

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2012

Public Authority: The General Medical Council
(the 'GMC')

Address: 3 Hardman Street
Manchester
M3 3AW

Decision (including any steps ordered)

1. The complainant requested all the relevant recorded information held by the General Medical Council ('the GMC') that related to his complaints about it. Some of the information was the complainant's own personal data and this was considered by the Information Commissioner ('the Commissioner') under the Data Protection Act.
2. For the remainder, the GMC explained that it had already provided some information, but that the residue was exempt by virtue of sections 40(2) [third party personal data], 42(1) [legal professional privilege] and 31(1)(g) [prejudice to law enforcement].
3. During the course of the Commissioner's investigation further parts of the withheld information were disclosed to the complainant. For the remainder, the Commissioner has decided that sections 40(2) and 42(1) were appropriately applied.
4. He finds procedural breaches of sections 10(1), 17(1), 17(1)(b), 17(1)(c) and 17(3), but given the further disclosures, now requires no remedial steps to be taken in this case.

Request and response

5. The complainant's son tragically died in April 1990. From that time the complainant has pursued the circumstances of his death through a number of forums, including the Police. One of those forums was the GMC who declined to undertake an investigation because of its time limits.

6. This was challenged by a charity. There was subsequently a judicial review case that was set in train against the GMC by the charity. The complainant was listed as an interested party in this judicial review.
7. The request referred to an earlier request dated 6 March 2009 that asked for everything about his deceased son's case. The Commissioner was referred to this case and considered it under both the Data Protection Act 1998 ('the DPA') and the FOIA. He therefore understood what information was being referred to by the new request.
8. On 13 July 2010 the complainant requested the following information from the GMC [the Commissioner has added the numbers for ease of reference]:

*'[1] I am therefore formally requesting **all** documentation in the GMC's possession that was not disclosed to me, following my initial request under the Data Protection Act and/or the Freedom of Information Act, as a consequence of the ongoing judicial review which, as you know, has now been concluded.*

[2] I am also formally requesting disclosure of any documents that have come into existence after my initial requests.'

9. The GMC confirmed receipt of the request on the same day. It confirmed that for part [1] it would conduct another internal review to confirm whether it maintained its position and explained that it would treat request [2] as a new request for information.
10. On 7 September 2010 the GMC issued its response to part [2] of the request. It confirmed that there was only one document that was added to the complainant's file in the time period and the complainant was provided with it. It confirmed that it held considerable information about the judicial review claim conducted by the charity, but that it believed that section 42(1) applied to it. It explained that the information was covered by legal professional privilege and that in its view the inherent public interest in allowing legal advice to be freely obtained, and in allowing the communications relating to litigation to take place in confidence outweighed the public interest in disclosure.
11. On 4 November 2010 the GMC communicated the result of its internal review into its handling of part [1] of the request. It apologised that it was late. It explained that it believed that the complainant had received all the information to which he was entitled. It stated that it was withholding information for the following reasons:
 - It was withholding some information by virtue of section 42(1) and it explained that the Commissioner had accepted its view in the

previous case. It did not however provide details of its public interest test;

- It was withholding other information by virtue of section 40(2) [by virtue of section 40(3)(a)(i)]. It explained that this information was the personal data of third parties and in its view disclosure would contravene the first data protection principle, because it would not satisfy any of the conditions found in Schedule 2 of the DPA; and
 - It also applied section 31(1)(g) to the remainder of the withheld information because it believed that the disclosure of the information would erode the confidence doctors have in it and this would prejudice its ability to ascertain whether or not doctors are fit to practice. It also did not explain its public interest determination for this exemption.
12. On 15 December 2010 the complainant wrote to the GMC and expressed dissatisfaction about the handling of his request. He explained that he was particularly concerned that he had not received the information withheld by virtue of section 42(1) in part [1] of the request. On 20 December 2010 the GMC confirmed that it had considered the information that the complainant was concerned about in its internal review dated 4 November 2010 and it was aware that the Commissioner would be considering it substantively in this investigation.
13. In light of the history of this case, the Commissioner used his discretion to consider this case at this point.

Scope of the case

14. On 4 November 2010 the complainant copied the Commissioner in on an email to the GMC in which he was expressing his dissatisfaction about the withholding of the information. He explained that he had *'copied this email to the Information Commissioner for his personal attention but would not expect him or his office to reverse your decision even if the GMC has acted illegally by the withholding of these documents'*.
15. On 14 December 2010 the Commissioner wrote to the complainant to ask him to provide further evidence if he wanted to make a complaint about the GMC's handling of his request. He received this information on the same day. From these actions, the Commissioner understood that he had been asked to determine whether the information that the complainant had not received had been appropriately withheld.

16. Part of the requested information was the complainant's own personal data. It should be noted that section 7 of the Data Protection Act 1998 ('DPA') gives an individual the private right to request copies of personal data held about them – this is referred to as the right of Subject Access. The Commissioner therefore conducted an assessment under section 42 of the DPA into the GMC's compliance with the DPA. This does not form part of this Decision Notice. This is because an assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of FOIA. The complainant received the result of the assessment on 13 July 2011.
17. On 4 August 2011 the complainant confirmed that he had referred the case to the Commissioner to consider and that he understood that his own personal data would not be provided under FOIA.
18. A further two disclosures were made to the complainant on 20 December 2011 and 8 February 2012. On 22 December 2011 the complainant confirmed that he wanted a decision notice in relation to the balance of the withheld information. This decision notice substantively focuses on the information that continues to be withheld, although it will also record the procedural breaches of the legislation that have occurred.
19. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of FOIA. In particular, the Commissioner is not the forum to consider whether the GMC's actions as a regulator of the medical profession had acted appropriately in its interpretation of its own legislation.

Reasons for decision

20. As a preliminary matter, it is important to note that any disclosure under the FOIA amounts to a disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under FOIA it should be prepared to disclose the same information to any other person who asks for it.
21. The GMC hold a large amount of information about the complainant's complaints. It has provided the complainant with the majority of the information. The information that has been withheld can be characterised in the following way:
 1. Information that was withheld as a result of his first subject access request – this batch contains some personal data that was

the complainant's own personal data, some third party personal data and some legal advice; and

2. Information that came into being between his first and second subject access request and was withheld – this batch consists of the information generated during the course of the GMC's litigation with the charity. To ensure completeness, the Commissioner has decided to consider all the information that was generated in the GMC's litigation with the charity in this case.
22. The Commissioner has carefully considered all of the information that has been withheld from the complainant and has gathered further arguments from the GMC about the withholding of this information. He has considered the operation of section 40(1) first and will then consider the operation of section 42(1) [legal professional privilege] and section 40(2) to the residue.

Section 40(1)

23. As noted above, all the information that constitutes the complainant's own personal data has been considered by the Commissioner under the DPA. Section 40(1) provides an absolute exemption for this information under the Act and therefore the Commissioner supports its application to this information.

Section 42(1)

24. Section 42(1) of FOIA is worded as follows:

"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"

25. The GMC has argued that the majority of the information that has been withheld was covered by legal professional privilege. The Commissioner has viewed the information withheld by virtue of section 42(1) and believes that it can be usefully divided into five categories:

1. The request for and the content of the external legal report that the GMC commissioned in November 2006 when considering how to handle the complainant's complaints and the occasions when the content of that advice was mentioned;
2. The summaries of the witness statements created by the lawyers as part of that report;
3. The requests for further external legal advice about specified issues and the advice that resulted after then;

4. Advice requests and the provision of advice by GMC's own lawyers during the handling of the complaints; and
 5. The material that was considered and created during the GMC's litigation with the charity.
26. Section 42(1) is a qualified exemption. The GMC also explained that in its view the public interest in maintaining the exemption outweighed that in disclosing the material.

Is the exemption engaged?

27. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
28. In this case the GMC has indicated to the Commissioner that it believes that legal advice privilege applies to the first four categories of information and that litigation privilege applies to the last category of information. The Commissioner will consider each in turn:

▪ **Advice privilege**

29. For the first four categories, the Commissioner has considered whether the GMC was right about the information being covered by legal advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, even where there is no pending or contemplated litigation.
30. It was considered in detail by the House of Lords in the *Three Rivers*¹ case and it explained that there were three requirements for material to be covered by legal professional advice privilege. The Commissioner has adopted this approach in this case and these factors can be summarised as follows:
1. It must be between a qualified lawyer in their professional capacity and a client;
 2. It must be created with the sole or dominant purpose of

