

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2019

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

Decision (including any steps ordered)

1. The complainant has requested the minutes of a Fitness to Practice Panel hearing in respect of a specific Doctor ("the Doctor"). The General Medical Council ("the GMC") withheld the requested information because it considered that disclosing it would breach data protection principles ("the DP principles").
2. The Commissioner's decision is that the GMC has correctly applied section 40(2) of the FOIA to withhold the information.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 4 June 2019, the complainant wrote to the GMC and requested information in the following terms:

"I write to request for a copy of the Fitness to Practice Panel (FTPP) determination in the Fitness to Practice proceedings involving [the Doctor]."

I believe the hearing took place in 2008 before the establishment of the Medical Practitioners Tribunal Service (MPTS).

The decision is no longer available on your website in line with your disclosure policy which requires you to make cases publicly available on your website for one year. It is my understanding,

however, that a copy of the determination can be provided upon request."

5. The GMC responded on 28 June 2019. It refused to confirm or deny holding information within the scope of the request as it argued that providing a confirmation (or a denial) would involve the disclosure of personal information about the Doctor which would breach the DP principles. Specifically, the GMC argued, a confirmation or denial would inform the world at large that a particular individual had (or had not) been subject to an FTPP.
6. The complainant requested an internal review on 1 July 2019. He noted that the GMC had, in response to an FOI request in 2010, disclosed a list of doctors who had been subject to FTPP hearings in the previous five years. The request and response was still available on a whatdotheyknow.com thread and the Doctor's name was on that list. Providing a confirmation that information was held, the complainant argued, would not therefore breach the DP principles, as the fact that the Doctor had been subject to an FTPP hearing was already in the public domain and no further information could be disclosed by acknowledging that the GMC held a copy of the outcome of the hearing.
7. Following an internal review, the GMC wrote to the complainant on 6 September 2019. It now revised its position and relied on section 40(2) of the FOIA to withhold the information that the complainant had requested. The GMC argued that disclosing the withheld information would breach the DP principles.

Scope of the case

8. The complainant contacted the Commissioner on 6 September 2019 to complain about the way his request for information had been handled.
9. In particular, he pointed to the fact that the GMC now routinely publishes information of this type on its website for a year after the panel hearing. As the information must have previously been in the public domain, the complainant argued, the GMC could not breach the DP principles by disclosing it.
10. The Commissioner considers that the scope of her investigation is to determine whether the GMC was entitled to apply section 40(2) of the FOIA to withhold the requested information.

Reasons for decision

Section 40 – personal information

11. Section 40(2) of the 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 (4A) is satisfied.
12. 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 processing of personal data, as set out in Article 5 of the General Data Protection Regulation ('GDPR').
13. 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.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.

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

18. 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.
19. Information disclosed in response to an information request and the request itself must be considered together. In this particular case, the complainant's request specifically names the Doctor. Therefore the only information that the GMC could provide which would satisfy the request would be information relating to the Doctor – who would thus be identifiable by reference to the wording of the request.
20. As the FTPP considers the Doctor's job performance, the Commissioner is of the view that the withheld information would be likely to have the Doctor as its main focus and that the information would be biographical.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the Doctor. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

Would disclosure contravene principle (a)?

22. 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.
23. The most relevant DP principle in this case is principle (a).
24. 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".

25. 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 if to do so would be lawful, fair and transparent.
26. 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.

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

27. Article 6(1) of the 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.

28. 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.

29. In considering the application of Article 6(1)(f) of the 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.

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

Legitimate interests

31. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of

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) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

accountability and transparency for their own sakes, as well as case-specific interests.

32. 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.
33. The Commissioner takes the view that there is almost always an inherent interest in understanding how public authorities are operating and how they are spending taxpayers' money.
34. In addition, in the circumstances of this particular case, the Commissioner recognises that there is also a legitimate interest in knowing that, given the important function they perform, practising doctors are appropriately licensed and regulated. Where an allegation is made that a particular doctor has fallen short of the standards required, there is also a legitimate interest in understanding how that allegation has been disposed of.

Is disclosure necessary?

35. '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. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
36. The Commissioner notes that the GMC does publish, on its register, details indicating that a particular doctor is, or is not, licensed to practice medicine in the UK.
37. However, she also notes that such publication, by itself, is insufficient to satisfy the legitimate interest in understanding why a particular doctor has been declared unfit to practice or in understanding whether the process for determining fitness to practice is fair and transparent.
38. The Commissioner therefore considers that the necessity test is met in this case and has gone on to conduct a balancing exercise.

Balancing Test

39. Even if processing is necessary to achieve a legitimate interest, the Commissioner is still required 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.

40. 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.

41. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. 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.

