

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2009

Public Authority: General Medical Council
Address: 5th Floor
St James's Building
79 Oxford Street
Manchester
M1 6FQ

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the General Medical Council (the "GMC") for an explanation as to why allegations against a named doctor had been dropped, together with information regarding expert witness reports. The GMC confirmed that it held information that fell within the scope of the request but refused to disclose it, citing section 40 of the Act. After carrying out an internal review the GMC also stated that section 42 applied to some of the withheld information. After considering the case the Commissioner believes that this information was exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i). Therefore the Commissioner believes that the information should be withheld. The Commissioner also decided that the GMC did not fulfil the requirements of section 17(1)(b), in that it did not fully cite the exemption it was seeking to rely upon.

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 31 January 2008 the complainant wrote to the GMC and quoted two of its case reference numbers. He requested,

"Explanations as to why each of the allegations made in the above case references against [named doctor] were dropped...I am requesting

explanations as to why these allegations of malpractice and all other allegations made in the two case references noted above were dropped.

In addition, I am specifically requesting any information held by you concerning the expert witness reports given against [named doctor] by [...] and [...] and also any other expert witness reports pertaining to this case. In particular I am requesting information about any conclusions made by the GMC about the competence, or otherwise, and the veracity, or otherwise, of any expert witness reports used in determining the outcome of these cases.”

The Commissioner has noted that the complainant in this case was not also the complainant in either of the GMC cases referred to in the request.

3. On 22 February 2008 the GMC replied to the complainant's request. In this response the GMC confirmed that it held information that fell within his request. However it refused to disclose this information, stating that it believed that it was exempt from disclosure under section 40(2), as disclosure would be in breach of the first principle of the Data Protection Act 1998 (the “DPA”). It informed him of his right to request an internal review, and his right to complain to the Commissioner.

4. On 23 February 2008 the complainant wrote to the GMC again, and requested the following:

“Explanations as to why each of the allegations against [named doctor] were dropped. I am requesting only such information to be disclosed as would not cause the GMC to break the principles of the Data Protection Act 1998 (specifically the first principle requiring that the processing of personal data should be fair and legal) with regard to the disclosure of personal data relating to a third party. That is to say I am requesting such information held in your files pertaining to why the allegations against [named doctor] were dropped in the above cases to the extent not excluded by...section 40(2)...”

5. The GMC treated this letter as a request for an internal review, and provided a full response in a letter dated 18 March 2009. It upheld its use of section 40(2), and again stated that it believed the disclosure of the information would be in breach of the first principle. In addition to this it also stated that some of the withheld information was also subject to legal professional privilege, and was therefore exempt under section 42 of the Act. It noted that section 42 was a qualified exemption, and stated that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure. Finally it informed the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

6. On 20 March 2008 the complainant contacted the Commissioner to make a complaint in relation to the GMC's response to his request.

Chronology

7. The Commissioner contacted the GMC on 8 December 2008 in order to discuss its handling of the complainant's request. He asked it to provide him with a copy of the withheld information, together with its submissions to support its use of section 40(2) and section 42. He asked for a response within 20 working days.
8. In a letter dated 5 January 2009 the GMC responded to the Commissioner and provided him with a copy of the withheld information, together with submissions to support its use of the exemptions.
9. After considering this letter the Commissioner contacted the GMC again in an email dated 9 January 2009 and asked it to clarify whether it had, prior to this request being made, placed any information about the GMC cases against the named doctor into the public domain. In an email dated 21 January 2009 the GMC informed the Commissioner that it had not.

Analysis

Procedural matters

Section 17

10. The Commissioner has initially considered whether the GMC has complied with its obligations under section 17(1) of the Act.
11. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1) (e.g. within twenty working days of receipt of the request), which –
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.

The full text of section 17 can be found in the Legal Annex at the end of this Notice.

12. The GMC informed the complainant that it was relying upon section 40(2) to withhold the requested information. Section 40(2) states that information is exempt from disclosure if one of the conditions listed in sections 40(3)(a)(i), 40(3)(a)(ii), 40(3)(b) or 40(4) is satisfied. In order to cite this exemption fully the Commissioner believes that the public authority should also cite which of the conditions it believes is satisfied (including citing the relevant sub-section number). In this case, although the GMC informed the complainant that it believed that the information was exempt under section 40(2) and also stated that it believed that disclosure would be a breach of the data protection principles, it did not go on to cite which of the sub-sections it was seeking to rely upon (i.e. section 40(3)(a)(i)). For this reason the Commissioner believes that the GMC did not comply with section 17(1)(b), as it did not specify which parts of these exemptions it was relying upon.

Exemptions

Section 40

13. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
14. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
15. The full text of section 40 can be found in the Legal Annex at the end of this Notice.
16. In this case the GMC is seeking to rely upon section 40(2) and 40(3)(a)(i) to withhold the requested information. It has argued that it believes that the disclosure of this information would be in breach of the first principle of the DPA.
17. In order to reach a view on the GMC's arguments the Commissioner has first considered whether the withheld information is the personal data of a third party, or parties.
18. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
19. In this instance the information requested is an explanation as to why allegations made in a GMC investigation against the named doctor were dropped, together with information regarding certain expert witness reports in relation to that case.
20. From the evidence provided by both parties the Commissioner is satisfied that the named doctor is alive. Therefore the withheld information does relate to a living

individual. The Commissioner is also satisfied that that individual would be identifiable from this information. Therefore he is satisfied that the withheld information is the personal data of the named doctor.

21. In other cases, such as FS50178633 (GMC), FS50180310 (Nursing & Midwifery Council) and FS50141015 (Department for Work and Pensions), where requests have been made for information about the details of complaints, or the existence of complaints, the Commissioner has reached the view that 40(5)(b)(i) provides an exemption for the public authority from the duty to confirm or deny whether it holds any information relating to those requests.¹ This is because he has reached the view that it would be a breach of the first data protection principle for the public authority concerned to even confirm whether there had been any complaints against that individual.
22. However in this case the Commissioner has not followed this approach. During the investigation of the case it came to his attention that the named doctor had put some detail of the GMC cases quoted in the request into the public domain (including the GMC case reference numbers quoted by the complainant in the original request) by publishing this information on the internet. For this reason the Commissioner has reached the view that in the circumstances of this case it would be within the named doctor's reasonable expectations that the GMC would confirm that it had been investigating those cases against them. The GMC itself commented, in the internal review, that normally it would not confirm or deny the existence of a complaint against a doctor, prior to a complaint going to a Fitness to Practise hearing. It stated that,

“...under normal circumstances, we would not provide any information to you whatsoever in respect of complaints made against [named doctor]. Obviously the factor that makes this situation abnormal is your awareness of the existence of complaints made against [named doctor].”

Therefore, due to the individual circumstances of this case, the Commissioner does not believe that section 40(5)(b)(i) applies to the withheld information. As such he is of the view that the GMC was correct, again in these circumstances, to confirm that it holds information relevant to the request.

23. The Commissioner has gone on to consider whether the GMC was correct to withhold the information in question. He has first considered whether the condition listed at section 40(3)(a)(i) applies in this case. Specifically he has gone on to consider whether disclosure of the withheld information would be in breach of the data protection principles, namely the first principle of the DPA.
24. The first principle of the DPA requires amongst other things that personal data is:
 - processed fairly and lawfully and,
 - that at least one of the conditions in schedule 2 of the DPA is met.

¹ http://www.ico.gov.uk/Home/tools_and_resources/decision_notices.aspx

25. The Commissioner has gone on to consider whether the disclosure of the withheld information would be fair.
26. In reaching a view on fairness the Commissioner has considered whether it would be fair for the GMC to put into the public domain details of cases against a named doctor, when those cases had not proceeded to a hearing by the GMC's Fitness to Practise panel. During the investigation of the case the GMC explained its processes to the Commissioner:

“In simple terms, the GMC's fitness to practise activities fall under two separate areas: an investigation phase, and where appropriate, an adjudication phase. Generally information is not placed into the public domain by the GMC prior to the adjudication phase unless there is an over-riding public protection requirement to do so. Parties engaged with the GMC's fitness to practise procedures would not expect their investigatory submissions to be placed into the public domain outside the adjudication context. It is however important for me to reiterate that [named doctor] has never been the subject of a public adjudication hearing and therefore any information placed in the public domain regarding any aspect of our investigations into [the named doctor's] fitness to practise has been as a result of disclosures made by [named doctor]...”

