

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 February 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested access to all complaints made to the General Medical Council ('GMC') about a named doctor.
2. As the named doctor had conditions placed on his registration by an Interim Orders Tribunal, GMC confirmed that details about the current investigation into the named doctor was subject to the personal data exemption at section 40(2) FOIA.
3. As regards any other complaints into the named doctor, GMC would neither confirm nor deny whether the requested information is held under section 40(5) FOIA.
4. The Commissioner's decision is that GMC correctly withheld all the requested information under section 40(2) FOIA and section 40(5) FOIA.
5. The Commissioner requires no steps to be taken.

## Background

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6. GMC explained that when it receives a complaint about a doctor an initial decision is made by the GMC whether an investigation should be conducted.
7. The GMC can refer a case to an Interim Orders Tribunal ('IOT') while they investigate a complaint about a doctor. They do this if they believe a doctor's practice should be restricted to protect members of the public, or if it is in the doctor's interest. ITO hearings are usually held in private.
8. The request in this case focuses on a named doctor who has had conditions placed on his registration by the IOT while an investigation is conducted.
9. If a case progresses past the investigation stage, the options for GMC are to refer the case to the Medical Practitioners Tribunal Service for a public hearing, or the doctor may receive a sanction on their registration. At the hearing stage, details about the case may be made publicly available and certain information may be made publicly available by the GMC on its website for a particular timeframe.
10. Public disclosure of information following the conclusion of complaints is governed by GMC's Publication and Disclosure Policy: <https://www.gmc-uk.org/-/media/documents/dc4380-publication-and-disclosure-policy-36609763.pdf>
11. The expectation of all parties involved in the GMC's complaint process is that information will only be published in line with the above Policy.
12. At the time of the request and at the date of this decision notice, GMC has not made any information public about its investigation, other than its existence and the nature of the conditions on the named doctor.

## Request and response

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5. On 16 March 2021, the complainant wrote to the GMC and requested information in the following terms:

“Could I please find out if it would be possible to get access to all complaints made to GMC about [the named doctor].”
6. GMC responded on 16 April 2021 stating that GMC would neither confirm nor deny whether they held the requested information under section 40(5B)(a)(i) FOIA.

7. The complainant requested an internal review on 19 April 2021 and GMC provided an internal review response on 11 May 2021, revising its position.
8. On the basis that it was public knowledge that the GMC were conducting an investigation and that the doctor's registration was subject to conditions imposed by an IOT, GMC said it was not appropriate to neither confirm nor deny that GMC had a complaint under investigation in respect of the named doctor. Therefore, GMC said that, while information about a complaint was held, details about its current investigation were subject to the personal data exemption at Section 40(2) FOIA.
9. GMC went on to say in the internal review that, in relation to any further complaints which may have been made about the doctor (if any), GMC maintained the use of the neither confirm nor deny exemption at Section 40(5B)(a)(i) FOIA.
10. The GMC argued that disclosing the withheld information about the current investigation or confirming or denying that it held any further requested information would breach the principles relating to the processing of personal data listed at Article 5 of the UK General Data Protection Regulation (UK GDPR).

### **Scope of the case**

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11. The complainant contacted the Commissioner on 11 August 2021 to complain about the way his request for information had been handled. He believes that GMC is using FOIA exemptions to block the release of information about which there is a huge public interest.
12. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information in respect of the complaint under investigation under section 40(2) FOIA and, in relation to any other complaints, whether confirming or denying the requested information is held would constitute the disclosure of a third party's personal data under section 40(5B)(a)(i) FOIA.

### **Reasons for decision**

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#### **Section 40 personal information**

13. Section 40(2) 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.

14. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
15. 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 EU2016/679 ('UK GDPR') to provide that confirmation or denial.
16. 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.
17. 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?/ Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

21. 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.
22. The complainant's request specifically names the doctor and the withheld information, in relation to GMC's current investigation, will be likely to have the doctor as its main focus. In the circumstances of this case, the Commissioner is satisfied that the information relating to a current investigation both relates to and identifies the named doctor.
23. GMC also advised that if it were to confirm or deny whether the requested information about any other complaints is held it would be disclosing whether or not the named doctor had been the subject of any other complaints other than what is being currently investigated. This confirmation or denial would therefore be disclosing personal data (whether or not they have been subject to other complaints) relating to the named doctor to the world at large.
24. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA. The Commissioner is also satisfied that if 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.
25. The fact that information constitutes the personal data of an identifiable living individual and the fact that confirming or denying whether the requested information is held would reveal the personal data of a third party 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.
26. The most relevant DP principle in this case is principle (a). 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".
27. 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 - or additionally 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, fair and transparent.
28. 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) UK GDPR

29. 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.
30. 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”<sup>2</sup>.
31. In considering the application of Article 6(1)(f) 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.
32. 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*

33. In considering any legitimate interest(s) in the disclosure of the requested information or in confirming or denying whether the
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<sup>2</sup> 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”.

requested information is held under the FOIA, 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.

