

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2014

Public Authority: General Dental Council

Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant requested from the General Dental Council ("GDC") information concerning the investigation of a complaint that he made about a dentist. The GDC disclosed some information but withheld other information under the exemptions in sections 21, 31, 40(2) and 42 of FOIA. It also stated that it held no information falling within one part of the complainant's request.
2. The Commissioner's decision is that the GDC has correctly withheld information under section 40(2) and that, on the balance of probabilities, it does not hold any information falling within one part of the complainant's request. He therefore does not require the GDC to take any further steps to ensure compliance with the legislation.

Request and response

3. On 1 March 2013 the complainant made a request to the GDC for information that it held in connection with his complaint about a named dentist. He requested:

"any and all records and documents the GDC and/or its staff and subcontracted parties inclusive of lawyers and their staff hold on the subject of or which make reference to the complaint of [name of complainant] against dentist [name of dentist] made to the GDC and any and all records and documents the GDC and/or its staff and subcontracted parties inclusive of lawyers and their staff hold on the subject of or which makes reference to the complaint of by [name of complainant] against dentist [name of dentist] made to the Parliamentary and Health Services

Ombudsman, including but not limited to letters, faxes, emails, memoranda of phone conversations, minutes or transcripts of meetings and inquiry sessions, legal submissions and exhibits, advisory papers and associated documents, etc., in the period from 1 September 2011 to the present"

4. On 26 March 2013, the GDC requested that the complainant provide further clarification regarding his request.
5. On 27 March 2013 the complainant sent the following email to the GDC:

"While I maintain that you have been duty bound to adhere to the deadlines for the 1/3/13 request, which was proper and clear, and the GDC's belated request for clarification is transparently obstructive, in order to be helpful I offer a list of some of the key documents encompassed in my 1/3/13 FOIA request which I expect by April 3:

a. Internal records of the GDC and their prosecution solicitors [name of firm of solicitors] as to when, how and why the named Prosecution 'expert' in this case came to be the Defence 'expert' in this case

b. GDC internal and prosecution team discussions about:

- i. *The possibility of investigating witness coaching allegations against the registrant*
- ii. *The GDC decision not to allocate this case to the Interim Orders Committee*
- iii. *The GDC decisions to omit or drop various charges before and after the Investigating Committee decisions*
- iv. *The GDC prosecution initial decision that testimony from Child A was not needed and the subsequent discussions of that decision by the prosecution team*
- v. *The GDC prosecution decision not to take witness testimony from Child A's mother*
- vi. *GDC discussions about auditing or not auditing the registrant's other patient records for inadequate record-keeping following the Investigating Committee decision to press charges regarding inadequate record-keeping for Patient A."*

6. On 28 March 2013 the GDC's solicitors sent a letter to the complainant by email. They confirmed that they were acting on behalf of the GDC in relation to the complainant's request under FOIA. They stated that:

"On 26 March 2013, the General Dental Council replied requesting further clarification from you about what information you were looking for, in order to respond to your request. You provided clarification via email on 27 March 2013.

You have confirmed that you would like the following information..."

The solicitors' letter then quoted paragraphs (a) and (b)(i)-(vi) of the complainant's email of 27 March 2013.

7. On 26 April 2013 the GDC's solicitors provided a response to the complainant. They stated that "[o]n 27 March you specified that you were interested in obtaining information under 7 headings." The seven headings that were detailed, and in relation to which responses were provided, were the headings identified in paragraphs (a) and (b)(i)-(vi) of the complainant's email of 27 March 2013. Some information was disclosed and other information withheld under sections 21, 31, 40 and 42 of FOIA.
8. On 3 May 2013 the complainant requested an internal review.
9. The GDC appointed a second firm of solicitors to advise on the internal review. The complainant was provided with the outcome of the internal review on 14 June 2013. It upheld the GDC's previous decision in relation to the application of exemptions, with the exception of some additional information contained in a document which was disclosed to the complainant.

Scope of the case

10. The complainant contacted the Commissioner on 1 August 2013 to complain about the way his request for information had been handled, specifically that the GDC had interpreted the scope of his request too narrowly and had withheld information that should have been disclosed to him.
11. In an earlier decision notice, issued on 26 March 2014 under case reference number FS50507507, the Commissioner considered whether the GDC was correct to interpret the scope of the complainant's request as limited to information covered by the seven parts of his request contained in his email of 27 March 2013. He determined it was correct

for the GDC to interpret the request as limited to those seven parts of the request.

12. In this decision notice, the Commissioner considered whether the GDC held any information falling within part (b)(vi) of the request and whether it was entitled to rely on sections 21, 31, 40(2) and 42 to withhold information falling within the scope of the other parts of the complainant's request, as determined in the Commissioner's earlier decision notice.

Reasons for decision

Section 1 - Information held

13. The complainant raised specific concerns that the GDC had stated that it held no information in relation to part b(vi) of his request, for information concerning the GDC's internal and prosecution team discussions about auditing or not auditing the dentist's other patient records for inadequate record-keeping following the Investigating Committee decision to press charges regarding inadequate record-keeping for Patient A.
14. The Commissioner therefore considered whether the GDC held any information falling within part b(vi) of the complainant's request.
15. In situations where there is a dispute between a public authority and a complainant about whether further information is held by the public authority, the Commissioner, following the lead of a number of Tribunal decisions, applies the civil standard of proof. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
16. The complainant raised particular concerns that the GDC had not identified any information about a potential audit of the dentist's patient records. He stated that at the public fitness to practice ("FTP") hearing the dentist's barrister had said that an audit of those records had been conducted by an independent consultant and his client had accepted the report that her patient records were generally poor. He indicated that her barrister had gone on to say that the dentist had since had instruction and a second audit she commissioned confirmed that her subsequent recordkeeping had improved to acceptable standards.
17. The complainant went on to say that the determination by the FTP Committee referred to it being a matter of agreement between the GDC

and the Defence that the dentist's recordkeeping was generally poor and, over a two year period, this was evidenced in Patient A's records.

18. The complainant was of the view that, given that the Defence arranged many months prior to the hearing for the two audits of a sampling from all of the dentist's patient records, it must be inferred that to the Defence it was obvious that the dentist was thought by the GDC to have been impaired for all her patients recordkeeping, not merely for Patient A. The complainant believed that it stretched credulity that the Defence would volunteer to the FTP Committee that all patient recordkeeping by the dentist was poor in the period following the incident involving Patient A unless the GDC had made plain to the Defence that the GDC considered that to be the reality, namely poor recordkeeping across the board. He queried why the Defence would go to such efforts of remediation, including two audits and volunteer the information during the hearing, if the GDC had not given a message that all recordkeeping by the dentist was doubted. He believed that the GDC must have conveyed the above and it would have been noted somewhere in their records, perhaps as diary note or memo of a telephone conversation or meeting.
19. By way of context, the GDC explained that the complainant's request followed his involvement over a period of 18 months with various GDC employees and also external legal advisors, acting on behalf of the GDC, in relation to his complaint about the dentist. It indicated that he had received a significant amount of correspondence prior to his request and had also regularly engaged with the GDC via the telephone. He had received a copy of the determination and transcripts of the GDC FTP case in early March 2013.
20. The GDC stated that, as the request related to a specific investigation into a named dentist, it and its solicitors operated case management systems under which all material information relating to the investigation into that case would have been stored and saved. The Commissioner was informed by the GDC that the information which was identified, retrieved and then reviewed in order to answer the request was:
 - hard copy and printed electronic internal GDC investigations, internal legal and hearings papers which included letters, notes of some key telephone conversations and emails and case documents; and
 - the hard copy case files from the GDC's solicitors.
21. The GDC stated that the search for relevant information was coordinated by a GDC employee who was not currently in the office. It had therefore

not been able to ascertain the precise manner in which searches were directed. However, it explained that records in relation to FTP complaints were held as a "case", that is, all information about the complaint was stored together. At the time in question the case information would have been a mix of electronic and paper records.

22. The GDC explained that it had located a large amount of information which could have included the information that the complainant had asked for, namely in relation to the specific questions about the GDC's investigation. The information recovered was then reviewed against the seven heads of the request in order to locate the particular information (where held) that would fall within those specific heads of the request.
23. The GDC went on to explain that it then commissioned a review by an external legal advisor of all of that documentation against the seven heads of the request. The external adviser identified from those documents which information fell within particular limbs of the request (where this was held).
24. Specifically in relation to part (b)(vi) of the complainant's request, the GDC confirmed that no information falling within this part of the request had been located. The GDC explained that, ultimately, it was a matter for the professional judgement of the its caseworkers, legal and other professional advisors to determine whether or not to consider a particular line of enquiry, and if they did not feel that it was relevant or necessary (or did not consider it at all) they may not have recorded any information in respect of it.
25. The GDC informed the Commissioner that the senior caseworker, who worked on this case at the time, had reviewed the file and commented that the issues arising from the first Investigating Committee hearing appeared to him to be very specifically referencing the records for the one particular patient to whom the complaint related. He did not believe that the GDC would have considered it proportionate at that stage in the case to extend the investigation to other patient records (ie consider an audit) and, if this had been the Committee's instruction, it would have been recorded and acted upon. The GDC went on to state that there was nothing in its records which had been identified to this effect.
26. The Commissioner enquired of the GDC whether any recorded information could have ever been held in relation to this part of the complainant's request but deleted or destroyed. The GDC informed him that this would not have occurred knowingly. It conceded that it was conceivable that ephemeral notes of discussions, calls, etc would have been created but then destroyed in the course of the investigation and prosecution as part of its "business as usual" processes.

27. The GDC went on to explain that much of the request related to events prior to June 2012. The request was made in March 2013 and any destruction (if it did occur) would have taken place prior to the date of the request. The GDC accepted that, as prior to April 2012, it used to operate a combination of both electronic and paper based case management, there was always a small risk that information might not be retained and/or be mislaid. It confirmed that it had subsequently moved all of its Fitness to Practice casework online. However, as it had explained above, it believed that it was very unlikely that the information would have been created in the first place and those documents and other pieces of information which were considered relevant to the case would have been retained as part of either the GDC's or its lawyers' case management processes.
28. Based on the explanation provided by the GDC, particularly the comments of the senior caseworker who worked on the case at the time, the Commissioner is satisfied that, on the balance of probabilities, it does not hold any information which falls within the scope of part b(vi) of the complainant's request. He has therefore decided that the GDC does not need to take any further steps to comply with FOIA in respect of that part of the complaint.

Exemptions

29. The GDC informed the Commissioner that it had provided information to the complainant because of his involvement as the informant in respect of the complaint about the dentist and as a witness in the subsequent FTP proceedings. It had also voluntarily disclosed other information to him, for example, in the processing of his FTP allegations against the dentist, specifically outside the scope of FOIA. This was information to which it had applied the exemption in section 21 (information available to the applicant by other means) on the basis that it was already known to be in his possession. The Commissioner is aware that some of this information may not have been disclosed by the GDC had it been requested by another person who did not have the same close connection with the case as the complainant, as the GDC would have considered the request under FOIA and regarded it as exempt from disclosure under section 40(2).
30. The Commissioner notes that a significant amount of information provided to him by the GDC is correspondence between the complainant and the GDC. The Commissioner has not provided any analysis in relation to this information as he does not believe that this was information that the complainant was seeking to obtain when he made his request. In addition and in any event, this information is exempt from disclosure under section 40(1) of FOIA as it constitutes the complainant's personal data.

31. The GDC withheld the remaining information falling within the scope of the complainant's request under the exemptions in sections 31, 40(2) and 42 of FOIA. The Commissioner initially considered whether the withheld information was exempt from disclosure under section 40(2).

Section 40(2) – Personal information

32. Section 40(2) provides an exemption for information which is the personal information of an individual other than the complainant and where one of the conditions listed in section 40(3) or 40(4) is satisfied.

33. 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."*

34. 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."*

35. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.

36. The Commissioner therefore considered:

(1) whether the withheld information constitutes personal data; and if so

(2) whether disclosure would breach one of the data protection principles.

(1) Does the withheld information constitute personal data?

37. In order to establish whether section 40(2) had been correctly applied, the Commissioner first considered whether the withheld information is the personal data of a party other than the complainant.

38. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.

39. The GDC noted that in its earlier decision notice in respect of this case (reference number FS50507507), the ICO concluded that had some information about the dentist not already have been put in the public domain as a result of the GDC's regulatory process, it might have been appropriate for it to have neither confirmed nor denied whether any information was held under section 40(5) of FOIA (and then not gone on to supply any information to the complainant).

40. The GDC also noted that the ICO's guidance on the definition of personal data states:

"In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about [her] activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' [her]."