27. As noted above, the Commissioner is aware that the named doctor has put some information into the public domain about the GMC cases. However, he does not believe that this limited disclosure is, in itself, enough to make the potential disclosure of detailed information regarding the GMC cases into the public domain fair.
28. In reaching this view the Commissioner has been mindful of the promise of confidentiality given by the GMC to all parties involved in a complaint against a doctor. In its letter to the Commissioner dated 5 January 2009 the GMC stated that,

“We give all parties an expectation of confidentiality and privacy during the investigation of enquiries and complaints, to encourage individuals to provide us with as much information as possible during the early stages of our regulatory procedures...We referred above to the publicity given by [named doctor] to the investigation carried out by the GMC in respect of complaints about [named doctor]. This is obviously [the named doctor's] prerogative. However, the fact that [named doctor] has not placed the information requested by [the complainant] into the public domain voluntarily, strongly infers that [named doctor] does not believe it should be made public, that [named doctor] has not waived her right to confidentiality and that s40(2) is applicable from [the named doctor's] perspective.”

The Commissioner finds these comments compelling. He believes that it would be within the reasonable expectation of any doctor under investigation by the GMC, for the GMC to not put into the public domain detailed information about the investigation until that investigation had proceeded to a hearing (except in exceptional circumstances). Furthermore, in this case he notes that at the time of

the request the cases against the named doctor were no longer under investigation, and had not proceeded to a hearing.

29. In reaching a decision on fairness the Commissioner has also been mindful of previous decision notices he has issued in regard to requests to the GMC for details and numbers of complaints against doctors – FS50144027, FS50088137 and FS50064698.² In these cases he noted the details of the GMC's complaints procedures (as referred to in the previous paragraph), and the fact that the requests in all those cases were in regard to complaints which had not proceeded as far as the GMC's adjudication process. In these cases he also noted the reasonable expectations of the doctors concerned, in relation to their complaint history / details of complaints against them. In all of these previous cases he found that the disclosure of this type of information would be unfair.
30. Whilst the Commissioner acknowledges that all these cases varied slightly in terms of the individual circumstances of each case, he believes that the principles regarding fairness in requests for details and numbers of complaints against doctors are also directly relevant in this case.
31. Further to this the Commissioner has also noted the views of the Tribunal in *Barbara Francis v ICO & the General Medical Council* [EA/2008/0028]. Whilst considering whether the GMC should disclose whether there had been any previous complaints about a named doctor (who had been subject to a public hearing), the Tribunal accepted the GMC's argument that the doctor would have had an expectation that information as to previous complaints (if any) would be kept confidential. The Tribunal found that in the circumstances the disclosure of the information would be in breach of the first data protection principle.³
32. After taking all of the above factors into account the Commissioner is of the view that the disclosure of the withheld information would be unfair. Therefore he believes that the withheld information is exempt from disclosure under section 40(2) and section 40(3)(a)(i). As he has reached the view that disclosure would be unfair, the Commissioner has not gone on to consider whether any of the conditions for processing listed in schedule 2 of the DPA would apply.

Section 42

33. As he has reached the view that the withheld information is exempt the Commissioner has not gone on to consider the GMC's application of section 42.

² http://www.ico.gov.uk/Home/tools_and_resources/decision_notices.aspx

³ EA/2008/0028, para 74.

The Decision

34. The Commissioner's decision is that the GMC was correct to withhold the requested information under section 40(2) by virtue of section 40(3)(a)(i).
35. However the Commissioner also believes that the GMC failed to meet the requirements of section 17(1)(b) of the Act, in that it did not fully cite the exemption it was relying upon.

Steps Required

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. 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.
Website: 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* 16th day of March 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 17

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 40

- (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) 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.
- (4)** The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5)** The duty to confirm or deny-
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6)** In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7)** "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

Section 42

- (1)** Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

- (2)** The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.