner requires no steps to be taken.

Other matters

50. Although it does not form part of the Decision Notice, the Commissioner has considered whether details of any complaints received against the doctors in question involves third party data relating to another individual, such as any complainant or patient. It is likely that the details of complaints received would involve third party personal data, including sensitive personal data. While this complaint has been determined without exploring the implications of this, it appears very likely that details of complaints would therefore be exempt from disclosure under section 40(2) of the Act.
51. In reaching this decision, the Commissioner has taken into account the Article 8 rights of the doctors in question, any complainants and/or other third parties whose personal data the complaint would likely constitute in the event of any

complaints being received. In this case, disclosure of the requested information (whether to the complainant or the general public) would be an unnecessary and disproportionate interference by a public authority in individuals' private lives as it cannot be justified by any of the reasons provided for in Article 8(2) ECHR and, as such, would be incompatible with that right. Further, in the Commissioner's view, were the public allowed access to details of doctors complaint histories on demand by virtue of the Act this would likely erode complainants' confidence that their personal details would be kept private. This may lead to less complaints being submitted and reduce the ability of the GMC to effectively regulate the medical profession.

Right of Appeal

52. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 15th day of December 2006

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 40 of the Act states:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is –
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Data Protection Act 1998

Section 1(1) DPA provides:

In this Act, unless the context otherwise requires –

"personal data" means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;