42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

43. There does not seem to be any dispute that the withheld information is not widely available now.

44. The complainant has pointed out that the withheld information would likely have been in the public domain at the time of the practice hearing. He also noted that the Medical Practitioners Tribunal Service and the GMC routinely publish information of this kind now, once the result of a Tribunal has been announced and that it remains on the website for a year afterwards.³ He therefore argued that disclosure now could not possibly breach the DP principles (as any "breach" would have occurred when the information was first disclosed) and the Doctor would have no reasonable expectation of privacy.

45. The GMC confirmed that Section 35B(4) of the Medical Act 1983 requires the publication of all findings of FTPPs. It noted that it had been its previous practice to make such "Determinations" available indefinitely.

³ <https://www.gmc-uk.org/-/media/documents/dc4380-publication-and-disclosure-policy-36609763.pdf>

46. However, the GMC went on to note that in February 2018, it had revised its previous policy and now only published Determinations for a year – although the summary information on the register was retained for much longer. In this particular case, the GMC noted that the summary information relating to the Doctor is still available.

The Commissioner's view

47. The Commissioner considers that the issues at play in relation to this request favour maintaining the exemption.
48. On the one hand, the Commissioner notes that the information has previously been widely available and, at the time the information was created, the Doctor would have had a reasonable expectation that this information would have remained in the public domain indefinitely – as that was the GMC's policy.
49. In addition, the Commissioner has had regard to the content of the information itself. Removing a doctor's name from the Register is the most severe sanction that the GMC can impose and it does not impose such a sanction lightly. The withheld information sets out a number of failings on the part of the Doctor which warranted his removal from the Register. The Commissioner has also had regard to the fact the Doctor appears to have gone on to practise medicine in at least one other country after having been removed from the UK's medical register.
50. However, and importantly, the Commissioner has also had to have regard to the change in the data protection landscape in the intervening period between the information originally being published and the request being made.
51. GDPR has brought about a significant shift in the obligations placed on organisations and way that they must approach the processing of personal data. There is a greater emphasis placed now on the rights of the data subject and data controllers have to be much clearer as to their reasons for processing personal data – those reasons themselves are more closely defined than was previously the case.
52. In particular, the Commissioner notes that GDPR has placed a "Right to be Forgotten" into statute law and an emphasis on ensuring that any processing of personal data is done lawfully.
53. In the Commissioner's view this would have had the effect of shifting the Doctor's reasonable expectations towards the information being withheld.
54. The GMC has clearly decided that publishing Determinations indefinitely is not necessary and proportionate for achieving any legitimate interest

there may be in verifying that doctors are appropriately qualified for the role they perform.

55. The Commissioner's view, expressed at the time the GMC consulted on its change of approach to publication in 2015 was that having a "blanket" policy allowing for an indefinite period of publication for material such as that in question was problematic from a data protection perspective.⁴
56. Having considered the matter at length, the Commissioner is conscious that ordering disclosure in this particular case – on the grounds that the information had *previously* been available – would have the effect of reintroducing a policy of blanket and indefinite disclosure of information of this type, notwithstanding the subsequent introduction of the GDPR and DPA 2018. Furthermore, the GMC would have no power to impose restrictions on how the information could be re-used or how long it would then remain in the public domain.
57. The Commissioner, as independent regulator of both the DPA and FOIA is not bound to accept the GMC's policy of time-limited disclosure of information such as that which has been withheld here. However, the Commissioner, as the independent regulator of the legislation is clear that she wished to provide a consistent message when it comes to data protection. Having stated that a policy of indefinite disclosure would be "problematic" from a data protection point of view, it would be inappropriate for her to take a diametrically opposed view for the purposes of disclosure of that data under the FOIA.
58. She considers that disclosure of such information, some ten years after it was first created, would be contrary to the reasonable expectations that the Doctor would have had, most particularly since the GMC introduced its updated policy. The Commissioner therefore considers that disclosure would be likely to cause a degree of distress to the Doctor.
59. Disclosure of the withheld information would be unfair to the Doctor as it would not take account of any remedial steps the Doctor may have taken to address the deficiencies set out by the FTTP.
60. The complainant has put forward no justification as to why the withheld information is particularly relevant at the present time and the

⁴ https://www.gmc-uk.org/-/media/documents/08---consultation-on-publication-and-disclosure-policy---outcomes-and-recommendations_pdf-64816452.pdf

Commissioner is not aware of any other reason why this would be the case.

61. In all the circumstances, the Commissioner considers that publication of this information at the present time would not strike the right balance between the rights of the Doctor and any legitimate interests necessitating disclosure under FOIA. She therefore considers that such disclosure would be both unlawful and also unfair to the Doctor.
62. The Commissioner has therefore decided that the GMC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

63. 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

64. 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.
65. 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

**Phillip Angell
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