

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2017

Public Authority: General Dental Council
Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the GDC for details of cases considered by the GDC's Practice Committee that had been given the "No Order" designation. The GDC disclosed some of the requested information to the complainant but withheld some information under the section 40(2) (personal information) and section 31 exemptions. The complainant also complained that the GDC held further information relevant to his request.
2. The Commissioner's decision is that the GDC has disclosed all of the information to which the complainant is entitled under FOIA. Where information has been withheld the Commissioner is satisfied that the section 40(2) exemption was correctly applied. The Commissioner requires no steps to be taken.

Request and response

3. On 15 August 2016 the complainant made a freedom of information request to the GDC which asked for details of cases considered by its Practice Committee that had been given the "No Order" designation. The request read as follows:

"Of the 354 cases, 'No Order' was imposed in 18 cases."

Please kindly provide the 'Notice of Inquiry' for the 18 cases given 'No Order' by GDC reported by informant 'Primary Care Trust or NHS'

4. This followed an earlier series of requests where the complainant had asked for the numbers, outcomes, and types of cases considered through the GDC's fitness to practice process. The complainant is a dentist who had previously been suspended by the GDC and these requests focused on factors common to his own case, such as the number of cases referred to the GDC by the NHS and the decision on those cases.
5. The GDC responded on 5 September when it explained that it held some information falling within the scope of the request. However, it explained that having looked in more detail at the 18 cases, the reason that some of the cases had "No order" registered against them is because they had not yet been heard. It also said that other cases never progressed to a public hearing or to a point where any charges had been made public.
6. The GDC went on to say that of the 18 cases six had not yet been listed and so no notices of inquiry had been published. A further four cases had not yet been heard by the third (private) stage of the fitness to practice process, the Investigating Committee, and so no notices of Inquiry were held for these cases either. Three cases had been heard by the Investigating Committee but had been closed at that stage. One case was progressing to a Health Committee which is also held in private because it considers whether a registrant's fitness to practice is impaired by reasons of their health. For these four cases the GDC said that it was withholding information under the exemptions in section 40(2) (personal information) and section 31 (Law enforcement) of FOIA. The GDC disclosed copies of Notices of Inquiry for the remaining four cases.
7. The complainant subsequently asked the GDC to carry out an internal review of its handling of his request and it presented its findings on 30 September. The review upheld the initial response to the request.

Scope of the case

8. On 30 September 2016 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. Following discussions with the complainant the Commissioner understands that the focus of his complaint is that he believes that the four Notices of Inquiry that were sent to him are "wrong" or not what he asked for. He suggests that his request has either been misinterpreted or else the GDC is withholding the "correct" four reports. On this point the Commissioner considers that the scope of her investigation is to

decide whether the GDC holds any further information falling within the scope of the complainant's request.

10. Whilst the Commissioner understands that this is the focus of the complainant's request, the complainant also said that "for completeness" he wanted the Commissioner to investigate whether any of the exemptions relied on by the GDC to withhold the Notices of Inquiry for the cases that were referred to the Investigating Committee or the Health Committee, applied. Therefore the Commissioner has also considered whether the section 40(2) and/or section 31 exemptions apply to the withheld information.

Reasons for decision

Section 1 – information not held / interpretation of the request

11. As the Commissioner explained above, the complainant appears to be of the view that the GDC has either misinterpreted his request or else the GDC is withholding the "correct" four Notices of Inquiry. As far as the Commissioner understands it, the complainant believes that because the four Notices of Inquiry he was provided with all allege some kind of misconduct and resulted in a formal sanction of one kind or another (suspension, reprimand etc.) the information is not what he asked for. This is because, presumably, his request only asked for the Notices of Inquiry where there had been "No Order" made against the registrant.
12. The Commissioner asked the GDC to consider the complainant's concerns and to clarify their response. As a result the GDC acknowledged that its response to the request could have been clearer and that this may have caused some confusion. In particular, it said that it had looked again at the four Notices of Inquiry that were disclosed and now accepted that three of the cases do not fall within the scope of the request. They explained that this appeared to be due to a categorisation input error when the outcomes were recorded incorrectly in its database as 'no order' when in fact an order had been recorded against the individuals concerned.
13. For one of the four individuals however, the GDC explained that while it had found that allegations were proven, no additional sanction was ordered by the Professional Conduct Committee because this individual was already suspended and had decided to retire. Therefore, it is correct to say that 'no order' was recorded by the Committee and it was appropriate that this was disclosed to the complainant.

14. The complainant had been concerned that the four reports that were disclosed were 'wrong' and that this appeared to be the main reason for his complaint. However, the GDC have made it clear that this was simply down to the cases being incorrectly recorded and the GDC misinterpreting the request. The complainant may have been provided with too much information but it is not the case that there are a further four "correct" notices of Inquiry which have been overlooked or withheld from him.
15. The Commissioner had sought to explain the situation to the complainant and suggested that he withdraw this element of the complaint. However, the complainant declined to do so and therefore the Commissioner must make a decision as to whether the GDC holds further information falling within the scope of the request.
16. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
17. In this case the complainant had asked for details of 18 cases which the GDC had referred to in an earlier request. Of these, 6 had not been listed and a further 4 had not yet been heard by the Investigating Committee so in these cases a Notice of Inquiry had not been produced. 4 cases had not progressed to a public hearing and so the Notice of Inquiry was withheld under the section 40(2) and section 31 exemptions (the Commissioner will go on to consider whether this information was correctly withheld). The GDC was able to disclose 4 Notices because they had been heard at a full fitness to practice hearing. However, it is now clear that 3 of the cases should not have been disclosed because action was taken against the dental professional. They were only included in the figure of 18 cases previously given to the complainant because they were incorrectly recorded on the database. Therefore, there are no further cases falling within the scope of the request. The GDC's explanation for the discrepancy is entirely logical and there is no reason at all to suggest that further information is held.