¹ *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* (2004) [2004] UKHL 48

obtaining or providing legal advice; and

3. It must be confidential.
31. The first requirement is one of fact. In this case all the information amounts to communications between a lawyer acting in their professional capacity and a member of staff of the GMC (their client). This requirement is therefore satisfied.
32. The second requirement is also one of fact. The Commissioner has examined the withheld information and is satisfied that the sole purpose of it was for the obtaining or providing of relevant legal advice. This requirement is therefore also satisfied.
33. The last requirement is an issue of law. The Commissioner considers that the information can be deemed confidential. This is because the information is of substance, was imparted in circumstances that led to an expectation of confidence (it was formal legal advice between a lawyer and their client) and the disclosure of the information would have led to an erosion of this confidence which would have not have accorded with the expectations of the confider. This erosion of confidence would have caused damage to the confider as its position may be prejudiced through unexpected disclosure. The final requirement is therefore satisfied.
34. The Commissioner's view is also that the advice has not lost its confidentiality and therefore it is privileged in this case. The Commissioner notes that this is a situation of advice privilege. He believes that in circumstances other than litigation partial disclosure to the complainant, as in this case, will not result in the loss of confidentiality and therefore the loss of legal advice privilege. His view has been supported by the Information Tribunal in *FCO v Information Commissioner* [EA/2007/0092]² ('FCO') at paragraph 22.
35. The Commissioner is satisfied that the information that has been provided to the public does not falsely represent the withheld information.

² This decision can be found at the following link:
http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf

36. After careful consideration, he is satisfied there is no waiver on the facts of this case, the confidentiality of the advice remains and the exemption is engaged.
37. For the avoidance of doubt, he also considers that summaries of witness statements created during the production of the said report can also be said to be part of the legal advice that has been provided. This is because the selection of facts from each report was discretionary and any reliance on those statements to maintain its position (whatever it is) further connects the statements to the legal advice itself.

▪ **Litigation privilege**

38. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
39. In this case, the GMC contemplated that the charity was likely to take it to court and its lawyers generated confidential communications in order to defend itself against this contemplated litigation. It explained that it considers the withheld information is subject to litigation privilege and release of the withheld information would adversely affect the course of justice.
40. The GMC has claimed litigation privilege in relation to the withheld information, on the basis that the withheld information was created for the dominant purpose of conducting or giving advice in relation to litigation. The GMC has argued that disclosure would prejudice the prospect of successfully defending any subsequent litigation about its handling of the complainant's case and/or the operation of its time limits in the future. It considers that the material and the issues that are discussed may prove relevant in other situations.
41. The Commissioner is content that the residue of the information that has not been disclosed and falls in this category can all be correctly said to be confidential communications and that they were generated and held to enable it to consider and defend its position under litigation. He is content that the information has maintained its confidentiality and that the exemption has been correctly engaged by the GMC.

The public interest test

42. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of FOIA. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner is only able to consider factors that are relevant to and

inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure. It is important to note that FOIA is a public disclosure regime and therefore the Commissioner is only able to consider whether the information can be disclosed to the whole world and not just the complainant by themselves.

43. It is also important to note from the outset that FOIA's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. However, it is clear that just because some members of the public may be interested in the information, does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public³.

▪ ***Public interest arguments in favour of maintaining the exemption***

44. The GMC has explained that legal professional privilege is a fundamental and established convention in the legal system. It reiterated the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals.
45. The GMC explained that as a regulator it requires high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. It explained that this was particularly important that its legal staff were able to consult external lawyers in confidence to ensure that the GMC receives necessary advice in a forum which is conducive to a free exchange of views. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments. As a consequence legal advice may well set out the perceived weaknesses of the GMC's position. Without such comprehensive advice, the quality of the GMC's decision making process

³ *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

would be reduced because it would not be fully informed and this is contrary to the public interest.

46. The GMC also explained that the disclosure of legal advice would be likely to have a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on future advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
47. It also stated that the disclosure would be likely to have a corrosive effect on good governance. This could lead to decisions being taken that are legally unsound. Not only would this undermine the GMC's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided. The Commissioner acknowledges that there is a public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this.
48. The GMC concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professional privileged material, there are no public interest factors of sufficient weight adequate to compel disclosure in this case.
49. The Commissioner acknowledges the strength of the arguments advanced by the GMC in relation to this point. Indeed, there is a significant body of case law to support the view that there is a strong element of public interest built into section 42(1). For example, the Information Tribunal in *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)* [EA/2005/0023] stated (at paragraph 35):

'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'

▪ ***Public interest arguments in favour of disclosing the requested information***

