Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **15 September 2014**

Public Authority: **General Osteopathic Council**
Address: **Osteopathy House**
176 Tower Bridge Road
London SE1 3LU

Decision (including any steps ordered)

1. The complainant has requested the full transcript of a hearing into allegations of Unacceptable Professional Conduct against a named osteopath. The General Osteopathic Council released a redacted copy of the transcript. It said that the information that had been redacted is the personal data of third persons.

2. The Commissioner's decision is that the General Osteopathic Council:

   - breached section 17 of the FOIA as its initial refusal notice did not meet the requirements of the FOIA; but

   - is correct to withhold the redacted information as it is the personal data of third persons and therefore exempt under section 40(2).

3. The Commissioner does not require the General Osteopathy Council to take any further steps.

Request and response

4. On 22 April 2014, the complainant wrote to the General Osteopathy Council ('GOsC') and requested information in the following terms:

   "Under the Freedom of Information Act, please provide me with an electronic copy of the full transcript of the disciplinary hearing against

[Named Individual]*, conducted last month, along with electronic copies of all of the official case documents including but not limited to:*

- *the charge statement*
- *any written statement of defence*
- *motions, skeleton arguments or other submissions from the parties*
- *witness statements; and*
- *documentary material admitted into evidence"*

5. GOsC responded on 21 May. In relation to the first element of the request, it released a redacted copy of the transcript and said information had been redacted in order to preserve the anonymity of the witnesses involved, and to maintain the confidentiality of their medical information and information about their personal life. In relation to the second element of the request, GOsC released the charge statement and said the remainder of the requested information was exempt from disclosure under section 31 (law enforcement) and section 32 (court records).

6. Following an internal review, GOsC wrote to the complainant on 13 June. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 19 June to complain about the way their request for information had been handled. They confirmed that they accepted GOsC's application of section 31 and section 32 to some of the information. However, they were not satisfied that the transcript had been redacted – specifically the redactions relating to information concerning the witnesses referred to as 'Patient A' and 'Patient B' throughout. They also did not consider that GOsC had issued a proper refusal notice as it did not cite a relevant exemption in its response.

8. The Commissioner focussed his investigation on whether the redacted information is the personal data of third persons and so exempt from disclosure under section 40(2). He has also considered GOsC's refusal notice.

Reasons for decision

9. **Section 17** of the FOIA says that if a public authority is relying on an exemption in order to withhold information, it should give the applicant

a notice that states that fact and specifies the exemption and why it applies.

10. In this case, GOsC explained to the complainant why it had redacted some information from the transcript, but did not cite the relevant exemption – section 40(2) – or say clearly why it applied.

11. GOsC has told the Commissioner that it subsequently provided the complainant with a further refusal notice that met the conditions of the FOIA. The Commissioner also notes GOsC's observations that it is a small but busy organisation and he recognises its efforts to nonetheless comply with the complex FOIA requirements of this request.

12. **Section 40(2)** of the FOIA says information is exempt from disclosure if it is the personal data of a third party (ie someone other than the applicant) and the conditions under either section 40(3) or 40(4) are also satisfied.

13. The Commissioner therefore first considered whether the requested information is the personal data of a third party.

Is the information personal data?

14. The Data Protection Act (DPA) says that for data to constitute *personal* data, it must relate to a living individual, and that individual must be identifiable.

15. Sensitive personal data is a category of personal data that includes information about an individual's race or ethnic origin, religious beliefs, health or sexual life. It is subject to stricter regulation than ordinary personal data.

16. The information that has been redacted concerns:

- In relation to Patient A - their job, the name of the company they work for, their sexuality, their age, the name of a particular online profile, and material contained on that online profile.

- In relation to Patient B – their sexuality, their job, and information about previous relationships.

- In relation to Patient A and Patient B – the name of the health club they are both members of, the location to which they intend to emigrate, and a holiday location.

- It also includes the names of Patient A and Patient B's friends/colleagues. The complainant has confirmed that they do

not want this particular information and the Commissioner has therefore not included it in his considerations.

17. The Commissioner is satisfied that all the requested information relates to the individuals concerned – the data subjects. He has then considered the second part of the definition: whether the individuals can be identified from the information.

18. The Commissioner has seen both the redacted and unredacted versions of the transcript. The data subjects that are the subject of the request are referred to as Patient A and Patient B throughout both documents. The Commissioner notes that the complainant has not requested the names of the data subjects; they have requested the information detailed in paragraph 16.

19. The Commissioner is satisfied that Patient A could be identified if their online profile, including the material associated with that profile, was to be released and that this is therefore clearly Patient A's personal data.

20. The Commissioner has then gone on to consider whether Patient A and Patient B could be identified if their jobs, employer, age, the country to which they intend to emigrate and a past holiday destination were to be released.

21. He has also considered the information concerning Patient A and Patient B's sexuality, and information about Patient B's previous relationships. If this information is shown to be personal data it is, in addition, sensitive personal information.

22. On the one hand, the Commissioner accepts that the withheld information does not explicitly identify any individual. However, if a member of the general public could identify the individuals by cross referencing the withheld information with other information, in the Commissioner's view the withheld information will constitute personal data.

23. The argument here is that the withheld information, once disclosed, may be combined with other information; information that is either already in the public domain or information known by a geographic community, or community of interest. This would therefore enable a picture to emerge, rather like building a mosaic from apparently unrelated pieces.

24. GOsC had submitted to the Commissioner a comprehensive argument in support of its position that disclosing the requested information would breach the Data Protection Act. However, GOsC had not first considered if the information is personal data and provided an explanation as to how the data subjects could be identified from it.

25. On request, GOsC explained to the Commissioner how this might happen. GOsC argued that releasing information about Patient A's work place and circumstances would risk that individual being identified for the reasons given in paragraph 23. The full explanation that GOsC provided is included in a confidential annex to this notice. The Commissioner also considers that there is a risk that Patient B could be identified if the requested information were to be released, and through association with Patient A.

26. The specific and unusual nature of the information – such as Patient A and Patient B's holiday destination and where they intend to emigrate – increases the likelihood that this information could be combined with other information to reveal the identities of both patients.

27. The Commissioner is mindful of the fact that whilst the complainant may not be able to link the information to an individual or individuals, disclosure under the Act is considered to be disclosure to the public at large. If the General Orthopaedic Council disclosed the information to the complainant under the FOIA, it should also be prepared to disclose the same information to any other person who asks for it.

28. Taking into account the above factors, the Commissioner considers that it could be possible for specific individuals to be identified if the withheld information were to be disclosed, and that this is more than a slight hypothetical possibility. Accordingly, the Commissioner is satisfied that the remaining information requested does constitute the individuals' personal data, within the definition at section 1(1) of the DPA.

29. Having decided that the requested information is third party personal data, the Commissioner then turned his attention to the conditions under section 40(3).

30. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of the DPA. The Commissioner considered whether GOsC was correct when it argued in its submission to him that disclosing the information would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully…'.

31. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:

    - Have the individuals concerned (ie the data subjects) given their consent to disclosure?

    - What reasonable expectation do the individuals have about what will happen to their personal data?

- What might be the likely consequences resulting from disclosure?

32. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so (condition 6 in Schedule 2 of the Data Protection Act). The Commissioner therefore also finally considered these interests.

Have the individuals given their consent to disclosure?

33. GOsC has provided the Commissioner with compelling evidence that the individuals concerned have not consented to the disclosure of their personal data: statements from both Patient A and Patient B in which they emphasise that they do not want their personal data to be released.

What reasonable expectation do the individuals have about what will happen to their personal data?

34. GOsC has explained that, in common with the practice of other UK health care regulatory bodies, it is the General Osteopathic Council's usual and established practice to anonymise the identities of complainants and patients in particular cases. In line with this, GOsC gave specific assurance to Patient A and Patient B that their identities would be protected.

35. The hearing in question was held in public and the complainant has argued that Patient A and Patient B attended and spoke at this public hearing voluntarily. They consider that Patient and Patient B could therefore have no expectation of anonymity or privacy.

36. The complainant has referred to the case of *Tredea v Information Commissioner and General Medical Council* (EA/2013/0041)[1] to support their arguments. Specifically, paragraph 40 of the appeal decision: that an individual "would have no legitimate expectation of confidentiality extending to any part of the record of a public hearing other than those parts of it that contain medical information…"

37. In that case, the applicant had requested a copy of the transcript of a Fitness to Practice hearing involving a named doctor. The Commissioner had decided that the General Medical Council had correctly applied the

[1] EA/2013/0041

section 40(2) exemption to the entire transcript. On appeal, the Tribunal said that the transcript should be released with specific information related to the subject's health (which is sensitive personal data) redacted.

38. The Tredea case differs from this case that in that the identity of the doctor in question - their name - was already in the public domain. In this case, the identities of witnesses in the hearing are not in the public domain. What is in question is whether releasing the information that has been requested has the potential to reveal who those witnesses are.