41. The GDC pointed out that in a decision notice in respect of the Nursing and Midwifery Council (reference number FS50169734) (a complaint regarding a request to the Nursing and Midwifery Council for information about a fitness to practice investigation concerning a named nurse) the ICO took the general view that whether a complaint has been made against a named individual acting in their professional capacity is information which constitutes the personal data of that individual. The GDC submitted that the case papers, from which the withheld information is drawn, are 'obviously about' the dentist and/or are 'clearly linked' to her. In other words, how the complaint/FTP investigation was progressed constitutes the personal data of the dentist

as it constitutes, in accordance with the definition of "personal data" under section 1 of the DPA, "...expressions of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual".

42. The GDC considered that the requested information contained the personal data of:
 - The dentist;
 - Staff of the GDC;
 - Employees of the GDC's external solicitors;
 - The expert, described in limb '1' of the request;
 - Patient A, to whom the complaint related; and
 - The complainant (The GDC noted that this information was exempt from disclosure under section 40(1) and that he had confirmed to the GDC that he was interested in third party information in an email of 27 March 2013).
43. The GDC explained that all of the information was created in the context of a specific investigation into the dentist, who is named in almost all documentation.
44. The Commissioner was informed by the GDC that it also considered whether any of the personal data within the withheld information constituted "sensitive personal data". "Sensitive personal data" is defined in section 2 of the DPA as personal data which falls into one of the categories set out in that section.
45. The GDC was of the view that the information relating to patient A was sensitive personal data within section 2 of the Data Protection Act 1998 (as it relates to her physical or mental health or condition). It argued that it would not be appropriate to release this to the world under FOIA. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves.
46. The GDC informed the Commissioner that it did not consider that information concerning the dentist was sensitive personal data within the definition of section 2.
47. The Commissioner initially considered the extent to which the withheld information constituted the personal data of the dentist to whom the request related. The withheld information is made up of GDC documents

related to its handling of the investigation into the dentist. These include documents discussing:

- the allegations against the dentist;
 - the scope of the investigation into those allegations;
 - how to proceed with the investigation;
 - the evidence related to the allegations;
 - the charges to be made against the dentist;
 - the evidence to be provided by witnesses; and
 - the scheduling of the hearing.
48. In the Commissioner's view the two main elements necessary for information to be personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in some way.
49. The Commissioner agrees with the GDC's view that, given the nature of the information that has been withheld and the context in which it was created, it clearly relates to an identifiable individual, the dentist, and is about her. Consequently, he is satisfied that it constitutes her personal data.
50. However, the fact that information constitutes the personal data of an individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The Commissioner therefore went on to consider whether disclosure of the dentist's personal data would breach one of the data protection principles.

(2) Would disclosure breach one of the data protection principles?

51. The GDC informed the Commissioner that, as regards the dentist, it believed that it would be a breach of the first, second, and fourth data protection principles of the DPA to disclose the withheld information.

52. The Commissioner initially considered whether the disclosure of the withheld information would be a breach of the first data protection principle. The first data protection principle requires that any disclosure of personal data is fair and lawful and that at least one of the conditions in schedule 2 of the DPA is met.
53. The Commissioner firstly gave consideration to whether the disclosure of the withheld information would be fair. In doing so, he took into account the following factors:
- (i) the individual's reasonable expectations of what would happen to her information;
 - (ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned; and
 - (iii) whether the legitimate interests of the public in disclosure were sufficient to justify any negative impact to the rights and freedoms of the individual concerned.

(i) Reasonable expectations of the individual concerned

54. The Commissioner considered the reasonable expectations of the dentist in terms of what would happen to her personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
55. When considering what information an individual should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to their public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
56. The GDC informed the Commissioner that, as the statutory regulator for dentists and dental professionals, its role requires it investigating FTP complaints. The FTP process has three main stages which are:
- initial consideration of a matter through an administrative assessment;
 - consideration by an Investigating Committee of any matter assessed to amount to an allegation;
 - consideration of the allegation by a Practice Committee at a hearing.