50. However, it is important to remember that the factors outlined above must be balanced against the arguments in favour of disclosing the legal advice which forms the requested information; Parliament did not intend the exemption contained at section 42(1) of FOIA to be used absolutely.
51. Indeed the Tribunal's decision in the case of *Mersey Travel* underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. It placed weight on the fact that the legal advice related to an issue which affected a substantial number of people. The complainant has made the argument that how the GMC conducted itself in relation to his complaint is of significant public interest and could be said to affect a substantial number of people. The Commissioner appreciates that the circumstances are of considerable importance to the complainant. However, his view is that the time of the primary events and the subsequent changes to the GMC's legislative role substantially mitigate the number of members of the public who are concerned about how the GMC conducted itself then.
52. The GMC has also acknowledged that there are public interest factors in favour of disclosure in this case. It has explained that there is an obvious public interest factor that favours transparency and accountability in relation to its actions and decisions that it has taken.
53. The Commissioner agrees with both parties that transparency and accountability are key principles underlying the application of the Act. The Commissioner accepts that there is a real public debate about how the GMC considers allegations about doctors and this continued to be present at the date of the request. He also accepts accountability is important when a public authority in this sort of situation decides to expend public funds in defending its position. This is a public interest factor that favours disclosure.
54. In addition, the Commissioner also considers it appropriate to consider the mitigation of the potential adverse consequences of the public losing faith in the GMC and considers that this adds further weight to the need for accountability in this particular case. Furthermore, the Commissioner also accepts that disclosure of the various pieces of legal advice (and the confidential communications generated in defending its actions) would enable the public to consider whether the decisions have been made on the basis of good quality legal advice and thus increase public confidence in the GMC's position.
55. However, the Commissioner does note that the use of information requests to circumvent acquiring legal advice (and/or litigation) has

been declared as being a weak one by the Information Tribunal – paragraph 30 of FCO (Tribunal reference above).

Balance of the public interest arguments

56. The Information Tribunal in *Calland v Financial Services Authority* [EA/2007/0136] (*'Calland'*)⁴ explained its approach when considering the balance of the public interest in this exemption [at paragraph 37]:

'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'

57. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164 (*'DBERR'*). In *Thornton*, the Tribunal usefully distilled the High Court's approach into six principles:

1. there is a strong element of public interest inbuilt into the exemption;
2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and

⁴ This decision can be found at:
http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
58. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case, the review that was undertaken of the complainant's complaint and the basis by which the GMC defended itself in court. Disclosure of the privileged material may therefore assist the public's understanding of the legality of its current position and the reasons why it has taken these actions.
59. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids the public understanding and participation in debates on issues of public importance – especially, as in this case, where information in the public domain raises concerns about what the GMC did and did not do.
60. However, the Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind LPP, namely, safeguarding the right of any person (or public authority) to obtain free and frank legal advice which goes to serve the wider administration of justice. This is enhanced by the material and the legal advice remained live at the time of the request which intensifies the strength of protection that is to be expected.
61. The Commissioner has carefully considered all the legally privileged material and does not think that its contents have been misrepresented by the GMC. It is noted that the material (whatever its content) is merely the legal opinion of a set number of individuals.
62. In considering where the public interest lies the Commissioner has taken into account the nature and sensitivity of the advice provided which, in his view, leads him to conclude that the inbuilt weight of legal professional privilege in relation to this information was still very strong at the date of the request. The Commissioner has also noted what is in the public domain and that the advice remains 'live' in terms of the issues to which it relates and therefore at the time of the request the potential for harm to the privilege holder was significant. Countering this, the Commissioner has attached some weight to the fact that disclosure of the advice would enable the public to further understand,

challenge and debate the reasoning behind the GMC's position on this issue.

63. Taking all these factors into account: the inbuilt weight of public interest in the concept of privilege; the nature and sensitivity of the advice; transparency and accountability; its 'live' nature and the possible harm resulting from the release of the information itself, the Commissioner has however concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 42(1).
64. He considers that after due consideration, the balance of public interest favours non-disclosure for all five categories of legally privileged material identified in paragraph 25 above, although he considers that the public interest in the transparency of the witness statements is much more limited than the other information (due to the nature of the information and how specific it is to the complainant's own complaint).
65. For the avoidance of doubt, the Commissioner has also considered during the course of his investigation, whether it would be possible for some parts of the withheld information to be provided without the exemption being engaged. Some of the information was separated out in this way and disclosed to the complainant. However, he has concluded for the balance of the information that the weight of the arguments favours the maintenance of the exemption to all of it.
66. For all the reasons above, he therefore determines that the exemption found in section 42(1) has been applied correctly and does not uphold the complaint.

