

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 26 February 2008

**Public Authority:** General Medical Council  
**Address:** Regent's Place  
35 Euston Road  
London  
NW1 3JN

### Summary

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The complainant requested information from the GMC in relation to a complaint and subsequent investigation and hearings concerning a named doctor. The GMC did not confirm or deny whether it had received any previous complaints against the doctor under sections 40(2) and 41. The GMC supplied some information, exempted *in camera* transcripts under sections 40(2) and 41 and claimed that the rest of the information requested was not held. The Commissioner is satisfied that the information withheld was correctly exempted under section 40(2) and that the remainder of the information is not held. However, the Commissioner has concluded that GMC breached section 17 of the Act because it failed to provide an adequate refusal notice within the 20 working days. No further steps are required.

### The Commissioner's Role

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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

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2. The complainant wrote to the General Medical Council (GMC) on 15 April 2005 to request the following information regarding a specific complaint to the GMC in relation to a named doctor:
  - (1) "Transcript of the hearing which took place in January 2001
  - (2) Transcript of the hearing which took place in August 2001
  - (3) All documents listed pursuant to a particular GMC rule

- (4) All medical reports / opinions obtained in relation to this doctor's treatment of [named individual]
- (5) Has the GMC ever been provided with any evidence that [named individual] had been sexually assaulted or abused by [named doctor]
- (6) Has the GMC ever been provided with any photographs of [named individual]
- (7) Did [named doctor] admit any charges in connection with [named individual]
- (8) In November 2000 the Trust who had previously employed [named doctor] found 11 boxes apparently hidden away by this doctor, these boxes contained numerous patients' records and photographs, I therefore request access to any documents / photographs relating to [named individual]
- (9) Any information what so ever that under this new act I am now able to gain access to"

NB The request has been paraphrased in parts to protect the identity of the individuals concerned

3. On 19 April 2005, GMC acknowledged receipt of the request and on 17 May 2005, wrote again to the complainant to say that it was taking longer to comply with the request than anticipated and that the time period allowed may not be met due to the complexity of the request. The GMC apologised and said that a response would be sent as soon as possible.
4. The response was sent on 19 May 2005. The GMC responded to each part of the request in turn. The original numbering of the request is kept for ease of reference.
  - (1) Parts of the transcript, which recorded public hearings, were supplied. However, the remaining parts recorded hearings that were held in private and the GMC refused to supply these parts of the transcripts citing two exemptions, section 40(2) personal information and section 44, prohibitions on disclosure. In respect of section 40(2), the GMC explained that this section exempts information that relates to a third party, release of which would breach the principles of the Data Protection Act 1998. Specifically in this case, the first principle that processing of personal information should be fair and lawful. The GMC added that disclosure would not be fair and lawful because the doctor had an expectation that the hearing would be held in private. For section 44, the GMC again referred to the Data Protection Act as the enactment that would prohibit disclosure.
  - (2) The GMC explained that this transcript was for a hearing held in private and refused to supply the information for the same reasons as those above.
  - (3) No explanation in relation to the Freedom of Information Act was given.
  - (4) The GMC claimed that it did not hold this information.
  - (5) The GMC claimed that it did not hold this information.
  - (6) The GMC claimed that it did not hold this information.
  - (7) The GMC claimed that it did not hold this information. However, it added that during the hearing of January 2001, the doctor did admit one charge that related to their place of work.
  - (8) The GMC claimed that it did not hold this information but advised the complainant to direct this part of the request to the Trust.

- (9) The GMC explained that it was unsure what information the complainant required and asked for clarification.
5. The complainant responded by letter dated 31 May 2005. In relation to points (1), (2) and (3), the complainant put forward arguments unrelated to the Act. For points (4), (5), (6), (7) and (8) the complainant claimed that the information had been obtained by Field Fisher Waterhouse Solicitors in the name of GMC and therefore, GMC were the holders of that information. The complainant also provided clarification in relation to point (9) requesting the following:
- (9) Was [named doctor] ever accused of any wrong doing or charged with any offences prior to 1998
6. The next communication that the complainant received from the GMC was a letter dated 14 July 2005. In the letter the GMC apologised for the delay in responding, explaining that it had just recently received a response from Field Fisher Waterhouse. The GMC repeated that the requested transcripts were exempt by virtue of the law of confidentiality and the personal information exemption. For point (3) of the request, the GMC still did not provide an explanation in relation to the Freedom of Information Act. For points (4), (5), (6), (7) and (8) the GMC explained that Field Fisher Waterhouse had confirmed that they are no longer in possession of the information. The information had been handed over to another firm of solicitors. The GMC also provided some detail as follows:
- (4) Medical records were handed over to the other solicitors. Field Fisher Waterhouse did not commission any expert reports themselves. The complainant was advised to contact the other solicitors on this matter.
- (5) Field Fisher Waterhouse are not aware of any such allegations.
- (6) Field Fisher Waterhouse are not aware of any such photographs.
- (7) That this had been explained in the GMC's previous letter dated 19 May 2005.
- (8) All such documentation had been handed over to the other solicitors and that Field Fisher Waterhouse had no recollection of any photographs.
- (9) The GMC claimed exemption under section 40(2) personal information and explained that, as this is an absolute exemption, it was under no duty to confirm or deny whether it held this information or not.
7. The complainant responded in a letter dated 18 July 2005. In this letter, the complainant requested that the GMC review its decision not to supply the information requested. The complainant again raised points not related to the Act. The complainant disputed the claims made by the GMC concerning points (4), (5), (6), (7) and (8). Specifically, the complainant contended that Field Fisher Waterhouse obtained witness statements, did in fact commission expert reports, that GMC had not supplied information in relation to points (5) and (7), and that the Trust had sent the boxes of information to Field Fisher Waterhouse and that they did contain photographs. In respect of point (9), the complainant said that it had been well publicised that the advent of the Freedom of Information Act would enable the public to know if a doctor had ever been accused of wrong doing and asked where else would a member of the public acquire this information if not from the GMC.

8. The GMC acknowledged the complainant's request for a review of its decision in a letter dated 29 July 2005 and indicated that a formal response could be expected by 15 August 2005.
9. The review decision, dated 17 August 2005, confirmed that, the remaining parts of the transcripts not already released, were exempt under section 40(2) personal information. Again, no explanation in terms of the Act was offered in relation to point (3) of the request. In response to points (4) and (5), the GMC reiterated that it did not hold this information. For point (6) the GMC said that Field Fisher Waterhouse had advised it that all records were handed over to the other solicitors and so the GMC does not hold the information. For point (7), it stated that if the doctor had admitted charges in relation to the named individual, this would have occurred after the charges were read at the start of the Professional Conduct Committee hearing and confirmed that the doctor did not do so. Again, for point (8), the GMC confirmed that all records were handed over to the other solicitors and so the GMC did not hold the information. For point (9), it was explained that in order to balance the needs of the requestor and third parties there are times when it is appropriate to apply an exemption (although it did not confirm which).

## The Investigation

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### Scope of the case

10. On 5 September 2005, the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The complainant strongly refutes the GMC's contention that it does not hold the information requested and provided several documents that they claim proves that the information is in the possession of the GMC or is held on behalf of the GMC by Field Fisher Waterhouse.
  - That the public has a right to know if a doctor has been accused of any wrongdoing.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

12. The Commissioner telephoned the complainant on 25 May 2006 to inform them that their complainant was now under investigation. The Commissioner also telephoned the GMC to inform it that he would be writing to request that copies of the exempt information be sent to him.
13. The Commissioner followed up the telephone call with a letter dated 9 June 2006, requesting that the GMC supply:

- copies of the exempt information;
  - an explanation (in terms of the Act) in regards to point 3 of the request;
  - a more detailed explanation concerning why release of the information exempted would breach data protection principles;
  - clarification of the relationship between the GMC and the solicitors referred to; and,
  - an explanation as to why the GMC does not hold for its own use, copies of the information originally held by Field Fisher Waterhouse.
14. The complainant wrote to the Commissioner on 21 June 2006 and supplied him with additional information, which although providing background context to the complaint, dealt with matters not directly relevant to the freedom of information request.
15. The Commissioner received a telephone call from the GMC on 27 June 2006. The GMC expressed concern at providing the information to the Commissioner. It stated that the information, in camera transcripts, were highly sensitive and self-evidently non-disclosable. The Commissioner attempted to reassure the GMC that he was experienced in handling sensitive information and had secure facilities for the storage of such information. He pointed out that he could not undertake a thorough and complete investigation without sight of the information in question. The Commissioner offered to issue an information notice, requiring the supply of the information, if that would help the GMC feel more comfortable. The GMC referred to the fact that a public authority had the opportunity to appeal an information notice, which the Commissioner confirmed as accurate. The GMC finally requested that the Commissioner send an email containing assurances that the information would be held securely and either destroyed or returned following resolution of the complaint, which he agreed to do and sent later that day.
16. On 28 June 2006, the Commissioner received an emailed reply explaining that the GMC believed the release of the information would breach the first data protection principle that processing of personal information be fair and lawful. It again expressed the opinion that the information was self-evidently non-disclosable and that it would prefer to resolve the matter without transferring the documents outside of the GMC. It also asked that the Commissioner clarify the legal powers under which he requested the documentation.
17. The Commissioner replied by email the same day and informed the GMC that he would not accept its assertion that the information in question was self-evidently non-disclosable. He explained to the GMC that it was his duty to decide whether the GMC had dealt with the information request in accordance with the requirements of the Act and in order to do so he must have access to the disputed information. In addition, the Commissioner explained that he expected a high degree of cooperation from public authorities and that he would prefer to be provided with information on an informal basis in order to avoid the time and consequent expense of issuing an information notice. However, if necessary he would issue an information notice, which would place a legal obligation on the GMC to provide the information. He directed the GMC to sections 51 and 54 of the Act, which set out his powers in this regard.

18. The GMC's reply was sent by email on 29 June 2006. It pointed out that as regulator with responsibility for compliance with the Data Protection Act, the Commissioner would appreciate its concerns regarding the release of sensitive personal data to third parties and that the GMC took its obligations in respect of confidentiality extremely seriously. It indicated that it would now be prepared to supply the information if the Commissioner would send certain reassurances, namely, that:
  - all appropriate measures would be taken to ensure the security of the GMC's documents;
  - under no circumstances would the documents be scanned or reproduced in any other format;
  - the documents would be returned to the GMC within 21 calendar days of receipt; and
  - under no circumstances would the documents be released to third parties without the GMC's explicit consent.
19. The Commissioner replied by email the same day. The Commissioner informed the GMC that he would prefer to keep copies of the information until the investigation and the period allowed for an appeal of his decision is over, and that if it insisted on the time constraint this would inevitably necessitate the keeping of more detailed notes. However, with this in mind, the Commissioner was prepared to accept the GMC's terms.
20. The Commissioner received a telephone call from the GMC the next day, 30 June 2006. The GMC told the Commissioner that a letter was being sent to him, but that the issue of supplying the information would have to be discussed with senior officials, the Chief Executive and the Director of Fitness to Practise, and that the Commissioner may need to issue an information notice after all.
21. On 7 July 2006, another telephone call was received from the GMC. The issue had been discussed with the Chief Executive and it now wanted to extend the exemptions it is claiming. In addition to section 40(2) and section 41, the GMC also wished to rely on section 32, court records. The GMC stated that it was unlikely to send the information. Following two previous Privy Council decisions, it could not release *in camera* transcripts to anyone. It informed the Commissioner that there might be limited scope for the transcripts to be viewed on site. The GMC also informed the Commissioner that even if he sent an information notice, it was likely that it would challenge the notice and claim that it was an unreasonable request. It repeated its belief that the Commissioner should not need to view the information, because section 32 is class-based and absolute, there is no need to see the actual information to clarify the application of that exemption. The Commissioner was told to expect a letter from the GMC the following week.
22. A letter from the GMC dated 12 July 2006 was received by the Commissioner. The GMC provided the Commissioner a brief description of the procedure for fitness to practise complaints explaining that although its procedure changed in 2004, the pre-2004 procedure applied in this case. The GMC informed the Commissioner that complaints were advanced in private until the doctor appeared

before the statutory adjudication panel, the Professional Conduct Committee (PCC). These hearings were held in public unless the committee agreed to *in camera* sessions, for example to take legal advice or discuss the doctor's health, as happened in the case to which the information relates. The transcripts from the public hearings had been released, but the *in camera* transcripts were being withheld. The GMC referred the Commissioner to Privy Council decisions, namely *Privy Council Appeal No. 49 of 1998: Dr John Roylance (Petitioner) v The General Medical Council (Respondent)*, which states:

“...The appellant now seeks an interlocutory order directing the untranscribed shorthand notes covering *in camera* deliberations of the committee to be disclosed. Their Lordships are satisfied that such an order would be inappropriate. It is acknowledged to be an unprecedented attempt to probe into *in camera* discussions. Counsel submits that the exceptional circumstances of the case warrant such an order. Their Lordships are wholly unpersuaded that this case can be so categorised. If the submission were to be accepted it would seriously inhibit freedom of discussion during *in camera* sessions. It is ruled out in the present case by public interest immunity attaching to the *in camera* discussions of the Professional Conduct Committee. Their Lordships are not satisfied that there are any good and sufficient reasons overriding that immunity...”

23. The GMC also informed the Commissioner that a similar view was expressed in *Privy Council Appeal No.21 of 1999: Dr Emmanuel Dibua Nwabueze (Appellant) v The General Medical Council (Respondent)*. The GMC said that it was unable to meet the Commissioner's request to send the *in camera* transcripts. It went on to explain why it believed the *in camera* transcripts constituted court records and therefore, fell within the exemption as set out in section 32 of the Act. The GMC stated that the PCC is an adjudication body established under statute (Medical Act 1983) which, exercises judicial functions on behalf of the State. That *in camera* PCC transcripts are documents created by a member of the administrative staff of a court for the purposes of proceedings in a particular cause or matter (as defined by section 32(2)(b) of the Act) and that in the context of section 32(4)(a), a court includes any tribunal or body exercising the judicial power of the State. The GMC point out that section 32 is absolute and claim that there are no circumstances in which *in camera* transcripts would be disclosable. As the *in camera* transcripts are self-evidently and absolutely exempt as a class, it is unnecessary for the Commissioner to inspect them and it would be inappropriate for it to release them. The GMC told the Commissioner that it would be happy to provide a formal declaration that the information requested was created by a GMC administrator solely for the purpose of PCC proceedings and that the PCC is a body exercising the judicial power of the State.
24. The GMC also explained to the Commissioner that the *in camera* transcripts are the personal information of the doctor, because the discussions revolved around the doctor's health and fitness to practise and as such, indisputably impact on the doctor's private and professional life. The legal representatives of the doctor had raised objections to the possible disclosure of the transcripts and the GMC believed that it would breach the first data protection principle to release the information because it would not be fair or lawful. The GMC believe that the

- transcripts contain sensitive personal data as described in Part 1 section 2(e) of the Data Protection Act 1998 and that neither conditions set out in Schedules 2 or 3 apply. In addition, the GMC said that the doctor made representations to the Committee with the reasonable expectation of confidence and that disclosure of the information would breach the GMC's common law duty in this regard and so section 41 of the Act applies. Therefore, the information is exempt under sections 32, 40 and 41 of the Act.
25. In regard to the third aspect of the complainant's request for information, which the GMC had failed to refer to in respect of the Act, it acknowledged that it should have done so and provided the Commissioner with its arguments. It inferred that the information to which this aspect of the complaint related was again, the in camera transcripts and repeated its reliance on sections 32, 40 and 41 of the Act.
  26. The GMC provided some explanation in terms of the solicitors involved. It stated that the case against this particular doctor was in two parts, and that information had been received from different sources. At the start of the case, Field Fisher Waterhouse was acting for a complainant in relation to one part and the GMC for the other. The complainant instructed different solicitors, Christian Fisher, and Field Fisher Waterhouse passed on the evidence it had collected to that point. Therefore, Christian Fisher did not act for the GMC and it was not appropriate for the GMC to contact them regarding this information. This was why the GMC did not hold any information in relation to points (4), (5), (6) and (8) of the request. In this letter, the GMC referred to the information it does hold, stating that some is held in electronic form and some held in hard copy within files identified by a case number allocated to the investigation of the named doctor.
  27. In respect of point (9) of the request, the GMC confirmed that it was claiming sections 40(2) and 41 of the Act. That these sections apply because the information consists of the confidential personal data of a third party. Again, it claimed that there is an expectation on behalf of the doctor that this information would remain confidential, that release would breach the first data protection principle and that none of the conditions in Schedule 2 or 3 could be applied.
  28. The Commissioner acknowledged receipt of the GMC's submission on 13 July 2006.
  29. Following a couple of telephone conversations and a letter, updating the complainant, the Commissioner telephoned the GMC on 22 February 2007. He inquired (in relation to point (9) of the request) as to whether there had actually been any previous complaints about the doctor in question. The GMC provided that information to him.
  30. On 19 April 2007, the Commissioner emailed the GMC to inform it that following internal discussions, he had decided to issue an information notice and that the GMC should expect it to arrive the next day.
  31. The GMC telephoned on 19 April 2007 and left a message, the Commissioner returned the call on 23 April 2007. The GMC asked whether there was any potential for further explanation as to why we needed the information, but that it



recognised that there was no statutory duty on the Commissioner to provide that explanation in the information notice. The Commissioner explained to the GMC that he was unclear whether section 32 applied and that in any case, in the original refusal notice, it had cited sections 40 and 41 and he was under a duty to assess the adequacy of the refusal notice and therefore had to decide whether those exemptions applied. He could not do this without having sight of the information. The GMC asked if there were any alternative to sending copies of the information, such as the Commissioner viewing the information on site or whether the GMC could bring the information to the Commissioner's offices. The Commissioner explained that he did not have the resources to visit authorities to view information as a matter of course and that the suggestion that the GMC would escort the information was an unusual one.

32. The Commissioner then received a letter from the GMC dated 24 April 2007. It expressed surprise at the receipt of the information notice and that the Commissioner had not included a reason why he was requiring disclosure of the information, as he was required to do under section 51 of the Act. It said that the Commissioner had not replied to the points raised in its letter of 12 July 2006 and that this made it difficult to decide whether to send the information or to appeal the notice to the Information Tribunal. It asked for the Commissioner's reasoning as a matter of urgency and enclosed copies of the transcripts that had originally been disclosed to the requestor.
33. On 2 May 2007, the Commissioner wrote to the GMC explaining that all the required elements of an information notice were adhered to and that an explanation had indeed been given during the telephone call of 23 April 2007. To avoid any further delay and misunderstanding, the Commissioner enclosed a copy of the telephone file note.
34. The Commissioner received a letter from the GMC, which was also dated 2 May 2007. The letter expressed surprise that the GMC had not received a reply to its letter of 24 April 2007 and repeated its view that the information notice did not comply with the requirements of section 51 of the Act. It declared its opinion that as the notice was defective it could neither comply with the notice nor appeal it to the Tribunal and therefore intended to do neither. The GMC also reminded the Commissioner that it believed that section 32 of the Act applied and that it was happy to supply statements to that effect which would (in its opinion) provide an acceptable solution.
35. On 15 May 2007, the GMC appealed the information notice to the Tribunal and informed the Commissioner by email.
36. On 17 May 2007, the Commissioner telephoned to update the complainant (and followed up with a letter).
37. On 4 June 2007, the complainant telephoned the Commissioner to inform him of an application to be joined to the information notice appeal to the Tribunal.
38. On 14 June 2007, the GMC telephoned the Commissioner to inform him that it would be withdrawing its appeal of the information notice and that it would write to

him shortly to outline how it intended to provide him with the information he requested.

39. On 26 June 2007, the GMC wrote to the Commissioner. It enclosed a letter from the solicitors acting for the named doctor dated 26 June 2007, objecting strongly to disclosure of the transcripts. To reaffirm its belief that the transcripts are 'patently not disclosable under the Act', the GMC referred the Commissioner to Rule 48(2) of the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules Order of Council 1988 S.I. No 2255 (as amended) and the statutory obligation to sit in private in Rule 17(1) of the General Medical Council Health Committee (Procedure) Rules Order of Council 1987 S.I. No 2174 (as amended). It also proposed that it would 'permit' the Commissioner to inspect the withheld portions of the transcripts if he undertook to reassure it that they would be kept confidential and not disclosed to anyone outside his office including, specifically, the complainant. In addition, that they would be securely destroyed following the conclusion of this matter and that the documents would be stored in hard copy only (reassurances that the Commissioner had already given on previous occasions). The GMC also referred the Commissioner to the following:
- section 31(1)(g) in the light of section 31(2)(b)-(d);
  - section 32(2)(b) given that the transcripts were created by the GMC only for the purposes of the inquiry [see Parts IV and V of the 1988 Rules];
  - section 40(2) in that the transcripts contain personal data of the doctor, including sensitive personal data about the doctor's "physical or mental health or condition", and the doctor has, through lawyers, objected to disclosure; and
  - section 41 in that there was an obvious expectation that evidence given in private would remain confidential.
40. 26 June 2007, the complainant telephoned the Commissioner and (amongst other things) informed him that the GMC rules had now changed and that Health Committee hearings are now held in public.
41. On 3 July 2007, the complainant spoke with the Commissioner and asked for a copy of the now redundant information notice, which was duly sent. The complainant also asked for a copy of the Commissioner's response to the Tribunal regarding the appeal of the information notice, however, as the appeal was being withdrawn, the Commissioner asked the complainant to make a formal information request which would be considered through his formal request procedures.
42. On 16 July 2007, the Commissioner sent confirmation to the GMC that the information it sent would be held securely and destroyed at the end of the process, repeating assurances previously given.
43. The complainant wrote to the Commissioner on 16 July 2007, again raising issues that are outside the scope of the Commissioner's remit.
44. On 17 July 2007, the GMC emailed the Commissioner and confirmed that it had officially withdrawn its appeal of the information notice and would arrange for the

- information to be supplied to him. The Commissioner informed the complainant of this development on the same day.
45. The GMC sent copies of the disputed information on 18 July 2007 and the Commissioner acknowledged receipt on 23 July 2007.
  46. During a telephone conversation with the complainant on 17 August 2007, the complainant informed the Commissioner that they could supply copies of letters that would demonstrate that the GMC were in possession of a large amount of information (some 969 pages and photographs) in relation to the complaints about the named doctor. The complainant stated that this proves that the GMC does indeed hold the information requested contrary to its previous claims. The complainant agreed to forward copies to the Commissioner.
  47. The Commissioner received a letter from the complainant dated 20 August 2007, which contained enclosures. The complainant had sent copies of three letters and two extracts from letters. These letters and extracts did indeed seem to indicate that the GMC had in its possession 969 pages relating to the complaints against the named doctor as well as some photographs. The Commissioner acknowledged receipt on 23 August 2007.
  48. On 26 September 2007, the Commissioner contacted the GMC sending a letter clarifying the situation and progress of the complaint. As so much time has elapsed since beginning the investigation, and the issues had become clouded by the difficulties in obtaining copies of the exempted information, the Commissioner felt it helpful to restate the situation as it stood. The Commissioner asked the GMC to confirm its claim that the only information held in relation to the complainant's request not previously released, is the transcripts of the in camera hearings and the number of previous complaints made about the doctor, if any. He asked the GMC if it could provide evidence of what information it holds in relation to this matter and demonstrate that the information is not relevant to the remainder of the complainant's request. He also enclosed copies of the letters and extracts that the complainant had supplied him (with the complainant's permission). He asked the GMC if it could confirm that the information referred to in these letters is, or has been, in the possession of the GMC. He also wanted to know whether it could provide evidence or demonstrate that the information is no longer in the possession of the GMC, indicating why this information is no longer in the GMC's possession considering that the case against the named doctor was not officially concluded. In addition, he asked the GMC to confirm who the GMC had passed the information to, when and why, and whether it could demonstrate that it had followed normal procedure in divesting itself of this information.
  49. The GMC replied to the Commissioner's letter on 15 October 2007. The GMC were able to confirm that it holds a substantial amount of information in relation to the complaints against the named doctor. However, it was at pains to point out that the investigation into the doctor was concerning the doctor's overall fitness to practise and was not just in regard to the individual named in the complainant's request. The GMC informed the Commissioner that it had reviewed the documents put before the Preliminary Proceeding Committee and the Professional Conduct Committee, but no information relevant to the request was