57. The GDC explained that in respect of the dentist's legitimate expectations, it concluded that, whilst the information relates to the individual's professional life, it was processed in the context of professional regulation, and the dentist would expect that her personal data would be handled in accordance with the GDC's publication and disclosure policy. This sets out that:
- (i) decisions of statutory committees held in public are published on the GDC website; and
 - (ii) Investigating Committee processes are usually private.
58. The GDC contended that the dentist would therefore reasonably expect that her personal data would be kept private, save as where it would be routinely published in accordance with the GDC's publication and disclosure policy, or unless there was an overwhelming public interest in publishing it.
59. The Commissioner notes that the withheld information relates to the dentist acting in a professional capacity, rather than a private capacity. There should therefore be a greater expectation that this type of information may be disclosed to the public. He also notes that this request concerns information regarding a complaint made to the GDC which resulted in a public disciplinary hearing in respect of the issues raised and, as part of which, the name of the dentist was made public.
60. However, the Commissioner is aware that the GDC has a policy of only publishing limited amounts of information on its website related to these types of matters. He also notes that the information to which the GDC has applied this exemption is detailed information about the handling of the investigation. This is not the type of information that a person subject to such proceedings would normally expect, in light of its normal approach, to be placed in the public domain by the GDC.
61. The Commissioner is therefore satisfied that the dentist would have had a reasonable expectation that the withheld information, which constitutes her personal data, would not be disclosed to the public at large.

(ii) Consequences of disclosure

62. The Commissioner was informed by the GDC that it had considered the consequences of disclosure on the dentist and had concluded that the release of further information would cause additional damage or

intrusion to her. It believed that, whilst some information about the dentist's FTP (and the finalised charge) entered the public domain (in accordance with the GDC's normal rules on publication and disclosure), the disclosure of further information would be unfair, as this might contain allegations that had not been formally tested or the facts that had not been proved. It argued that, if such information was made available, it would be likely to undermine the public (and the dental professions) confidence in the regulatory system. This was because unsubstantiated allegations would be inappropriately released to the world and, consequently, natural justice, and the principles of fairness underscoring the regulatory system, would be undermined. The release of unsubstantiated information could, for instance, also have attendant negative implications for a dentist's work and personal life.

63. The GDC also contended that disclosure could result in further, less tangible harm being suffered by the dentist, for instance, unwarranted correspondence or further complaints, or unfair detriment to her business or customers (including the NHS as a commissioner of dental services). It also believed that it would be unfair to require the dentist to have to rebut or correct publicly any unfounded or unsubstantiated information which was released under FOIA.
64. The GDC noted that, to the extent that any allegation related to professional regulation, which may have profound implications on the dentist's ability to practise, it was information which it believed warranted a higher threshold in order for it to be released to the world at large.
65. The Commissioner accepts that the disclosure of the withheld information could result in information about unproven evidence and allegations about the dentist be placed in the public domain. Any such disclosures could clearly be potentially harmful to her in a professional, as well as in a personal, capacity. The Commissioner also accepts that disclosure could cause distress to the dentist by the reopening of matters which she believed had been concluded after the final GDC FTP hearing and decision.

(iii) General principles of accountability and transparency

66. The Commissioner notes that, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.

67. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

The GDC's arguments

68. The Commissioner was informed by the GDC that it recognised that the disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to their activities. The GDC also recognised that there is a public interest in understanding its decision making in respect of particular cases, in knowing where particular registrants have acted improperly and assessing whether it is regulating the dental profession effectively. To this end, the GDC explained that it tried to be as transparent as possible (and is required to be transparent in holding its FTP hearings in public, save in narrow circumstances). It stated that, for example, there was an extensive amount of information made available on its website.
69. The GDC informed the Commissioner that the FTP process and, in particular, the conclusion of FTP matters by Practice Committees was open and transparent where possible, and in accordance with the relevant statutory rules. It explained that comments may be made in determinations, where appropriate, on the investigation undertaken (as there is internal independence between the committee hearing the case and the GDC investigation and prosecution teams). It pointed to the fact that its determinations provide analysis of the exact accusations that have been made and what the decision is. In the GDC's view, this public explanation satisfied the public interest and the public interest was not further served by the release of additional information. It did not consider that the release of personal data, beyond that it would normally publish, was necessary in discharging this public interest, which was met, it believed, through the independent nature of the Professional Conduct Committee, the role of the Professional Standards Authority ("PSA") and the GDC's other reporting arrangements.
70. The GDC also raised concerns regarding the lawfulness of disclosure. It explained that there was an expectation on the part of dentists that, save for the public elements of the GDC's processes, detailed information about their case would be kept confidential unless the public interest required disclosure. The voluntary release of information which would otherwise not be disclosed would be open to challenge as a breach of the privacy or confidence of the dentist.
71. The GDC pointed to the ICO's decision notice in respect of case reference number FS50169734 (a complaint, referred to above, regarding a request to the Nursing and Midwifery Council for information about a fitness to practice investigation concerning a named nurse) in

which the ICO found that it was the regulator's role, as well as that of NHS Trusts and other establishments, to ensure that healthcare professionals maintained the required FTP standards and that the legitimate interest was met by these bodies performing their functions, rather than disclosing details of complaints against specific individuals. The ICO found that it was not necessary to disclose the nurse's personal data as the legitimate interest could be satisfied by an alternative mechanism.