34. 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.
35. From the Commissioner's own research into the background of this matter, it is clear there has been press and public interest in the named doctor. The Commissioner therefore understands the complainant is pursuing a legitimate interest in making enquiries about matters that have received media attention and that disclosure would promote overall openness, transparency and accountability.
36. In the circumstances of this particular case, the Commissioner also recognises that there is a legitimate interest in protecting, promoting and maintaining the health, safety and well-being of the public. This extends to knowing whether doctors are the subject of any wrongdoing which requires an investigation to be conducted. It also extends to the transparency of GMC's procedures when handling complaints where an allegation is made that a particular doctor has fallen short of the standards required - and in understanding how those complaints have been investigated and disposed of.
37. The Commissioner therefore recognises that there is a legitimate interest that would be served by disclosure of the withheld information. Doctors hold a position of trust and are responsible for delivering appropriate care to their patients. If there are concerns over the care that is being provided, there is a legitimate interest in knowing what those concerns are and how they are being addressed.

*Is disclosure necessary or is confirming whether or not the requested information is held necessary?*

38. '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 or 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 or disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
39. The information which the GMC normally discloses about doctors is set out in its Publication and Disclosure Policy. This makes clear that the

GMC does not routinely publish simply whether or not an investigation has been carried out into any specific doctor. Whether or not any information about an investigation is published on the medical register depends on the outcome in each case.

40. The Commissioner notes that if a case progresses to a public hearing, or the doctor receives a sanction on their registration, certain information may be made publicly available by the GMC on its website for a particular timeframe.
41. Despite the amount of information already in the public domain, as far as the Commissioner is aware, there was nothing available in the public domain at the time of the request which reveals the more detailed information being sought here.
42. The Commissioner is satisfied in this case that there are no less intrusive means and therefore it is necessary in order to meet the legitimate interest in disclosure, to disclose the requested information about the current investigation or in confirmation or denial of whether any other requested information was held.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

43. 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.
44. 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.
45. 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.

46. 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.
47. The GMC explained that due to its Publication and Disclosure Policy there would be no expectation on the named doctor's part that information held in relation to the current investigation, or confirmation or denial whether any other requested information is held, would be made publicly available at the time of the request. No final conclusion or decision has been reached by the GMC and it is only when a doctor is referred to a public hearing, or has their practice restricted in some way, that such details would become publicly available.
48. The Commissioner notes that the outcome of any investigation that takes place could conclude that the complaint was ultimately unfounded. Just because there is an investigation, does not automatically mean there has been any wrongdoing.
49. In the Commissioner's opinion, at this stage, the disclosure of the information even in redacted form (or confirmation whether or not it is held) 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 his personal data would be disclosed to the world at large at this stage. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to the contents of any complaint being disclosed to the world in response to the FOIA request or that the named doctor has deliberately made this information public.
50. The Commissioner does note the complainant's argument that there is significant public interest in the details of any complaints against the named doctor, and that not releasing the requested information or confirming whether it is held creates an impression of excessive and undue secrecy on the part of GMC whose duty is to protect the public. The Commissioner also considers that there is some legitimate interest in the public being able to scrutinise whether the GMC has taken action in a particular case.
51. However, while he considers there is a legitimate interest in maintaining public confidence in the GMC's complaints handling procedures, the Commissioner is not persuaded that revealing under the FOIA the details of the current investigation or whether the named doctor is the subject

of other complaints is necessary in order to maintain that public confidence. The GMC publishes the outcomes of investigations where sanctions are found to have been necessary and, while it may be a matter of interest to scrutinise the GMC's decision-making process at an earlier stage, the Commissioner does not consider that this carries significant weight in the circumstances of this case.

52. The Commissioner is satisfied that the disclosure of this information at this time would cause damage and distress to the named doctor. There does not seem to be any dispute that the withheld information is not widely available now and that the named doctor would expect any complaints to be treated as confidential at this stage.
53. 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 disclosure of the information or confirmation or denial as to whether the requested information is held would not be lawful.
54. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure or confirmation or denial would be fair or transparent.
55. In this instance, the Commissioner has decided that GMC has demonstrated that the exemptions at sections 40(2) and 40(5B)(a)(i) applies to all the withheld information.

## **Right of appeal**

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56. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**