

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 April 2021

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

Decision (including any steps ordered)

1. The complainant has submitted an information request to the General Medical Council (the GMC) that refers to three investigation cases. The GMC has refused to confirm or deny it holds information within the scope of the request, under section 40(5B)(a)(i) of the FOIA (personal data), as to do so would disclose individuals' personal data.
2. The Commissioner's decision is as follows:
 - The GMC can rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny it holds the requested information as to do so would contravene data protection legislation. Confirmation or denial would release the personal data of particular doctors.
3. The Commissioner does not require the GMC to take any remedial steps.

Request and response

4. On 12 June 2018 the complainant wrote to the GMC and requested information in the following terms:

"As of today's date (12 June 2018) I wish under the freedom of information act to request copies of all information concerning my case (inclusive of medical reports) relating to three GMC investigations"

5. The GMC responded on 28 June 2018. It relied on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny it holds the information the complainant has requested.
6. The GMC provided a review on 7 February 2020. It maintained its reliance on section 40(5B)(a)(i) to neither confirm nor deny it holds the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 30 June 2020 to complain about the way her request for information had been handled.
8. The Commissioner's investigation has focussed on whether the GMC can rely on section 40(5B)(a)(i) to neither confirm nor deny it holds the information that has been requested.

Reasons for decision

9. Under section 1(1)(a) of the FOIA anyone who requests information from a public authority is entitled to be told whether or not the authority holds the information.
10. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether the authority holds the information does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR')
11. For the GMC to be entitled to rely on section 40(5B)(a)(i) the following two criteria must be met:
 - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - providing this confirmation or denial would contravene one of the data protection principles.

Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

12. Section 3(2) of the Data Protection Act 2018 defines personal data as "*any information relating to an identified or identifiable living individual*".

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
15. The GMC considers that confirming or denying if the requested information is held would disclose to the world at large whether or not the GMC had investigated particular doctors. The GMC has provided the Commissioner with a background to the request which she has noted but which she does not intend to reproduce in this notice.
16. No doctors are named in the specific request but, in its submission to the Commissioner, the GMC has discussed how specific doctors could be identified if it was to confirm or deny it holds the requested information.
17. The GMC has provided the Commissioner with detail on how it has viewed and interpreted the complainant's request, which the Commissioner does not intend to detail in this notice. But if held, the GMC says, the requested information would be personal data of any doctors under investigation because if it were not, there would be no way for the GMC to identify what information the complainant was interested in. She was not interested in any and all cases - only ones which may or may not have concerned three specific doctors. It is the GMC's view that in making her request using the words that she did, the complainant considered that she had provided sufficient information for it to respond to her request. This is especially in the light of past requests the GMC says it has received from the complainant, with their associated correspondence and disclosures.
18. The GMC has also referred to the Commissioner's decision in FS50838516¹. In that case, no specific doctor had been named in the request, but the Commissioner found that the request needed to be read as part of a wider email chain. In order to identify what information was being sought, it was necessary to read the request in the context of earlier emails, in which a doctor was named. As such the Commissioner considered that a doctor would be identified. The First-tier Tribunal (Information Rights) ('the FTT') subsequently upheld the Commissioner's decision in EA/2020/0150V.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617253/fs50838516.pdf>

19. The GMC has referred to paragraph 37 of the FTT's decision in which the judge says:

"In any event, even if the [request] email could be viewed in isolation, there would be nothing to stop the Appellant (if she so wished) publishing the whole email chain and any response in relation to the request for information (or confirmation that it is or not held) which would immediately identify whether a complaint had been made against the Doctor (who would be named), which had been considered by the GMC."