72. The GDC informed the Commissioner that it was equally of the view that the principles in the above decision notice could be extended to the details of the handling of the investigation into the dentist in this case. As it had explained, the GDC considered that there was a legitimate interest in the public understanding how it made its decisions and that the public would wish to know about proven misconduct against the individual. It argued that, whilst there might be some limited legitimate interests in knowing about unproven, untested or dropped charges, the public disclosure of such information would cause unwarranted interference to the rights, freedoms, and legitimate interests of the dentists involved, and more broadly the legitimate interests of the GDC in terms of natural justice and the effective management of its regulatory proceedings.
73. The GDC also believed that it was important to note that the request was made within six weeks of the determination of its FTP Committee. It explained that, although the dentist had no direct right of appeal from the determination as impairment had not been found, she (or indeed anyone else who had been affected by the GDC's decision-making) could have sought to judicially review the GDC's determination. It stated that applications for judicial review must be brought promptly and in any event within three months of the date of the decision (i.e. of the determination).
74. The GDC considered that the release of information to the world about an existing case, which could have been subject to further legal challenge, would have been likely to prejudice natural justice in the event that such a challenge was brought. It believed that the release of information about a draft charge to public scrutiny could lead to adverse publicity which could result in either additional pressure for those deciding the case or place undue influence on the parties involved in any hearing. The GDC maintained that this factor was still relevant despite the time which had elapsed in this case because the legal test for applying exemptions is the date on which the request was made.
75. The GDC argued that this case related to a single complaint made in relation to the care provided to a single patient, albeit a minor, which resulted in a finding of "not impaired". It did not consider that it was the

type of case where there would usually be a higher level of public interest because of a wider risk to public safety or confidence in the dental profession because of more extensive allegations against a dentist. It explained that it also took into account the recent nature of the hearing, the relatively limited nature of the finalised allegations against the dentist and the finding that, whilst there was impairment, there was no misconduct on the part of the dentist.

The complainant's arguments

76. The complainant informed the Commissioner that he believed that the disclosure of the withheld information would help to shed light on what he believed to be a defective investigation, prosecution and FTP hearing. He pointed to what was, in his view, a considerable body of opinion, including a BBC investigation, which suggested that the GDC was unfit for its regulatory function because of its defective and impaired conduct and processes. Consequently, he believed that the public interest favoured rigorous (and timely) independent scrutiny of the GDC process in cases such as the one with which he was concerned, particularly given that it involved a child and that, despite misconduct having been found, no sanctions were imposed on the dentist.
77. The complainant also contended that public interest test was engaged because the GDC was not effectively transparent to the PSA, an agency which has never used its power to request judicial review in respect of the GDC decision-making, and was clearly underfunded for the range of agencies it is meant to scrutinise.
78. The Commissioner notes that Parliament has charged the GDC with the function of regulating the dental profession. His view, therefore, is that it would be a matter for Parliament to consider whether, taking into account relevant evidence, the GDC should continue to carry out that function. He also notes that the complainant made a complaint to the PSA about the GDC's handling of his complaint about the dentist and it subsequently reviewed the matter. The PSA is the body given the responsibility by Parliament of oversight and scrutiny of the GDC.
79. Unless Parliament decides to the contrary, the Commissioner has to proceed on the basis that the GDC is the appropriate body to consider and determine complaints such as the one that the complainant made and that the PSA is the appropriate body to oversee the GDC's exercise of that function. He therefore believes that any public interest in disclosure of detailed information relating to the investigation of a specific complaint is likely to be limited where that the case has been considered by the GDC and is under review or has been reviewed by the PSA.