Section 40(2)

67. The GMC withheld some further information by virtue of section 40(2). Section 40(2) ['the third party personal data exemption'] of the FOIA states 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 40(1); and*
- (b) Either the first or the second condition below is satisfied.'*

68. In summary, the conditions specified are either that disclosure would contravene one or more data protection principles, or that the information would not be available to the data subject if he made a Subject Access request under the Data Protection Act ('DPA') for it.

69. The Commissioner has split this information into the following **ten** categories:

1. Fitness to Practice history and the personal contact details of named doctors;
2. Information sent to a doctor that was not involved with the case in error and subsequent correspondence about that error;
3. The names and personal details of experts that the GMC considered in this case and those who they commissioned;
4. The details of other complaints about other matters and the names of other complainants;
5. Direct contact details of the GMC's external solicitors, the solicitors that were instructed by other parties and the name of an administration assistant in an external solicitors;
6. Personal details of witnesses to the Police and names of who they were witnesses for;
7. Details contained in the chronology of the report dated November 2006 about the named doctors' actions, statements and situation in the police investigation;
8. Details contained in the chronology of the report dated November 2006 about the actions taken by the Police and the CPS in relation to their investigation about specific named individuals;
9. Details contained in Annex A of the November 2006 report that relate to the recommendations made in another investigation which comment directly on the performance of certain officers; and
10. Details contained in Annex 3 that summarises the CPS' findings in relation to the allegations made against the named doctors.

Is all the information personal data?

70. 'Personal data' is defined by section 1(1) of the DPA. The information does constitute each of the data subject's personal data because it relates to an identifiable living individual and connects them to the report. The information also does not constitute the complainant's own personal data. Section 40(2)(a) is therefore satisfied.
71. The DPA also provides additional safeguards for sensitive personal data which is defined in section 2 of the DPA. Section 2 states that personal data relating to, amongst other things, the commission or alleged

commission by an individual of any offence amounts to sensitive personal data. While the GMC did not specifically state the information was sensitive personal data to the complainant, the Commissioner considers as a matter of fact that some of what is held is. This is because information held by the GMC was used to consider whether the individuals involved could have committed a criminal offence.

72. In relation to section 40(2)(b) the GMC's main arguments have been focussed on why disclosure would contravene the first data protection principle and this is what the Commissioner has focussed on.
73. For personal data, the first data protection principle has three components. They are that the disclosure of the information to the public must be:
 - fair to the data subjects;
 - in accordance with one or more conditions in Schedule 2 of the DPA; and
 - lawful to the data subjects.
74. For sensitive personal data, an extra condition found in Schedule 3 of the DPA must also be satisfied.
75. Every relevant condition must be satisfied for the first data protection principle not to be contravened and the exemption not to apply. If even one condition is not satisfied, the first data protection principle would be contravened and the exemption would be applied correctly.

Is the disclosure of the information unfair to the data subjects?

76. In accordance with his decision issued in **FS50286813** (Stroud District Council), the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectations of the data subject with general principles of accountability and transparency.
77. To do so, he has considered each category in turn and specifically borne in mind the following factors:
 - Why the GMC holds the information;
 - The individuals' reasonable expectations of what would happen to their personal data;
 - Whether disclosure would cause any unnecessary or unjustified damage to the individual; and

- The legitimate interests of the public in knowing these details weighed against the effects of disclosure on the data subject.