39. GOsC accepts that the hearing in this case was held in public. However, it has told the Commissioner that there were no members of the public present when Patient A and Patient B gave evidence. Furthermore, GOsC has said that had any members of the public been present, it would have applied to hear parts of their evidence in private. Had members of the public been present GOsC says it would have used screens and other mechanisms to protect the identities of Patient A and Patient B.

40. Once GOsC received the request for the transcript, it anonymised it so that the remaining evidence reflected that which any members of the public gallery would have been allowed to hear, had any been present.

41. The complainant has also said that Patient A and Patient B volunteered certain information during the course of the hearing and therefore would expect that it could be revealed to the world at large. Moreover, the complainant has told the Commissioner that their expectations of anonymity would be diminished because these individuals were found to have "lied on oath".

42. The Commissioner is not convinced by this argument and he agrees with GOsC that both patients were obliged to provide this information in response to questions lawyers asked them during the course of the hearing.

43. Having considered all the arguments submitted by both parties, the Commissioner is satisfied that Patient A and Patient B would have a reasonable expectation that their personal data, and their identities, would be protected and not released into the public domain. That both patients were expressly assured by GOsC that they would remain anonymous is a particularly compelling factor in the Commissioner reaching this conclusion.

What might be the likely consequences of disclosure?

44. As mentioned in paragraph 33, Patient A and Patient B provided GOsC with their views on the potential release of the requested information. In their statements, they confirm that they found the hearing extremely stressful and they are relieved that it is over. Both mention that GOsC had assured them that their anonymity would be preserved. Patient A and Patient B say that the release of the information would therefore cause them a great deal of anxiety and they are fearful that, if their identities were known, they might be persecuted – in person or in the media - and that it might negatively impact their current or future employment.

45. It is clear to the Commissioner that disclosing the requested information – with the risk that this might result in them being identified – is very likely to cause damage and distress to Patient A and Patient B by harming their emotional wellbeing and mental health.

46. The Commissioner is satisfied that the data subjects have not *consented* to their personal data being released, that they would not *expect* it to be released and that they would be *distressed* if it were to be released. He therefore considers it would be unfair to release the requested information, and a breach of the Data Protection Act.

Is there any legitimate interest in disclosure to the public?

47. Despite the factors above, the requested information may still be disclosed if it can be argued that there is a compelling public interest in doing so.

48. In correspondence to GOsC, the complainant has argued that in order for medical professionals to be properly and carefully regulated it is important for the complete transcript of hearings to be available to the public. They refer to a "principle of open justice"; the desirability of someone being able to read and assess exactly what the hearing Committee heard in order to maintain confidence in the system.

49. There is certainly a public interest in ensuring the General Osteopathy Council operates transparently and in how it determines allegations of Unacceptable Public Conduct. In its submission to the Commissioner, GOsC has argued that these interests have been satisfied through its release of a redacted version of the transcript of the disciplinary hearing in question.

50. The redacted transcript provides substantial information on the number and nature of the allegations, the circumstances of the misconduct, who committed the misconduct, matters that were proved and not proved, mitigation put forward to the Committee, and the reasons for the

Committee's decisions at the end of each stage of the proceedings. GOsC says that the withheld information – detailed at paragraph 16 – does not contribute anything further to GOsC satisfying its duty to be transparent.

51. Furthermore, GOsC says that setting a precedent of identifying witnesses would hamper its ability to comply with its statutory duties to regulate the osteopathy profession – and so be contrary to the public interest. This is because potential witnesses may be deterred from participating in hearings if they believed their identities might be revealed.

52. The Commissioner is convinced by GOsC's arguments. He is satisfied that there is no compelling public interest to be served in disclosing the withheld information that would override its duty to process the data subjects' personal information fairly.

Summary

53. As in the Tredea decision, the complainant has had almost the entire transcript, with very specific information redacted. In the Tredea case sensitive personal data was redacted because non-sensitive personal data was already in the public domain. In this case, the personal data of unidentified witnesses was redacted.

54. The Commissioner is satisfied that the redacted information is the personal data, and sensitive personal data, of third persons and that releasing it would contravene one of the conditions under section 40(3)(a)(1). It would be unfair to do so, would breach the first data protection principle and there is no legitimate public interest in its disclosure. It has not been necessary to go on to consider the conditions under section 40(4).

Right of appeal

55. 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

56. 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.

57. 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 .....

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