

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2023

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

Decision (including any steps ordered)

1. The complainant made a request for information regarding enquiries or investigations about a named doctor. The GMC refused to confirm or deny whether it holds the requested information under section 40(5B)(a)(i) FOIA.
2. The Commissioner considers that the GMC was correct to apply section 40(5B)(a)(i) FOIA to refuse to confirm or deny whether the requested is held.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made the following information requests to the GMC on 15 November 2022:
"Can you please provide the following information on [name and registration number redacted]
 1. How many times has [name redacted] been the subject of a Provisional Enquiry by the GMC.
 2. How many times has [name redacted] been the subject of a full GMC investigation into her fitness to practise."

5. On 28 November 2022 the GMC responded to the request. It refused to confirm or deny whether it holds the requested information under section 40(5B)(a)(i) FOIA.

6. The complainant asked the GMC to carry out an internal review on 13 December 2022. In particular he said that:

"I accept the right for doctors, complainants and patients to expect complaints concerning them to be treated as confidential. I did not request for any detailed information on the nature of any complaints made against [name redacted] to be provided to myself.

My request was simply for the total number of times that [name redacted] had been the subject of both an initial enquiry and a full inquiry by the GMC.

I would argue that a simple answer on the number of times is not covered by the exemptions and would ask that you reconsider my request."

7. On 28 December 2022 the GMC provide the internal review, it upheld its response.

Scope of the case

8. The complainant contacted the Commissioner on 16 January 2023 to complain about the way the request for information had been handled.

9. The Commissioner considered the scope of his investigation to be to determine if the GMC was correct to refuse to confirm or deny whether the requested information is held under section 40(5B)(a)(i) FOIA.

Reasons for decision

Section 40 – personal information

10. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held 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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.

11. Therefore, for the GMC to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request 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 the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

12. Section 3(2) of the DPA 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. In this case the GMC has argued that confirming or denying whether the information is held would confirm or deny whether the named doctor was the subject of an enquiry and/or investigation.
16. The Commissioner is satisfied that if the GMC confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
17. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the GMC from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
18. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

19. Article 5(1)(a) UK GDPR states that:- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

20. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) UK GDPR

21. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
22. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:- “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”¹
23. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under 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 confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

¹ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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

(i) Legitimate interests

25. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
26. The Commissioner considers that the public has a legitimate interest in knowing whether a doctor has been the subject of an enquiry and/or an investigation.

(ii) Is confirming whether or not the requested information is held necessary?

27. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
28. The Commissioner considers that disclosure of the requested information would be necessary to meet the legitimate interests in this case.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

29. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For

example, if the data subject 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, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

30. Before personal data can be disclosed, it is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
31. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
32. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed or that that the public authority will not confirm whether or not it holds their personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
33. It is also important to consider whether disclosure (or confirmation or denial) would be likely to result in unwarranted damage or distress to that individual.
34. The GMC has previously explained to the Commissioner that it has a legal obligation to maintain and publish a register of doctors (the Medical Register), the current electronic version is accessible from the GMC's website. This allows members of the public to search for and find information about a doctor who is or has been registered with the GMC at any time since 20 October 2005. Where applicable, the Medical

Register includes certain details of a doctor's fitness to practise history since 20 October 2005.

35. The GMC's Publication and Disclosure Policy sets out disclosure expectations for all parties involved in a complaint including the length of time that hearing outcomes and sanctions on a doctor's registration will be publicly available.
36. GMC believes that to publicly confirm or deny whether it holds the information requested would breach the first data protection principle, which requires that the processing of personal data is fair, lawful and transparent. It believes the conditions at Article 6 of the UK GDPR, which are about the lawfulness of processing, are not met and therefore confirming if the information is held would be unlawful.
37. In the Commissioner's opinion disclosure could result in an interference with the rights and freedoms of the named doctor. The Commissioner considers that the named doctor, would not have any expectation that the GMC would confirm or deny the existence of the requested information given its Publication and Disclosure Policy.
38. Whilst the Commissioner has acknowledged that there is a legitimate interest in the public being aware of any complaints, the Commissioner is satisfied that confirmation or denial outside of the Publication and Disclosure Policy would cause damage and distress to the named doctor who is the subject of the request.
39. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the confirmation or denial as to whether the requested information is held would not be lawful.
40. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent.
41. In this instance, the Commissioner has decided that the GMC has demonstrated that the exemption at section 40(5B)(a)(i) FOIA applies to the request.

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@Justice.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.....

Gemma Garvey
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