80. When considering the application of an exemption and any public interest factors in relation to the application of an exemption, the Commissioner's view is that the relevant circumstances to be taken into account are those that exist at the date of the request or when a public authority actually deals with the request, provided this is within the statutory time for compliance (normally 20 working days from receiving the request). Any relevant factors or changes in circumstances that arise after this time should not generally be considered.
81. The Commissioner notes that the FTP hearing regarding the dentist took place on 25 February 2013 and the decision was issued shortly afterwards. The complainant made an initial request for information to the GDC on 1 March 2013. This was narrowed to the request that is being considered in this decision notice on 27 March 2013. The complainant also made a detailed complaint to the PSA in March 2013 concerning the GDC's handling of his complaint about the dentist.
82. It appears that, at the time that the GDC issued its refusal notice on 26 April 2013, the PSA was still considering the complaint made to it by the complainant. The Commissioner accepts that there is a public interest in the GDC not placing in the public domain detailed information about one of its investigations which is under review by the PSA at the time of the request so as not to prejudice the conduct of that review.
83. The complainant also informed the Commissioner that he believed that the GDC's argument that he could have challenged its decision via judicial review was not a valid one as only an extremely rich person could afford the costs of doing so. In addition, he argued that, as the GDC had used the potential for judicial review proceedings as an argument for withholding information, this was no longer relevant once the relatively short timeframe for such proceedings had run out.
84. As noted above, the Commissioner believes that the appropriate time for the consideration of public interest factors is at the time of the request or, at the latest, the time of a public authority's response. In light of this, he accepts the GDC's argument that at that time it was still possible that judicial review proceedings in relation to its handling of the complaint could be commenced. He therefore acknowledges that this is a legitimate public interest factor for the GDC to have taken into account in its application of the exemption.
85. The complainant also raised concerns that the GDC found, and the dentist accepted, that her record keeping was deficient which meant that her patients would have had deficient dental records. He noted that the GDC only required her to improve her record keeping in the future but did not require her to try to remedy the deficiencies that already existed in her patients' records. The complainant believed that this

meant that many of her patients would have incomplete dental records, something they should have been informed of and something that the GDC should have tried to ensure was corrected.

86. The complainant emphasised that from his perspective the failure of the GDC to act in relation to the defective patient records of all of the dentist's patients, other than Patient A, was at the core of the public interest in disclosure. He felt that, if no-one among the GDC personnel gave genuine consideration to an audit of the patient records of the dentist, then all her patients had been let down by this strange omission. The complainant argued that all of the patients of the dentist, other than Patient A, would still to this day be in the dark that their records were poor. In his view, the GDC seemed allied with the dentist in keeping a lid on scandalous unprofessionalism essentially unpunished, with its consequences uncorrected. He believed that the appropriate alternative would have been a GDC run audit and then instructions to the dentist to inform and work with every patient affected to correct and fill in missing details in their records. The complainant believed that this was something that could have been done and that it was the GDC's responsibility to ensure that it was done.
87. With regard to the issue of the dentist's record keeping, the Commissioner notes that in relation part b(vi) of the complainant's request, for information concerning the GDC's internal and prosecution team discussions about auditing or not auditing the dentist's other patient records for inadequate record-keeping, he found in the earlier part of this decision notice that, on the balance of probabilities, it held no information. Taking this into account and having reviewed the withheld information, the Commissioner does not believe that the disclosure of the withheld information would shed new light on the issue of the dentist's record keeping in general. He notes that the focus of the discussions in the withheld information, as indicated by the GDC's senior caseworker who worked on the case at the time, is the dentist's record keeping specifically related to Patient A. The discussions are not concerned with record keeping in respect of the dentist's other patients.

The Commissioner's view

88. The Commissioner accepts that the disclosure of the withheld information would place in the public domain detailed information about the investigation into the complainant's concerns about the dentist, including evidence and allegations that had not been proven. He notes that at the conclusion of GDC's investigation, there was a full hearing before the GDC's FTP Committee and, at the time of the request, the GDC's handling of the complaint was under review by the PSA.

89. The Commissioner believes that any public interest in disclosure must be weighed against potential the prejudices to the rights, freedoms and legitimate interests of the dentist who was the focus of the GDC's investigation. Taking into account of all of the issues discussed above, the Commissioner has concluded that the strength of the legitimate interest in disclosure is not sufficient to supersede the right of the data subject, the dentist, to privacy. This decision has been informed by his consideration of the reasonable expectations of the dentist, the possible consequences of disclosure and the timing of the request.
90. The Commissioner has therefore concluded that it would be unfair to disclose the withheld information as this would breach the first data protection principle. In light of this, it has not been necessary for him to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. He has therefore decided that the GDC has correctly applied section 40(2) to the information that it withheld under that section.
91. Having determined that the withheld information was exempt from disclosure under section 40(2), the Commissioner did not consider the GDC's application of other exemptions to that information.