- discovered. The GMC therefore, confirmed that it held no information in relation to points (4), (5), (6) and (8) of the original request.
50. The Commissioner telephoned the GMC on 15 November 2007. He was concerned that the previous letter from the GMC did not sufficiently address the questions that he had posed and he requested a further response, which the GMC agreed to supply. The Commissioner also sent a letter updating the complainant on 21 November 2007.
  51. The Commissioner received a further response from the GMC dated 23 November 2007. In this letter, the GMC once again confirmed that the vast majority of the information it held did not relate to the request. It provided the Commissioner with a list detailing the kind and type of information held. The GMC also confirmed that all information held is still retained, and that information relating to fitness to practise is held indefinitely. In relation to the information held by Field Fisher Waterhouse on behalf of the GMC, the GMC referred the Commissioner to its comments on this matter detailed in its letter of 12 July 2006.
  52. On 29 November 2007, the Commissioner wrote again to the GMC. As he felt there were remaining issues to clarify. Bearing in mind the considerable amount of time it had taken to reach this stage of the investigation, he suggested that the speediest method of concluding this case would be if he visit the GMC at its offices and asked if this would be an agreeable solution.
  53. The GMC telephoned on 3 December 2007 explaining that it was already planning to visit the Commissioner's offices on an unrelated matter and suggested that it would be expedient to meet with him then. In a telephone conversation on 6 December 2007, the Commissioner agreed to the GMC's suggestion.
  54. The meeting between the Commissioner and the GMC took place on 16 December 2007. During the course of this meeting, the GMC satisfied the Commissioner that it held no further information in relation to the original request other than that previously referred to in previous correspondence. However, the Commissioner had raised with the GMC certain questions regarding the involvement of Field Fisher Waterhouse solicitors that he was still unclear about and the GMC agreed to review this aspect.
  55. On 17 December 2007, the GMC wrote to the Commissioner explaining the involvement of Field Fisher Waterhouse and confirming that the solicitors held no information relevant to the original request.
  56. On 7 and 8 January 2008 respectively, the Commissioner updated the complainant and acknowledged receipt of the GMC's letter.

## Analysis

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### Procedural matters

57. Public authorities are under an obligation to either supply the information requested or, issue a refusal notice within 20 working days. The GMC did not supply the information or a refusal notice within the time allowed and therefore, breached section 17 of the Act.
58. Section 17 requires that when refusing to supply information, a refusal notice should state the exemption that the authority is choosing to rely upon and explain why that exemption applies to the information requested. The GMC did not offer the complainant an explanation, relevant to the Act, in respect of point (3) of the request. Therefore, the GMC also issued an inadequate refusal notice in breach of section 17.

### Information not held

59. The GMC claim that in relation to points (4), (5), (6) and (8) of the request, no information is held. The Commissioner has not been presented with, or uncovered, any evidence to suggest that the information requested is in the possession of the GMC or held on behalf of the GMC.
60. The GMC have performed additional searches as requested by the Commissioner (for example see paragraph 49) and have contacted the solicitors to confirm that information is not held by them (see paragraph 6).
61. The complainant supplied the Commissioner with letters and extracts of letters, which they claim, provide such evidence. However, these letters only demonstrate that the GMC was in possession of a large amount of information concerning the complaints made about the named doctor. They do not amount to conclusive proof that the information requested is held.
62. The GMC confirms that it is in possession of 969 pages of information relating to the complaints against the named doctor, but has repeatedly assured the Commissioner that the information held does not relate to the request.
63. The Commissioner is therefore, satisfied that in regard to points (4), (5), (6) and (8) of the request, no information is held.

