

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2022

Public Authority: Health and Care Professions Council (HCPC)
Address: Park House
184-186 Kennington Park Road
London
SE11 4BU

Decision (including any steps ordered)

1. The complainant made a request for information relating to fitness to practise complaints about two named radiographers. HCPC refused to disclose the information requested in relation to one of the radiographers under section 40(2) FOIA and refused to confirm or deny whether the information is held regarding one of the radiographers under section 40(5B)(a)(i) of FOIA.
2. The Commissioner considers that HCPC was correct to refuse to disclose the information requested about one of the named radiographers under section 40(2) FOIA and was also correct to refuse to confirm or deny whether the requested information is held regarding one of the named radiographers under section 40(5B)(a)(i) of FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made the following information request on 10 February 2022:
 - i. All available information in the fitness to practise case of [name redacted] in 2011; and
 - ii. Details of any fitness to practise complaints received about [name redacted].

5. On 3 March 2022 HCPC responded. It refused to disclose the information requested in relation to one of the radiographers under section 40(2) FOIA and refused to confirm or deny whether the information is held regarding one of the radiographers under section 40(5B)(a)(i) of FOIA.
6. The complainant requested an internal review. HCPC provided the result of the internal review on 11 April 2022. It upheld its response.

Scope of the case

7. The complainant contacted the Commissioner on 3 May 2022 to complain about the way their request for information had been handled.
8. The Commissioner considered the scope of his investigation to be to determine whether HCPC was correct to withhold the requested information regarding one of the named radiographers under section 40(2) FOIA (part 'i' of the request) and whether it was correct to refuse to confirm or deny whether it holds the requested information in relation to one of the named radiographers under section 40(5B)(a)(i) FOIA (part 'ii' of the request).

Reasons for decision

Section 40 – personal information

Part i

9. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

¹ As amended by Schedule 19 Paragraph 58(3) DPA

processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

13. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
16. 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.
17. In this case the withheld information relates to a fitness to practise case against a named radiographer. The Commissioner is satisfied that the withheld information both relates to and identifies the named radiographer. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

21. In the case of an 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 if to do so would be lawful, fair and transparent.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

23. 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" lawful bases for processing listed in the Article applies.
24. The Commissioner considers that the lawful basis most applicable is 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"².
25. In considering the application of Article 6(1)(f) of the UK GDPR 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.

² 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 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".

26. 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

27. 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.
28. The HCPC accepts that there is a legitimate interest in the outcome of fitness to practise (FTP) final hearings and release of the reasoning behind how the panel reached their decision would provide transparency in FTP hearings. The principle of transparency is one which the HCPC strongly supports and aims to promote where possible. Details of its FTP final hearings are listed on its Tribunal website (<https://www.hcpts-uk.org/>) 28 days before the hearing and final hearings are generally open to the public.
29. The Commissioner considers that there is a legitimate interest in disclosure of information relating to the outcome of fitness to practise hearings.

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

30. '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.
31. To meet the legitimate interests in this case it would be necessary to disclose the withheld information, that is all information relating to this fitness to practise case.

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

32. 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.
33. 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.
34. 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.
35. 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 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.
36. 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.

37. HCPC explained that where a Panel decides that an allegation is not well founded, the outcome will not be published on the Tribunal (HCPTS) website unless the registrant concerned requests that the information is published. In the absence of such a request, any information about the hearing on the Tribunal website will be removed from that website once the proceedings have concluded. It said that this is in accordance with its Fitness to Practise Policy.
38. HCPC therefore said that the data subject will expect that information released about their hearing will be done in line with this policy. To disclose this information in response to this FOI request, the HCPC would be releasing the information to the public at large and in breach of its own policy. This would have the result of HCPC registrants being unsure of the HCPC's policy and procedure for publishing FTP information.
39. Given the length of time since the hearing took place and that the outcome of the hearing resulted in no sanction placed on the data subject's HCPC registration, HCPC concluded that the data subject's rights and freedoms outweigh the legitimate interests of the public in accessing this information which is personal and confidential to the registrant.
40. In the Commissioner's opinion disclosure could result in an interference with the rights and freedoms of the data subject. The Commissioner considers that the data subject, would not have any expectation that the HCPC would disclose the withheld information into the public domain at this time.
41. Whilst the Commissioner also considers that there is some legitimate interest in the public being informed of the outcome, the Commissioner considers that disclosure at this time would cause damage and distress to the data subject given their reasonable expectations.
42. 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 disclosure would not be lawful.
43. 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.
44. In this instance, the Commissioner has decided that the HCPC has demonstrated that the exemption at section 40(2) FOIA applies to request i.

Part ii

45. 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.
46. Therefore, for the HCPC 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?

47. Section 3(2) of the DPA 2018 defines personal data as:- "any information relating to an identified or identifiable living individual".
48. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
49. 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.
50. In this case the HCPC has argued that confirming or denying whether the information is held would confirm or deny whether it had received any complaints about the named radiographer.
51. The Commissioner is satisfied that if the HCPC 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.
52. 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 HCPC 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.

53. 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?

Would disclosure contravene principle (a)?

54. Please see paragraphs 20-22 above.

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

55. Please see paragraphs 23-26 above.

(i) Legitimate interests

56. Please see paragraph 27 above.

57. The HCPC accepts that there is a legitimate interest in releasing whether it has received any FTP complaints about a registered radiographer as this would support openness in the complaints, if any, received about a healthcare professional.

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

58. Please see paragraph 30 above.

59. The Commissioner considers that it would be necessary to disclose whether or not the HCPC had received complaints about the named radiographer to meet the legitimate interests identified in this case.

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

60. Please see paragraphs 32-36 above.

61. The HCPC has argued that the data subject would not reasonably expect that it would release confidential information regarding their HCPC registration to the public at large. As explained earlier if a HCPC registrant is referred to a FTP final hearing or has interim sanctions placed on their registration, the HCPC will make these details publicly available by publishing details on its website. Given that this registrant has no fitness to practise information in the public domain, to confirm or deny the existence of any such complaints received would cause unnecessary distress to the registrant. The HCPC considers therefore that the data subject's rights and freedoms outweigh the legitimate interests of the public to know whether or not the requested information is held or not.

62. In the Commissioner's opinion disclosure could result in an interference with the rights and freedoms of the data subject. The Commissioner considers that the data subject, would not have any expectation that the HCPC would confirm or deny the existence of complaints under these circumstances.
63. Whilst the Commissioner also considers that there is some legitimate interest in the public being informed of whether complaints have been made about a particular registrant, the Commissioner is satisfied that confirmation or denial would cause damage and distress to the radiographer who is the subject of the request.
64. 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.
65. Given the above conclusion that confirmation or denial 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.
66. In this instance, the Commissioner has decided that the HCPS has demonstrated that the exemption at section 40(5B)(a)(i) FOIA applies to request ii.

Right of appeal

67. 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

68. 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.
69. 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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