Other matters

Internal review

92. The complainant raised concerns that the GDC's internal review letter appeared to suggest that the reviewer did not inspect any of the documents covered by the request but relied on the views of the solicitors who advised the GDC on the original response. He was concerned that if the person who carried out the internal review did not see any of the documents falling within the scope of his request, they would not have been in a position to identify and rectify any mistake that may have been made by the GDC's solicitors who considered the request originally.
93. In addition, the complainant noted that it appeared that the internal review was not carried out by the GDC but by solicitors on its behalf. He accepted that the GDC might want to take legal advice as part of the internal review process but queried whether it should have handed over responsibility for the review to its solicitors.
94. The GDC informed the Commissioner that they had written to the complainant on 14 June 2013 to set out their view of the handling of the internal review. As confirmed in that letter, the GDC explained that, as the original request had been dealt with by external solicitors, they had

taken the view that the internal review should be considered by a different firm of external solicitors. The GDC's decision regarding the internal review was based on the opinion that the latter firm of solicitors provided.

95. The GDC noted that there is no legal requirement to carry out an internal review or legally prescribed process that must be followed in undertaking an internal review. It pointed to the section 45 Code of Practice which sets out at paragraph 39 that:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

96. The GDC considered that it had complied with these obligations and that all the factors were reconsidered. It noted that whilst the section 45 Code of Practice sets out (at paragraph 40) that the public authority should "undertake a full re-evaluation", there is no express requirement in the Code of Practice for all of the information to be reconsidered. It confirmed that the documents disclosed in response to the original request were reconsidered in their unredacted form, which led to further disclosures to the complainant. In addition to this, it explained that the solicitors that advised on the original response provided the solicitors advising on the internal review response with a summary of the different categories of documents that fell within the request. This enabled the solicitors advising on the internal review response to assess the relevance of the cited exemptions and whether the public interest test had been applied appropriately.
97. The GDC explained that it usually considered most, if not all, of the original information and available evidence as part of an internal review, since the majority of reviews were targeted on particular issues and related to significantly less information than in this case. It identified two previous cases that the ICO had investigated and explained that because these cases involved requests for more limited information, the withheld information was again considered in its entirety at internal review.
98. The GDC went on to explain that it had agreed with the solicitors advising on the internal review that they would not need to reconsider all of the information that had been considered by the original solicitors as this would be disproportionate in the circumstances. It confirmed that the solicitors advising on the internal review did liaise with the original solicitors and review relevant decisions of the ICO in order to undertake

a "full re-evaluation of the case" in compliance with the section 45 Code of Practice. The GDC stated that this was an independent review, by a firm of external solicitors, with an expertise in this area, who was not involved with the original response and who could identify errors in the handling of the request.

99. The GDC believed that it therefore appropriately relied on the conclusion of the solicitors advising on the internal review and assurance that:

- the categories of information identified by the original solicitors were ones which fell within the scope of exemptions identified;
- the relevant public interest arguments had been properly considered and balanced; and
- the further information identified should be released to the complainant.

100. The Commissioner initially notes that FOIA does not impose any obligations on public authorities in respect of internal reviews other than to state whether or not it offers an internal review procedure and it makes no provision for how an internal review should be carried out, if a public authority chooses to offer this option to requesters.

101. The Commissioner notes that the decision as to the outcome of the internal review was taken by an employee of the GDC acting on the advice of external solicitors. The Commissioner sees nothing wrong in principle with this approach being adopted by a public authority.

102. With regard to the complainant's concerns that the withheld information was not viewed by the employee of the GDC who provided the outcome of the internal review or the solicitors who advised on it, he notes that the solicitors advising on the internal review were provided with a summary of the different categories of documents that fell within the scope of the request. The GDC believed that this enabled the solicitors to effectively assess the relevance of the cited exemptions and the application of the public interest. Given the circumstances of the case, particularly the large amount of information identified as falling within the scope of the request, the Commissioner does not believe that this was an inappropriate course of action to follow.

Right of appeal

103. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

104. 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.

105. 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

Rachael Cragg
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Information Commissioner's Office
Wycliffe House
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SK9 5AF