

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2016

Public Authority: General Medical Council
Address: 3 Hardman Street
Manchester
M3 3AW

Decision (including any steps ordered)

1. The complainant has requested the name and particular qualifications of a case examiner associated with a complaint he had submitted to the General Medical Council (GMC). The GMC responded to the request under both the FOIA and the Data Protection Act (DPA). Under section 40(5)(b)(i) of the FOIA, the GMC refused to confirm or deny it holds the requested information, advising that to do so would contravene the DPA.
2. The Commissioner's decision is that the GMC correctly applied section 40(5)(b)(i) to the request because to confirm or deny it held the information would breach one of the data protection principles.
3. The Commissioner does not require the GMC to take any steps.

Request and response

4. On 24 December 2015, the complainant wrote to the GMC and requested information in the following terms:
"May we know who your Assistant Registrar consulted as an asbestos expert able to understand the seriousness of the actions of [Dr A]."
"May we have some information as to their asbestos qualifications."
5. The GMC acknowledged the request on 6 January 2016 and explained that it would consider the complainant's request under both the FOIA and the DPA. The GMC responded to the request under the FOIA on 22 January 2016. It refused to confirm or deny that it held the specific information that had been requested, citing the provision at section

40(5)(b)(i) of the FOIA. It said the complainant was seeking personal data of a third person and that publicly confirming whether or not the GMC held it would breach the first principle of the DPA.

6. Following an internal review the GMC wrote to the complainant on 1 March 2016. With regard to its response under the FOIA, the GMC maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 3 March 2016 to complain about the way his request for information had been handled.
8. The Commissioner has focussed his investigation on the GMC's application of section 40(5)(b)(i) of the FOIA to the information the complainant has requested.

Reasons for decision

9. The GMC has provided some background to the request. This is provided in the Confidential Annex to this notice.

The GMC's approach

10. The GMC has explained to the Commissioner its approach to requests from a complainant (or doctor who is subject to a complaint) for the identity of a case examiner in relation to a specific complaint. It says it considers such requests under the DPA as well as the FOIA as it considers this to be the most transparent and helpful way of dealing with them. The GMC says it considers such requests under the DPA because, in addition to being the personal data of the case examiner involved, it considers this information to be the personal data of the complainant (and/or doctor) as it forms an integral part of the decision making process.
11. The GMC has explained that considering these requests in this way provides a route to disclosure where otherwise it would not be able to disclose the information. [Further information is contained in the Confidential Annex.] It does not therefore consider it appropriate to confirm whether or not it holds the requested information under the FOIA, and therefore it applied section 40(5)(b)(i).

Section 40(5) – neither confirm nor deny information is held

12. Section 1 of the FOIA provides two distinct, but related rights of access to information that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not requested information is held and, if so
 - b) the duty to communicate that information to the applicant.
13. However, in relation to personal information, section 40(5)(b)(i) of the FOIA says that a public authority is not obliged to confirm or deny that it holds information if, by confirming or denying that it is held, the authority would breach one of the data protection principles.
14. This subsection is about the consequences of confirming or denying whether the information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles, but whether the simple action of confirming or denying that it is held would do so.
15. The Commissioner's guidance on section 40(5) explains how there may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information about an individual can itself reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process.
16. For the GMC to have correctly relied on section 40(5)(b)(i) the following conditions must be met:
 - confirming or denying whether information is held would reveal personal data of a third party; and
 - confirming or denying whether information is held would contravene one of the data protection principles.
17. In order to reach a view regarding the application of this exemption, the Commissioner has first considered whether confirming or denying relevant information is held would reveal personal data of a third person as defined by the DPA.

Is the information personal data?
18. The DPA says that for data to constitute personal data, it must relate to a living individual, and that individual must be identifiable.

19. The GMC has confirmed to the Commissioner that its position is that, at the time of the request, confirming whether or not it held information about a particular case examiner (their name and asbestos-related qualifications) would disclose personal information about a doctor, namely whether or not that doctor has been the subject of a complaint.
20. As far as the Commissioner is aware, the doctor in question – 'Dr A' – (referred to by name in the original request) is alive. The name of an individual clearly relates to that individual and enables him or her to be identified. The Commissioner is therefore prepared to accept that confirming whether or not the GMC holds the requested information about a case examiner constitutes the personal data of a third person – a particular doctor. He has gone on to consider the conditions under section 40(3) of the FOIA.

Would confirming or denying whether the information is held contravene one of the data protection principles?

21. 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.
22. The Commissioner has considered whether the GMC is correct when it argues that confirming whether or not it held the requested information at the time of the request would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...'

What reasonable expectation does the individual have about what will happen to their personal data?

23. The GMC has provided the Commissioner with a summary of its complaints process. When it receives a complaint about a doctor an initial decision is made as to whether an investigation should be conducted. When an investigation is completed, two case examiners (one medical and one non-medical) will consider the complaint. They can conclude the case, issue a warning, agree undertakings with the doctor or refer the case to a Medical Practitioners Tribunal (MPT). MPT hearings are usually held in public, although may be held in private if discussing a doctor's health or any other confidential matter. It is at this hearing stage that details about the case may be made publicly available. Outcomes of MPT hearings are also published on the GMC's website. Details of any warnings or current restrictions on a doctor's registration are also made publicly available.
24. The GMC says that, consequently, it will only publicly disclose the existence of a complaint if a doctor has any current warnings or

restrictions on his or her registration, or if a complaint has progressed to a MPT hearing. All parties involved in the GMC's complaint process expect that information will only be published in line with these disclosure points.

25. The GMC has also drawn the Commissioner's attention to his recent decision in a similar case - [FS50597418](#). The GMC says it provided arguments on that occasion that are relevant to this case.
26. In FS50597418 the Commissioner was prepared to accept that any doctors relevant to that particular request would not expect the GMC to confirm or deny it holds information about any complaints about them. The Commissioner also considered that the doctor(s) may well be distressed if the existence of this information was confirmed or denied.
27. Taking account of the doctor's reasonable expectations, and the potential impact on them if the existence of a complaint was confirmed or denied, the Commissioner was satisfied that confirming or denying whether the requested information was held would be unfair, and a breach of the first data protection principle.
28. On the basis of the GMC's current submission and his decisions in similar cases, such as FS50597418 and also FS50277585 and FS50477181, the Commissioner is satisfied that the GMC has correctly applied section 40(5)(b)(i) to the request. This is because confirming whether or not this information is held would disclose the personal information of 'Dr A'.

Balancing the individual's rights and freedoms against the legitimate interest in confirming or denying information is held

29. Despite the factors above, the GMC may still confirm or deny it holds the requested information if there is compelling public interest in doing so that would outweigh the legitimate interests of 'Dr A'. Although the Commissioner recognizes that the information is of interest to the complainant, confirming or denying the information is held under the FOIA would effectively disclose 'Dr A's' personal data to the world at large.
30. The Commissioner considers that there is a legitimate public interest in openness and transparency and has noted the GMC's arguments in FS50597418. Based on these, the nature of the requested information, the fact that, if held, 'Dr A' would not expect their personal data to be disclosed and that, if held, disclosure could cause damage and distress, the Commissioner is satisfied that any legitimate public interest would not outweigh 'Dr A's' legitimate interests.

31. The Commissioner is therefore satisfied that the GMC has correctly applied the exemption under section 40(5)(b)(i) of the FOIA to the request, because to confirm or deny it holds relevant information would release the personal data of a third person and would contravene the Data Protection Act.

Right of appeal

32. 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

33. 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.
34. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF