

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2016

Public Authority: General Dental Council (GDC)

Address: 37 Wimpole Street
London
W1G 8DQ

Decision (including any steps ordered)

1. The complainant has requested a registrant's indemnifier and his policy number.
2. The GDC refused to confirm or deny whether the requested information was held under section 40(5) of the Freedom of Information Act 2000 (FOIA).
3. The Commissioner's decision is that the GDC was incorrect to neither confirm nor deny whether the requested information was held under section 40(5) FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The GDC shall inform the complainant whether the requested information is held. If the information is held it should provide it to the complainant or else issue a refusal notice in accordance with section 17 of FOIA.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 8 September 2015 the complainant requested information of the following description:

"I made a freedom of information request on 27th August. This related to a case heard by the Investigating Committee on 1st September 2011, regarding [named registrant]."
7. I was informed by the GDC that I should have received papers "6.2" before the hearing (I did not receive these papers) and my FOI request was for this bundle of papers.
8. The information I specifically require is the registrant's indemnifier and his policy number."
9. On 24 September 2015 the GDC responded. It explained that the GDC's position on disclosing indemnity/policy information in relation to a Registrant via an FOI request is that it can neither confirm nor deny whether the information is held under section 40(5) FOIA.
10. The complainant requested an internal review on 24 September 2015. The GDC sent the outcome of its internal review on 28 October 2015. It upheld its original position.

Reasons for decision

Section 40(5) – neither confirm nor deny

11. The GDC has argued that it would not be appropriate to publicly disclose whether or not it holds the indemnity insurance information for the registrant in question as it discloses whether the registrant has or had indemnity insurance. It said that to confirm or deny whether this information is held would breach the first principle of the DPA, which requires that the processing of personal data is fair and lawful. It does not believe that any of the conditions in schedule 2 are met and therefore confirming whether or not the information is held would be unlawful.
12. Section 1 of the FOIA provides two distinct, but related rights of access to information that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not requested information is held and, if so

b) the duty to communicate that information to the applicant.

13. However, in relation to personal information, section 40(5)(b)(i) of the FOIA says that a public authority is not obliged to confirm or deny that it holds information if, by confirming or denying that it is held, the authority would breach one of the data protection principles.
14. This subsection is about the consequences of confirming or denying whether the information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles, but whether the simple action of confirming or denying that it is held would do so.
15. The Commissioner's guidance on section 40(5) explains how there may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information about an individual can itself reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process.
16. For the GDC to have correctly relied on section 40(5)(b)(i) the following conditions must be met:
 - confirming or denying whether information is held would reveal personal data of a third party; and
 - confirming or denying whether information is held would contravene one of the data protection principles.
17. In order to reach a view regarding the application of this exemption, the Commissioner has first considered whether confirming or denying relevant information exists does, in fact, constitute personal data as defined by the DPA.

Is the requested information personal data?

18. In this case the GDC has argued that confirming or denying whether it holds indemnity insurance information about the registrant relevant to this case, would be the personal data of the registrant. This is because the GDC does not as a matter of course hold indemnity insurance information about registrants. It would only hold this information if there was an issue with the registrant's fitness to practice. It therefore argued that to confirm or deny whether this information is held, would confirm or deny whether there had been an investigation into the registrant's fitness to practice. The Commissioner considers that this is therefore

information from which the data subject would be identifiable and would be classed as personal data.

Would confirming or denying whether the information is held contravene one of the data protection principles?

19. The first data protection principle says that personal data must be processed fairly and lawfully.

What reasonable expectation does the individual have about what will happen to their personal data?

20. The GDC argued that the requested information, if held, relates to the registrant's public life. It confirmed that it is a legal requirement for registrants to hold indemnity insurance to enable patients to claim compensation if something goes wrong with their treatment. As stated above the GDC would only ask the registrant to provide it with this information if there was a concern about their fitness to practice.
21. The GDC said that the registrant has a reasonable expectation that information, that would give away whether there was concern about a registrant's fitness to practice, would be kept confidential and only processed for the purpose of the GDC performing its regulatory (i.e. fitness to practice or disciplinary) functions.
22. The Commissioner considers that where concerns have been raised with a registrant's fitness to practice and there is no finding of wrong doing, it would be reasonable for registrants to have an expectation of confidentiality. However if there has been a finding of wrong doing, the Commissioner would not accept that registrant's could reasonably expect the same level of confidentiality and should have some expectation that the fact that there are concerns with their fitness to practice would be shared more widely.
23. In relation to this case, there is a press release; publicly available on the GDC's website, which confirms that there were findings of wrong doing in relation to the [named registrant's] fitness to practice and that he was going to be erased from the register¹. The GDC has confirmed to the Commissioner that the registrant in question has been erased from the register.

¹ <http://www.gdc-uk.org/Newsandpublications/Pressreleases/Pages/Coventry-dentist-struck-off-for-misconduct.aspx>

Balancing the individual's rights and freedoms against the legitimate interest in confirming or denying information is held

24. The Commissioner notes that there is a legitimate public interest in information that demonstrates that the GDC's regulation of dentists is operating effectively.
25. Taking into account the dentist's reasonable expectations, because he has been erased from the register, the Commissioner is satisfied that confirming or denying whether the requested information is held would not be unfair. He considers that there is legitimate public interest in this information. The Commissioner's decision is therefore that the GDC incorrectly applied section 40(5)(b)(i).

Right of appeal

26. 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

27. 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.
28. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF