

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 01 March 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the review of a complaint he had submitted to the General Medical Council (GMC). The Commissioner's decision is that the GMC was correct to neither confirm nor deny that the information was held under section 40(5)(b)(i) of FOIA. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

2. On 24 July 2016 the complainant made the following request for information after his fitness to practice complaint about the GP treating his wife:

'I made a complaint about a doctor's treatment of my wife.

As part of the GMC investigation into the doctor's fitness to practice, I was told that the doctor's performance was looked at "in the round". As part of this process, the GMC would contact the doctor's employers, contractors and others to see if there were any other concerns about the doctor's practice.

I would like to be given the following information:

1. *The names of all bodies, organisations and individuals who were contacted by the GMC to provide information about the doctor.*
2. *Copies of the responses they gave.'*

3. On 29 July 2016 GMC responded that it was unable to disclose the information under FOIA and cited section 40(2) personal data of a third party (by virtue of section 40(3)(a)(i)).
4. On 2 August 2016 the complainant requested an internal review and provided arguments against the section 40 decision as it was *'crucial for me, on behalf of my wife, to have proof that the "in the round" investigation was actually carried out.'*
5. On 6 September 2016, GMC provided the outcome of the internal review. The review explained that disclosures under FOIA are *'public disclosures to the world'* and that where complaints about a doctor do not progress to a public hearing or to sanctions, then *'the information is treated as the confidential personal data of the doctor and other parties involved'*.

GMC stated that *'therefore it is our view that to publically acknowledge the existence of the complaint...would breach the first principle of the Data Protection Act 1998 (DPA)'*. The review amended the exemption used in the initial response to:

'Section 40(5)(b)(i) of the FOIA applies where the information, if held, would be the personal data of a third party and where confirming it's held would breach any principle of the DPA.'

6. However, outside of the FOIA, GMC provided some information to the complainant about which organisation had been contacted. The GMC also explained that the response received was *'fully the doctor's personal data and not appropriate for disclosure to him under the DPA or voluntarily'*.

Scope of the case

7. On 26 September 2016 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the GMC has correctly cited section 40(5)(b)(i) of the FOIA in response to the request.

Background

9. The GMC provided details of their complaint process as a background:

'When we receive a complaint about a doctor an initial decision is made as to whether an investigation should be conducted. On completion of an investigation, a complaint is considered by two case examiners (one medical and one non-medical). They can conclude the case, issue a warning, agree undertakings with the doctor or refer the case to a Medical Practitioners Tribunal (MPT) for a hearing. MPT hearings are usually held in public, although may be held in private if discussing a doctor's health or any other confidential matter. It is at this hearing stage that details about the case may be made publicly available. Outcomes of MPT hearings are also published on our website. Details of any warnings or current restrictions on a doctor's registration are also made publicly available.

Therefore, we will only publicly disclose the existence of a complaint against a doctor if they have any current warnings or restrictions on their registration, or if the complaint has progressed to an MPT hearing. The expectation of all parties involved in the GMC's complaint process is that information will only be published in line with these disclosure points.'

Reasons for decision

10. Section 40(5) states that:

"The duty to confirm or deny -

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either –

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded.

11. It is necessary to first consider whether confirming or denying that the requested information is held would involve the disclosure of personal data. If this test is met then the Commissioner will go on to consider whether this would breach any of the data protection principles.

Would confirming or denying that information is held involve the disclosure of personal data?

12. Section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as:

"...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."

13. The Commissioner has published guidance on section 40(5) which acknowledges that there may be situations in which it could be argued that giving the confirmation or denial to the requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
14. The FOIA is motive and applicant "blind", and the test is whether the information can be disclosed to the public at large, not just to an individual. Therefore information can only be disclosed under the FOIA if it could be disclosed to any member of the public who requested it.
15. The GMC explained that to confirm or deny whether the information is held or not, would reveal whether a complaint had been made about a specific individual in a professional capacity and therefore the information would constitute personal data of the individual.
16. The Commissioner considers it reasonable to assume that, if the GMC did hold information relating to the request it would be likely to be personal data of third parties.
17. The Commissioner must also consider whether any individual could be identified by virtue of the GMC confirming or denying that it holds the requested information. Having taken into account the background to and the specific wording of the request, the complainant clearly knows the identity of specific individuals. Therefore the Commissioner accepts that confirmation as to whether the requested information is held or not would be likely to tell the public something about those individual(s), namely whether they were involved in any investigation or complaint.

Would confirming or denying this personal data is held, breach any of the data protection principles?

18. The GMC argued that confirming or denying whether the information requested is held would breach the data protection principles, in particular, the first data protection principle.

19. Principle 1 of the DPA states:

*"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 "*

20. The GMC stated that, in this instance, confirming or denying whether the information is held would communicate whether or not a complaint had been made about a particular doctor. It considered that the doctor would have a reasonable expectation that details of any complaint made about them would not be made public, unless it had reached a stage at which it would normally be expected to be disclosed. (See the background above at paragraph 9.)

21. In light of the above the Commissioner accepts the GMC's argument that the doctor in the request would have an expectation of confidentiality which would extend to refusing to confirm or deny that any complaint was made.

22. The Commissioner also accepts that an individual would be likely to feel distressed if the GMC confirmed whether or not information of the type requested was held.

23. In previous recent decision notices (FS50597418 and FS50619296), the Commissioner has upheld the GMC to neither confirm or deny information about complaints and the Commissioner considers that similar arguments apply here:

'the Commissioner is prepared to accept that any doctors relevant to this request would not expect the GMC to confirm or deny it holds information on any complaints about them.'

24. In conclusion, the Commissioner finds that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the GMC is entitled to refuse the request on the basis of section 40(5)(b)(i) of the FOIA.

25. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to

consider whether this is lawful or whether one of the schedule 2 conditions is met.

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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF