Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2017

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

Decision (including any steps ordered)

1. The complainant has requested information about the number of complaints made against a specific surgeon.

2. The GMC states that under section 40(5)(b)(i) of the FOIA it is not obliged to confirm or deny that it holds the requested information as to do so would disclose personal data of a third person which would breach the first principle of the Data Protection Act (DPA).

3. The Commissioner's decision is that the General Medical Council (GMC) has correctly relied on section 40(5)(b)(i) of the FOI.

4. The Commissioner does not require the GMC to take any steps as a result of this decision notice.

Request and response

5. On 3 March 2017, the complainant wrote to the GMC and requested the following information:

1. Statistical data on the Rule 12 applications and;
2. The number of complaints the GMC received about [named doctor]

6. The GMC responded on 21 March 2017. It provided the information requested at part 1, however it refused to confirm or deny whether it held the information requested at part 2, citing section 40(5)(b)(i) as its basis for doing so.

7. Following an internal review the GMC wrote to the complainant on 11 March 2017 and maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 17 May 2017 to complain about the way her request for information had been handled.

9. The Commissioner considers the scope of this case to be to determine if the GMC was correct to neither confirm nor deny that it holds the information requested at part 2 of the request.

10. The complainant provided the Commissioner with substantial background information which assisted her in carrying out her investigations.

11. Further information is contained in a confidential annexe which is not available to the public.

Reasons for decision

12. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the Act to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.

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

13. 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.

14. 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.

15. 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 the data protection principles, but

whether the simple action of confirming or denying that it is held would do so.

16. The Commissioner's guidance on section 40(5) explains that 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 information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process.

17. 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 person; and

- confirming or denying whether information is held would contravene one of the data protection principles.

18. 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?

19. Section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as:

"…data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

20. As far as the Commissioner is aware, the doctor in question is alive. The Commissioner considers that whether that doctor has been the subject of a complaint relates to that doctor and that he or she could be identified from this information. Consequently, the Commissioner is satisfied that the information that would be revealed if the GMC confirmed or denied that it holds the requested information, is the personal data of a third person. She has gone on to consider the conditions under section 40(3) of the FOIA, which concern the release of personal data.

Would confirming or denying whether 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…'.

23. When assessing whether disclosure would be unfair and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to the individuals public or private life, what their reasonable expectations might be and whether or not the individual has consented to the disclosure of their personal information.

24. The Commissioner has noted that the information concerns the individual's public life ie their role as a doctor. The GMC has told the Commissioner that consent to disclosure has been refused or not provided.

25. The GMC explained that to confirm or deny whether the information is held or not, would reveal whether a complaint had been made about a specific individual in a professional capacity and therefore the information would constitute personal data of the individual.

26. The Commissioner has finally considered what reasonable expectation the individual would have about what will happen to their personal data.

27. The GMC explained that when it receives a complaint about a doctor an initial decision is made as to whether an investigation should be conducted. On completion of an investigation, a complaint will be considered by two case examiners (one medical and one non-medical).

28. They can conclude the case, issue a warning, agree undertakings with the doctor or refer the case to the MPTS (Medical Practitioners Tribunal Service) for a hearing. MPT hearings are usually held in public, although may be held in private if discussing a doctor's health or any other confidential matter. At this hearing stage details about the case may be made publicly available.

29. Decisions of all MPT hearings where there is a finding of fact are published on the MPTS website for 12 months. If there is a finding of impairment the decision will also be published on the doctor's entry on

the LRMP (List of Registered Medical Practitioners). If there is a finding of no impairment the outcome will cease to be available after this period and will not be published on the LRMP. Details of any current warnings or restrictions on a doctor's registration are also made publicly available.

30. The GMC stated that it would only publicly disclose the existence of a complaint if a doctor has any current warnings or restrictions on his registration, or if the complaint has progressed to an MPT hearing and the information remains publicly available in line with its publication and disclosure policy[1]. The expectation of all parties involved in the GMC's complaint process is that information will only be published in line with these disclosure points.

31. The GMC has referred the Commissioner to her decisions in a number of separate, but similar, cases including FS50619296 and FS50597418.

32. In these cases, the Commissioner was prepared to accept that any doctor relevant to the request in question would not expect the GMC to confirm or deny that it holds information about a complaint about them, if that complaint did not lead to any warnings or restrictions on their registration, or if the complaint did not progress to a MPT. The Commissioner also considered that the doctor(s) may well be distressed if the existence of such information was confirmed or denied.

33. As in those cases, in the present case the Commissioner has taken account of the doctor's reasonable expectations, and the potential impact on them if the existence of a complaint was confirmed or denied.

34. The Commissioner considers that confirming or denying the requested information is held would be unfair to the doctor concerned because it would disclose their personal data; namely whether or not they had been the subject of a complaint. To confirm or deny the requested information is held would therefore breach the first data protection principle and the Commissioner is satisfied that the GMC has correctly applied section 40(5)(b)(i) of the FOIA to the request.

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

35. 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 the particular doctor.

[1] http://www.gmcuk.org/DC4380_Publication_and_disclosure_policy_36609763.pdf).

Although the Commissioner recognizes that the information is of interest to the complainant, confirming or denying the information is held under the FOI would effectively disclose the doctor's personal data to the world at large.

36. The GMC recognises that in some circumstances there may be a public interest justification for disclosure of information outside of this policy. However, in order to override the data subject's privacy rights there would need to be sufficient public interest in disclosure.

37. The GMC further acknowledged that the complainant made her request in the context of her concerns and the information is therefore of interest to her in a private capacity, however, it did not consider that there was sufficient public interest to justify the disclosure of the information under FOIA.

38. It therefore maintained the application of section 40(5)(b)(i) of the FOIA in that it is not obliged to confirm or deny the existence of complaints which are not associated with current restrictions on the doctor's registration or any publicly available MPT hearing.

The Commissioner's decision

39. Due to the circumstances of this case the Commissioner undertook an extensive investigation. The Commissioner considers that there is a legitimate public interest in openness and transparency. However she has also considered the nature of the requested information, the fact that, if held, the doctor concerned would not expect their personal data to be disclosed and that, if held, disclosure could cause damage and distress to the doctor concerned.

40. The Commissioner acknowledges that the requested information is of interest to the complainant but upon the conclusion of her investigation does not consider it is of sufficient wider public interest such that it would outweigh the doctor's legitimate interests.

41. In conclusion, the Commissioner finds that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the GMC is entitled to refuse the request on the basis of section 40(5)(b)(i) of the FOIA.

Right of appeal

42. 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

43. 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.

44. 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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