Category one

78. The GMC explained that the information was gathered during its enquiries into the complainant's complaints. It explained that it would consider the doctor's past performance and their personal details would be considered as a preliminary matter in considering the new complaint.
79. The GMC explained that it held the information about the Doctor's fitness to practice in connection with its regulatory functions. It explained that doctors understood that it would protect their personal data and only disclose previous performance issues when this was required for a Fitness to Practice hearing. Having considered the withheld information, alongside the GMC's arguments in previous cases on this sort of information (such as **FS50248766**), the Commissioner considers that it is reasonable for the doctors in this case to consider that this information would not be disclosed to the public.
80. The Commissioner can understand that the disclosure of this information would be likely to cause the named doctors damage and distress. It must be noted that the events that the complainant are concerned with happened over twenty years prior to the request and the revisiting of these matters is known to cause damage and distress to those individuals. The information itself is not material to the complaint made by the complainant, but is of the most personal nature – where an individual lives and whether or not other complaints have been made about their professional standing. The Commissioner considers the nature of the information and the time that has passed renders disclosure unfair.
81. It would seem particularly unfair to disclose information that could potentially refocus the public's attention on the issues raised, some time after the GMC had concluded the matter. This view is supported by the Information Tribunal (the "Tribunal") in the case of *London Borough of Camden v Information Commissioner* (EA/2007/0021). In this case, the Tribunal considered expired Anti-Social Behaviour Orders and the Tribunal indicated that disclosure of this data would be unfair on the grounds that "...publicity long after the making of an order...is quite different from identification and denunciation when or shortly after the order is made..." (para 28).
82. The Commissioner understands that there is a public interest in accountability and transparency. Indeed these concepts form the cornerstones of FOIA. However, the disclosure of this data would not increase transparency to much of a degree and would be an

unwarranted and unjustified disclosure of the personal data of the data subjects. It follows that the Commissioner considers that the disclosure of this information would be unfair to the data subjects and a contravention of the first data protection principle. Section 40(2) was applied correctly.

Category two

83. The GMC initially sent out papers to another doctor whose name was close to one who was subject to the complaint. The Commissioner considers disclosure of this information to the public (including their personal details) would be unfair to that doctor as they had no involvement in the matter. It would also lead to a misconception that the doctor may have done something wrong which would be totally unjustified. In the Commissioner's view as disclosure would be unfair, it would contravene the first data protection principle and therefore section 40(2) has been correctly applied.

Category three

84. The medical evidence in the complainant's complaint was complex and the GMC needed to employ an expert to enable it to be represented in a potential Fitness to Practice Panel and/or the subsequent court case.
85. The withheld information contains details of the names of those experts, their personal details and the amount they would charge for their expertise. The GMC explained that it considered that the reasonable expectations of these experts were that they would neither anticipate nor expect their information to be released into the public domain by the GMC.
86. The Commissioner having considered the withheld information does not consider that those experts would expect their personal details to be disclosed to the public. They would expect privacy in relation to those details where they are being considered for employment by the GMC. The Commissioner considers that this information is akin to Human Resources information.
87. When assessing the legitimate interests of the public, the Commissioner considers that members of the public will have a natural, and legitimate, interest in knowing how a Regulator deals with a series of complaints and the actions that it takes. The Commissioner considers that there is also a weighty public interest in knowing the process by which the GMC undertakes its responsibilities.
88. However, the Commissioner considers that the process is clear from what has been disclosed and the additional personal data does not provide meaningful further accountability in this case. Furthermore, the

information in the public domain about the complaint substantially mitigates any remaining public interest in the names and financial standing of experts.

89. It is the Commissioner's view that the disclosure of this information would be unfair to the data subjects and that the information has been correctly withheld by virtue of section 40(2).

Category four

90. The GMC is a complaints handling body and consequently handles many complaints simultaneously. This includes in some circumstances obtaining legal and casework advice for more than one case at once, even where they are not factually connected (but may be connected for example in relation to the issues that they raise).
91. This has happened in this case. The Commissioner considers that the nature of other complaints and the names of the complainants and the complained about cannot be said to have been anticipated to be disclosed as a result of the complainant's complaint.
92. The information is of a private and sensitive nature. Neither the doctors nor the complainants would expect this information to be disclosed to the public. The Commissioner, having considered the information, concludes that information about other complaints can correctly be withheld by virtue of section 40(2) and need not be provided to the public.

Category five

93. The GMC employed a number of solicitors when considering the complainant's complaints. It also corresponded with the solicitors who represented the doctors.
94. The GMC provided those solicitors and their firm's names, but did not provide their direct email or phone number.
95. The Commissioner considers that the solicitor's and firm's names are the only things that are necessary to provide to take into account the public's legitimate interests in accountability and transparency. They enable a member of the public to make a complaint where appropriate either to the firm, a regulatory body or the court.
96. The Commissioner considers it is correct to keep the personal details back so that the individuals are only contacted directly by their clients and the correct channels of communication can be used otherwise. Indeed, solicitors would anticipate this protection from phone calls to

enable them to effectively manage their practice. In conclusion, the Commissioner considers that disclosure would be unfair.

97. Similarly, the Commissioner considers that the disclosure of the junior administrative assistant's details would also be unfair because it would not accord with their expectations.

Category six

98. As noted above, the Police undertook an investigation into the matters and passed its files to the GMC. The details of the witnesses and who instructed them is information that would be expected to be disseminated only in relation to a potential prosecution. Where a prosecution did not materialise, it would be expected that information about witnesses would be kept private (as they would not be required to give witness statements in a public court).
99. The Commissioner considers that information about witnesses (particularly when the case has not gone to court) attracts a real expectation of confidentiality. It is expected that the information in the statements is made in the best of faith and used only in the administration of justice. If a court case does materialise, then the witnesses will have the chance to be cross examined and the reliability of the statements will be further scrutinised. However, without the court process the witnesses would expect their confidentiality to be maintained.
100. The Commissioner considers that there is little legitimate public interest in the disclosure of this information so long after the events and that its disclosure would cause witnesses real damage and distress. It may also inhibit witnesses coming forward in the future to the police. The First Tier Tribunal (Information Rights) in *Marriott v IC and Metropolitan Police* [EA/2010/0183] considered a case about the witnesses employed by the Metropolitan Police during the time period that included the Jack the Ripper case. The Tribunal when considering section 30(2)(a) considered that even a century was not long enough to discharge the expectation of confidentiality for this sort of information or reduce the perceived prejudice that would result from disclosure.
101. The Commissioner considers that the placing of the witness information into the public domain outside the court process would be likely to cause damage and distress to those witnesses. It would not accord with their reasonable expectations and would be unfair to them as data subjects. As disclosure would be unfair, section 40(2) has been appropriately relied upon.

Category seven

102. The GMC disclosed the majority of the chronology of the report. However, it did redact some details about the named doctors' actions, statements and situation in the police investigation. As discussed above, information about allegations of the commission of criminal offences amounts to sensitive personal data and has an enhanced level of protection.
103. The GMC explained that the disclosure of this information was likely to cause the doctors real damage and distress. This is especially so given that it would resurrect the case again after twenty years (see paragraphs 80 and 81 above).
104. Bearing in mind the fact that this information relates to investigations of allegations of criminal behaviour, and that the investigations did not result in a hearing, the Commissioner finds this argument persuasive. The Commissioner considers that the GMC is right and the disclosure of this information to the public at this time would not be fair to the data subject.
105. The unfairness is further exacerbated because the chronology is a summary by an individual who was not involved with the actual investigation and there is a level of hearsay within the withheld information that would not amount to admissible evidence.
106. The GMC confirmed that it considered that the disclosure of the information would be likely to cause the individuals both damage and distress. It would be a disclosure of very private information and released in the current form would imply that the individuals may have committed criminal acts, without adequate evidence, after more than 20 years and without the right to reply. The Commissioner is satisfied that in the climate at the time of the request, the individuals would not anticipate the disclosure and the disclosure of the information could cause real distress.
107. When assessing the legitimate interests of the public, the Commissioner considers that members of the public will have a natural, and legitimate, interest in knowing how a Regulator deals with a series of complaints and the actions that it takes. The Commissioner considers that there is also a weighty public interest in knowing the process by which the police undertakes its responsibilities.
108. However, the GMC has pointed out that these legitimate interests are offset to some extent by the information that is available in the public domain. There has been a lot of publicity about the particular case to which the complaint relates and further disclosure of the disputed

information is unlikely to materially aid understanding. The Commissioner agrees that the information in the public domain does mitigate the necessity in transparency to a significant effect.

109. Overall, the Commissioner concludes that the disclosure of the disputed sensitive personal data would not be fair. He is satisfied that the disclosure would amount to an unwarranted intrusion into the individuals' lives and be a disproportionate invasion to their right to privacy. It follows that disclosure would contravene the first data protection principle and section 40(2) has been applied correctly.

110. There are also no conditions in Schedule 3 of the DPA that could be satisfied in this case and this alone confirms that the information has been withheld correctly under section 40(2).

Category eight

111. The information held for category eight is similarly the sensitive personal data of the named doctors. The Commissioner considers that disclosure would be unfair for the same reasons as outlined in paragraphs 103 to 110 above.

112. The information was correctly withheld by virtue of section 40(2).

Category nine

113. The solicitors summarised the recommendations made in a police report about some of the flaws that were present in the initial investigation it undertook into the complainant's complaints. The GMC redacted some of the comments about the alleged performance of individual police officers by virtue of section 40(2).

114. The Commissioner considers that the issue in this case is whether disclosure would be unfair to the data subjects. To expose to the public whether or not particular officers had performed their roles correctly would be against their expectations that private information about employment performance would remain private.

115. The Commissioner considers that generally an employee would expect that their disciplinary record would remain private between them and their employer. In addition he notes that the officers in question do not hold a very senior grade. Therefore he considers that the individual would be less likely than a more senior officer to have any expectation that the public would be told whether or not they had been the subject of disciplinary action.

116. When considering the reasonable expectations of the officers in this case the Commissioner has also taken into account the Police Reform Act 2002 and the Police (Complaint and Misconduct) Regulations 2004.

117. Section 11(7) of the Regulations states:

"As soon as practicable after any misconduct hearing or other action that is taken in respect of the matters dealt with in any report submitted under paragraph 22 of Schedule 3 of the 2002 Act, the Independent Police Complaints Commission or, as the case may be, an appropriate authority shall notify any complainant and interested person of the outcome of that hearing or action, including the fact and outcome of any appeal against the findings of or sanctions imposed by such a hearing."

118. In view of the above, the Commissioner has considered whether police officers should, irrespective of their seniority, reasonably expect that information about potential performance issues to be made available to others. He notes that the IPCC (Independent Police Complaints Commission) only publish the name of officers when there are proven allegations of something being seriously wrong. The Commissioner considers that the process above engenders the continuous expectation that information of this nature will only be disclosed to interested parties when necessary and not to the public at large. He considers that these expectations are reasonable in this case.

119. The reasonableness is further enhanced by the time that has passed, the fact that the issues were taken seriously by the Police (leading to an internal investigation), the fact that the information has been summarised by the solicitors and the information not being in the public domain (to the best of the Commissioner's knowledge).

120. The Commissioner accepts that there may be a legitimate interest in the general public knowing whether officers who are unfit to police are disciplined appropriately. However he considers that the provisions of the Police Reform Act satisfy this interest and that disclosure under FOIA is not appropriate in this case.

121. Therefore, he considers that section 40(2) has been applied appropriately to this information and it need not be provided to the public.

Category ten

122. The information held for category ten is also the sensitive personal data of the named doctors. The Commissioner considers that disclosure

would be unfair for the same reasons as outlined in paragraphs 103 to 110 above.

123. The Commissioner is aware that the complainant has received the unsummarised version directly from the CPS. This substantially mitigates any public interest in the summary being disclosed to the public as the right parties have been informed already.

124. It follows that the information was correctly withheld by virtue of section 40(2).

Procedural breaches

125. The request was complex because it related to a very large amount of information. However, the GMC did not comply with all the procedural provisions of FOIA and the next section of this Notice will explain where it fell short and why.

Section 10(1)

126. Section 10(1) of FOIA states that on receipt of a request for information a public authority comply with its obligations found in section 1 of FOIA (subject to a limited number of exceptions, none of which are relevant in this case).

127. Section 1(1)(b) requires that the GMC provides the complainant with all of the information that he was entitled to within 20 working days. The GMC failed to do so and therefore breached section 10(1) of FOIA.

Section 17(1)

128. Section 17(1) requires a public authority issues a complete refusal notice within 20 working days. The GMC did not succeed in issuing such a notice. It failed to be clear that it identified all the information requested, failed to explain what exemptions it was applying or why they applied. It therefore breached section 17(1) of FOIA.

Section 17(1)(c)

129. Section 17(1)(c) requires a public authority to explain why exemptions apply when it is not obvious. The Commissioner does not consider that the GMC managed to explain why it was applying a number of exemptions in this case and therefore breached section 17(1)(c) of FOIA.

Section 17(3)

130. Section 17(3) requires that a public authority explains where the balance of public interest lies when applying a qualified exemption and

why. The GMC failed to explain why it considered that the public interest favoured the maintenance of section 42(1) in this case and also breached section 17(3) of FOIA.

131. The Commissioner notes that the GMC has apologised to the complainant and the Commissioner about these breaches of FOIA and has provided the complainant with the information that the Commissioner requested it to provide.

132. The Commissioner has therefore used his discretion to require no remedial steps to be taken in this case, because there are no substantive steps (within his powers of regulating FOIA) that can remedy the procedural breaches above.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

134. 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.

135. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Pamela Clements
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