20. The GMC notes that, in the above decision, the judge suggested that the Appellant could at some point publish the whole email chain in question, which would identify the doctor. In the GMC's view the judge need not have restricted himself to saying that the Appellant may publish a document that he knew existed – the email chain. He could, the GMC says, just as well have said that the Appellant could (create and) publish any content which, alongside the GMC's response - even if the GMC response did not name the doctor - would tie the doctor to confirmation that there had been an investigation into them.
21. In line with her decision in FS50838516 and for the reasons discussed in the FTT's decision in EA/2020/015V, the Commissioner is satisfied that, although no doctors are named in the request, the request could still lead to certain doctors being identified. The request forms part of a wider correspondence with the GMC and another body and it is the case that the complainant *could* put this wider correspondence into the public domain and so link her request in this case to those doctors.
22. With regard to the two criteria at paragraph 13, the Commissioner is satisfied that it is possible that doctors could be identified from the requested information, if held, and that the requested information, if held, would relate to them. She is therefore satisfied that confirming whether or not the requested information is held would disclose those doctors' personal data as it would indicate whether or not they have been subject to investigations by the GMC.

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

23. Article 5(1)(a) of the GDPR states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*".
24. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request or, as in this case, if the authority confirms or denies it holds the personal data. This means that the

authority can only confirm or deny it holds the information if to do so would be lawful, fair and transparent.

25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

26. The lawful basis most applicable is GDPR basis 6(1)(f) which states:

"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

27. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:

(i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information

(ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question

(iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject, that is the doctor in this case

28. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Is a legitimate interest being pursued?

29. In considering any legitimate interest(s) in confirming or denying under the FOIA that the information is held, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

30. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

31. The request for information in this case, if it is held, refers to three GMC investigations. In correspondence to the Commissioner the complainant has comprehensively discussed the wider circumstances and her request. Again, the Commissioner has reviewed this background and

context but does not intend to reproduce it in this notice. She fully accepts, however, that the complainant's interest in how the GMC has managed any investigations into any doctors is a legitimate interest for the complainant to have.

32. In its submission, the GMC has acknowledged that there is an interest in confirming or denying the material requested is held because it would ensure that its investigatory conclusions follow from expert reports that it obtains, and that it carries out effective investigations generally.
33. The GMC also says that there would also be a legitimate interest in confirming or denying that the requested information is held and whether it has investigated any doctors, in that patients of the doctors would be able to have further information about them to inform if they wished to continue to be treated by those doctors.

Is disclosure necessary to meet the legitimate interests?

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Confirmation or denial under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner accepts that, for the complainant, confirmation or denial would be necessary in this case. The complainant has specific concerns and confirming or denying the information she is seeking would help to address those concerns, although it would not fully address them.
36. Because the Commissioner has found that confirming or denying the information is held is necessary to meet the complainant's legitimate interests it is necessary to carry out the third test and balance the legitimate interests against the data subjects' interests or rights and freedoms.

Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject, that is the doctor in this case?

37. In considering the above question, it is necessary to consider the impact of the confirmation or denial. For example, if the data subjects would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, the data subjects' interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

38. In its submission to the Commissioner the GMC has explained that information it publishes about doctors' fitness to practise history is explained in its 'Publication and disclosure policy' (PDP). The PDP is clear as to what information it publishes, and it does not include information on the outcomes of all the complaints the GMC investigates. This guides the expectations of all parties involved in a complaint. The GMC has also confirmed that it has not approached the doctors for their consent to confirm or deny the information is held but, as such, does not have their consent.
39. The Commissioner has considered the complainant's correspondence. But from the above factors, and because of the background and circumstances of the request, the Commissioner is satisfied that the doctors in question would have the reasonable expectation that their personal data would not be put into the public domain as a result of an FOI request. The personal data that would be released through confirmation or denial concerns those individuals in their professional capacity. Nonetheless the Commissioner considers it is likely to cause those individuals a degree of distress if their personal data was released, through the GMC confirming or denying it holds the information the complainant has requested.
40. While she recognises that the information, if held, is of interest to the complainant, the Commissioner does not consider it is of sufficient wider public interest such that it overrides the data subjects' rights and freedoms. As such, she has decided that the GMC can rely on section 40(5B)(a)(i) to neither confirm nor deny it holds the information the complainant has requested.

Right of appeal

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

42. 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.
43. 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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