Section 40(2) – Personal information

18. The GDC has withheld information which relate to cases which had not progressed to a public fitness to practice hearing under the section 40(2) and section 31 exemptions. For the 3 investigating Committee

cases the information comprises letters notifying the parties of the hearing and the charges (rather than a Notice of Inquiry) which would have been sent to them privately. For the Health Committee case, the information is a Notice of Inquiry which would have been sent to the party involved but which would not be published in advance. Due to their sensitive nature, these types of cases are also held in private. The Commissioner has first considered whether section 40(2) applies.

19. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and, so far is relevant here, disclosure would contravene one of the data protection principles.

20. Personal data is defined in the Data Protection Act 1998 as follows:

“personal data” means 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;

21. The withheld information in this case are Notices of Inquiry which record a charge made against a dental professional. This information clearly identifies a living individual and includes significant biographical information about them. The Commissioner is satisfied that this is personal data.

22. In deciding whether section 40(2) applies the next thing to consider is whether disclosure would contravene one of the data protection principles in the Data Protection Act 1998. In this case the GDC has said that in its view disclosure would contravene the first principle which requires that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

23. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the

Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.

24. In assessing whether disclosure would be unfair and thus constitute a breach of the first data protection principle the ICO takes into account a number of factors such as:
- Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
 - What reasonable expectations does the individual have about what will happen to their personal data?
 - What are the consequences of disclosure?
 - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
 - Is there a public interest in disclosure which outweighs the rights and freedoms of the data subjects?
25. The GDC has argued that disclosure would be unfair because dental professionals (and people making a complaint) have a reasonable expectation that details of complaints made against them in the first three stages of the GDC's fitness to practise complaints procedure, which are private, will remain confidential, and will not be publically disclosed. Only if a complaint proceeds to a Fitness to Practice Committee (i.e. public) hearing, being the fourth (and final) stage of GDC's fitness to practise complaints procedure, and/or action is taken on their registration will information be published.
26. The GDC's website describes the different stages of its fitness to practice process and this together with 'consent to investigation' forms for dental professionals and members of the public makes it clear that the first three stages of the complaints process are private, and the information they provide will be treated as confidential. The GDC said that whilst it had not sought the consent of the parties involved in the cases it did not believe that consent would be provided.
27. The Commissioner has considered the GDC's arguments and accepts that there would be a reasonable expectation that details of a complaint and the GDC's investigation would not be disclosed until the dental professional has had a chance to defend themselves and the case has been considered at a public hearing. Whilst the information relates to their professional rather than private lives, it is quite right that they

would not expect information to be disclosed whilst the complaint is still being considered and when a decision has not been reached. Indeed, it appears that the GDC's gives just such assurances in its communications with dental professionals and complainants.

28. The Commissioner also takes the view that disclosure is likely to be distressing to the individuals concerned and impact on their professional reputation. It should be remembered that disclosure under FOIA is considered to be disclosure to the world at large and not just the person making the request. In the Commissioner's view it would be unfair to require the dentist to have to rebut or correct publicly any unfounded or unsubstantiated information which was released under FOIA. For these reasons the Commissioner is satisfied that disclosure would be unfair.
29. The Commissioner is also mindful that having reviewed the withheld information, two of the cases appear to include information which would fall under the definition of sensitive personal data in section 2(e) the Data Protection Act 1998:

In this Act "sensitive personal data" means personal data consisting of information as to-

(e) his physical or mental health or condition,

30. One of the cases before the Investigating Committee and the Health Committee case involve charges that the dental professional's fitness to practice was impaired by a health condition. This is sensitive personal data and as such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner will nearly always find that disclosure of such information would be unfair.
31. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose information if there is a public interest in doing so or if the legitimate interests of the applicant outweigh the rights and freedom of the data subject.
32. Whilst disclosure may serve the general public interest in transparency and accountability, the Commissioner is mindful that where a complaint is found to be substantiated at a fitness to practice hearing, the details will be made public. Therefore the Commissioner finds that any public interest in disclosure is very limited. On the other hand disclosure would undermine the fitness to practice process by releasing information about

the GDC's investigation before any allegations have been formally tested.

33. The Commissioner also notes that the GDC does not have consent to disclose the requested information and she has already found that disclosure would cause damage and distress to the individuals concerned and run contrary to their reasonable expectations. Therefore, in the absence of any compelling case for releasing the information the Commissioner finds that disclosure would be disproportionate and outweighed by the legitimate interest in protecting the rights and freedoms of the data subjects. Consequently, the Commissioner has decided that disclosure would contravene the first data protection principle and that the section 40(2) exemption is engaged.

Right of appeal

34. 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

35. 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.
36. 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

Paul Warbrick
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF