

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 March 2010

Public Authority: General Medical Council
Address: Regents Place
350 Euston Road
London
NW1 3JN

Summary

The complainant requested from the General Medical Council (GMC) a copy of employer comments that it might have received from a Hospital Trust in relation to a specified consultant. The GMC initially responded to the request in accordance with section 1(1)(a) of the Freedom of Information Act 2000 (the "Act"), although it later sought to rely on section 40(5)(b)(i) at the internal review stage. The Commissioner has concluded that section 40(5)(b)(i) is engaged, as to confirm or deny whether the GMC held the requested information would disclose the personal data of the consultant, in contravention of the first data protection principle. The GMC is therefore not required to take any steps. The Commissioner, however, finds the GMC to have breached section 17(1)(b) in its processing of the request.

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. In correspondence dated 16 August 2009, the complainant requested a copy of *"the letter written to the GMC by [the named consultant]'s employers, [the named employer], presumably around the end of 2008."*
3. The General Medical Council (GMC) responded to the request on 8 September 2009 by complying with section 1(1)(a) of the Act.
4. The complainant requested an internal review on 19 September 2009. The GMC provided the outcome to its review on 15 October 2009, stating that technically the request should have been refused in the first instance under section 40(5) of the Act.

The Investigation

Scope of the case

5. On 9 November 2009, the complainant contacted the Commissioner to complain about the way her request for information had been handled.

Chronology

6. Following the receipt of the complaint, the Commissioner contacted the GMC on 30 November 2009 to make it aware that a complaint had been made. The GMC subsequently wrote to the Commissioner on 15 December 2009 to outline its position regarding the request.
7. The Commissioner telephoned the GMC on 12 February 2010 to obtain further details of the case. The GMC emailed the Commissioner with this information later that day.
8. In correspondence of 17 February 2010, the Commissioner directed the complainant to a previous decision notice issued under the case reference FS50178633 where details of a complaint about a named doctor had been requested from the GMC. In this instance, section 40(5)(b)(i) had been found to be engaged in circumstances that the Commissioner considered broadly analogous to those presented here. The complainant confirmed on 7 March 2010 that she wished to pursue the case.

Analysis

Procedural Matters

9. The public authority failed to cite the correct subsection of section 40 (40(5)(b)(i)) at the refusal notice stage and therefore did not comply with the requirement contained at section 17(1)(b) of the Act. This section of the Act is set out in the attached Legal Annex, as are all other sections of the Act referred to in this notice.

Exemptions

Section 40(5)(b)(i)

10. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA). The first data protection principle, which requires that personal data be processed fairly and lawfully, is the relevant principle in this case.
11. The Commissioner addresses each of these points in turn.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

12. The complainant has requested a copy of employer comments received by the GMC from the employer of a consultant. The Commissioner agrees with the GMC that the process of confirming or denying whether the requested information is held would constitute a disclosure of personal data. Specifically, the action of confirmation or denial would unavoidably disclose whether a complaint had been made against the named consultant.

Would complying with section 1(1)(a) contravene the first data protection principle?

13. The Commissioner considers that the information requested in the present case is of a sufficiently similar nature to case FS50178633, which also involved the GMC, to justify the same arguments being offered and a similar conclusion being reached. A copy of this decision is appended to this notice.

The Decision

14. The Commissioner's decision is that the public authority responded to the request for information in accordance with the Act in that the exemption from the duty to confirm or deny provided by section 40(5)(b)(i) is engaged.
15. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements set out at section 17(1)(b).

Steps Required

16. The Commissioner requires no steps to be taken.

Right of Appeal

17. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 25th day of March 2010

Signed

**David Smith
Deputy Commissioner and Director of Data Protection**

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

Appendix: Decision Notice FS50178633

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 October 2008

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 "all correspondence between the GMC, [named doctor] and his employers". The GMC confirmed or denied whether it held that information under section 1(1)(a) of the Act. After considering the case, the Commissioner finds that the GMC was not obliged to respond under section 1(1) (a) by virtue of the provisions of section 40(5)(b)(i). This is because in responding to the request it has disclosed information which constitutes the personal data of the named doctor. The Commissioner does not require the GMC to take any further steps in relation to the complainant's request.

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.
2. In considering this case, the Commissioner has also taken into account his dual role as regulator of the Data Protection Act 1998 (DPA). As a result the approach he has adopted in this case together with his findings encompasses and reflects his remit under both pieces of legislation.

The Request

3. On 16 August 2007 the complainant made a request for "all correspondence between the GMC, [named doctor] and his employers".
4. On 12 September 2007 the GMC replied to the complainant's request of 16 August 2007. The GMC confirmed or denied whether the information was held under section 1(1)(a) of the Act.
5. A full text of section 1 is available in the Legal Annex at the end of this notice.
6. Further correspondence occurred between the complainant and the GMC in relation to the request as set out at paragraph 2 above.

The Investigation

Scope of the case

7. On 30 September 2007 the complainant contacted the Commissioner to make a complaint in relation to the GMC's response to his request.

Chronology

8. The Commissioner contacted the GMC on 17 June 2008 in order to discuss its handling of the complainant's request.
9. In a letter dated 1 July 2008 the GMC responded to the Commissioner. The Commissioner has considered the GMC's response.
10. A full text of section 1 is available in the Legal Annex at the end of this notice.

Analysis

Exemption

11. Section 40(5) sets out the following:-

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) the 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).
- 12. The information was requested under the Act as a result of previous correspondence between the complainant and the GMC about [named doctor]. This prompted the Commissioner to consider whether the GMC would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
- 13. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
- 14. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemptions in section 33A(1) of that Act were disregarded.
- 15. A full text of section 40 is available in the Legal Annex at the end of this notice.
- 16. In this instance the information requested is "all correspondence between the GMC, [named doctor] and his employers". Within the GMC's response of 1 July 2008 it provided the Commissioner with background information which has enabled him to conclude that if the requested information was held it would contain the personal data of a third party. The nature of the request also meant that the GMC's response in accordance with its duty under section 1(1)(a) inevitably disclosed whether or not a complaint had been made against the [named doctor].
- 17. The Commissioner is of the general view that whether or not a complaint was made against a named individual acting in their professional capacity is information which constitutes the personal data of that individual.
- 18. 'Personal data' as defined under section 1(1) of the DPA is data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.

19. At the time the request was made, the Commissioner is satisfied that the [named doctor] was alive and at the time of drafting this Notice, there is nothing to suggest that this is no longer the case.
20. Whether or not a complaint was made against [named doctor] is clearly the personal data of the doctor as it relates to an identifiable living individual.
21. The Commissioner would like to clarify however that strictly speaking, the complainant's request was not to know whether or not a complaint had been made against [named doctor]. Rather, it is the fact that responding to such a request would reveal this information which prompted him to consider the case in the manner that he has.
22. In light of the above findings, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
23. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether a complaint had been made against [named doctor] in the context of the request for the correspondence concerning the [named doctor], his employers and the GMC would contravene any of the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

24. The first data protection principle states in part; *'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 is met...'*
25. A full text of the first data protection principle is available in the Legal Annex at the end of this Notice.
26. The Commissioner considers the most applicable condition for processing in this case is likely to be Schedule 2 (6)(1) which states;

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'
27. In considering whether or not confirming or denying whether a complaint had been made against [named doctor] would contravene the first data protection principle, the Commissioner took into account the reasonable expectations of [named doctor], the legitimate interests of the public at large, as well as the rights and freedoms of [named doctor].

28. Without disclosing any more detail than is necessary in order not to defeat the intention of section 40, the Commissioner is satisfied that in the context and background of this request, the [named doctor] would have had a reasonable expectation of privacy and would not have expected the public to have access to information which discloses whether or not a complaint was made against him/her.
29. The Commissioner considers the public has a legitimate interest in knowing that an individual providing a medical service(s) is fit and proper to do so. For instance where an allegation against a medical professional's fitness to practice has been proven to be founded via a complaints investigation process, and all available appeal rights have been exhausted, then the public has a legitimate interest in knowing that such an allegation was made, as well as the details of the allegation and actions taken as a result by the relevant public bodies. Therefore, there could be in effect a legitimate interest in knowing whether or not an individual was the subject of a complaint to the extent that it confirms that there have been legitimate and proven concerns about their fitness to practise.
30. The Commissioner is however aware that it is inherent in the nature of their role for medical professionals to be the subject of complaints (founded or unfounded) The public interest however is in knowing they are competent enough in their roles and meet all the expected standards. In the Commissioner's view therefore this interest is not satisfied by merely knowing their complaints history, rather, it is the existing mechanisms in place to ensure standards are maintained that satisfy the public's legitimate interest.
31. It is the role of the GMC to ensure that doctors always maintain the required fitness to practice standards. Generally speaking therefore, the public interest in ensuring these standards are maintained is satisfied by the role carried out by these bodies rather than by knowing an individual's complaints history. Specifically in this case, the legitimate interest of the public would not be satisfied by responding to a request for information in a manner which would reveal whether or not [named doctor] had been the subject of a complaint. The disclosure is therefore not necessary for the purposes of satisfying the legitimate interests of the public.
32. From the facts available to him, the Commissioner is satisfied that disclosing whether or not [named doctor] was the subject of a complaint is not necessary for the purposes of legitimate interests of pursued by the public and this disclosure would be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the nurse in question.
33. The Commissioner is therefore satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the Act would contravene the fairness element of the first data protection principle.
34. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he has not gone on to consider the other data protection principles.

35. He therefore finds that the GMC was not obliged to have responded to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i). The Commissioner will not proactively seek to consider such exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has duty to consider the rights of data subjects. These rights, set out in the Data Protection Act are closely linked to article 8 of the Human Rights Act and the Commissioner would be breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights, even if the public authority has not cited the exemption.

The Decision

36. The Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained at section 40(5)(b)(i).

Steps Required

37. The Commissioner requires no steps to be taken.

Other Matters

38. The Commissioner acknowledges that this has been a complex case and can comprehend the GMC's failure to correctly apply section 40(5)(b)(i) on this occasion. However he would encourage the GMC and other public authorities to always consider the application of section 40(5)(b)(i) when considering its response to a request of this nature in the future.

Right of Appeal

39. 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.

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 22nd day of October 2008

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Right of Access

Section 1(1) provides that -

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

Refusal of Request

Section 17(1) provides that -

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."

Personal Information

Section 40(2) provides that –

"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."

Section 40(3) provides that –

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.

Section 40(5) provides that –

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).

The Data Protection Act 1998

Interpretative provisions

Section 1(1) provides –

In this Act, unless the context otherwise requires –

“data” means information which –

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“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;

“processing”, in relation to information or data, means obtaining, recording, or holding the information or data or carrying out any operation or set of operations on the information or data, including –

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

Section 1(2) provides –

In this Act, unless the context otherwise requires –

- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
- (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

Section 1(3) provides –

In determining for the purposes of this Act whether any information is recorded with the intention –

- (a) that it should be processed by means of equipment operation automatically in response to instructions given for that purpose, or
- (b) that it should form part of a relevant filing system,

It is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

Section 1(4) provides –

Where personal data are processed only for the purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 2 provides –

In this Act “sensitive personal data” means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, such as the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1

The Data Protection Principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

2. The processing is necessary –

- (a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by the contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary –

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.