### Exemptions

64. Originally, in the refusal notice dated 19 May 2005, the GMC sought to rely upon the exemptions set out in sections 40(2) personal information, 41 information supplied in confidence, and section 44 prohibitions on disclosure. However, as the authority did not seek to maintain reliance on section 44 after this time, there has been no need to consider its use and it is therefore, not addressed in this notice.

## Section 40(2) personal information

65. In relation to points (1), (2), (3) and (9) of the request, the GMC has claimed reliance on section 40(2) personal information. Section 40(2) provides an exemption to the duty to disclose information where the information requested constitutes the personal data of a third party, (subject to the provisions of the Data Protection Act 1998). Section 40 is an absolute exemption and therefore, there is no need to apply the public interest test under section 2 of the Act.
66. When considering disclosure or non-disclosure of third-party personal information, an authority is required to consider the data protection principles as set out in Schedule 1 of the Data Protection Act 1998.
67. The first data protection principle requires that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 of the Data Protection Act is met. When considering compliance with the first data protection principle it is necessary to consider what the reasonable expectations of a person would be in relation to how their information would be used.
68. In addition, where the personal data is classified as sensitive personal data, as defined in Part 1, section 2 of the Data Protection Act 1998, then at least one condition in Schedule 2 and one condition in Schedule 3 of the Data Protection Act must be met.
69. As the exempted information consists of transcripts of in camera proceedings of the Health Committee, involving discussions around the named doctor's health and fitness to practise, and the number of previous complaints (if any) in respect of the named doctor – the Commissioner is satisfied that the information exempted falls within the definition of sensitive personal data. The Commissioner is also satisfied that none of the conditions in schedules 2 or 3 are met.
70. The complainant made a point of informing the Commissioner that GMC Health Committees are now heard in public. However, the Commissioner's understanding is that when discussing sensitive or confidential issues, such as a doctor's health, a hearing may still proceed in camera. In any event, at the time of the hearing in question, health committee hearings were held in private (in camera) and therefore, the expectation of the data subject (the named doctor) will have been that the information would remain confidential.
71. As the exempted information concerns the named doctor's fitness to practise and discussions on the doctor's health and that part of the hearing was held in private (*in camera*), the doctor has a reasonable expectation that the information will not be released to the public. The GMC also received strong objections to the release of the information from the doctor's legal representatives and therefore, the Commissioner accepts that it would not have been fair or lawful for the GMC to disclose the information in question.

72. The Commissioner is satisfied that disclosure of the information would be contrary to the first data protection principle. Therefore, the GMC were correct to exempt this information from disclosure under section 40(2) of the Act.

### **Other exemptions applied by the GMC**

73. The GMC also sought to rely on section 41 information supplied in confidence, and section 32 court records. In latter correspondence with the Commissioner, the GMC also referred to section 31(1)(g) (in light of 31(2)(b-d)) law enforcement. However, as the Commissioner is satisfied that the information has been correctly exempted under the absolute exemption set out in section 40(2) personal information, there is no need for him to consider the application of other exemptions.

### **The Decision**

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74. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- Information relating to points (1), (2), (3) and (9) of the request were correctly exempted under section 40(2) of the Act.
  - The GMC complied with section 1(1)(a) in that it correctly informed the complainant that the information relating to points (4), (5), (6) and (8) of the request was not held.
  - The GMC complied with section 1(1)(a) in that it supplied the information relating to point (7) of the request.
75. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The GMC breached section 17(1) of the Act, by not providing the information or a refusal notice within 20 working days.
  - The GMC breached section 17(1) by providing an inadequate refusal notice.

### **Steps Required**

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76. The Commissioner requires no steps to be taken.

## Other matters

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77. Although they do not form part of this Decision Notice, the Commissioner wishes to highlight the following matters of concern:
78. The Commissioner is extremely disappointed that the GMC felt unable to cooperate fully with his investigation (as outlined in the chronology section of this notice), thus prolonging the investigation of the complaint.



## Right of Appeal

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79. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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 26th day of February 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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