

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2020

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

Decision (including any steps ordered)

1. The complainant has requested the qualification and area of psychiatry expertise of an individual. The individual in question was employed by the General Medical Council (the GMC) to investigate a doctor responsible for the care of a close relative of the complainant, who died in hospital. The GMC has refused to confirm or deny that it holds this information under section 40(5B)(a)(i) of the FOIA, as it believes that to do so would disclose personal data, and that this disclosure would contravene data protection legislation.
2. The Commissioner's decision is that the GMC can rely on section 40(5B)(a)(i) of the FOIA to refuse to confirm or deny that it holds the requested information, as she is satisfied that doing so would contravene data protection legislation.
3. The Commissioner does not require any further steps to be taken as a result of this decision notice.

Background

4. The Commissioner understands that the complainant submitted a complaint to the GMC in 2018 about the clinical care provided to one of his close relatives by a doctor (the Doctor). The GMC considered the complaint and decided to gather further evidence to determine whether the allegations exceeded the threshold for a formal investigation. This included the GMC instructing an independent expert (the Expert), a registered doctor, to provide an opinion about the way the complainant's close relative was treated by the doctor who was the subject of the complainant's complaint. As no concerns were identified, the complaint

was closed with no further action. The complainant requested a review of the GMC's decision to close his case, but it was concluded that there were no grounds to do so. The GMC has confirmed that it disclosed a redacted copy of the Expert's findings to the complainant at his request. It stated that the name and professional qualifications of the Expert were removed from the findings before the GMC disclosed them to the complainant.

Request and response

5. On 12 December 2019, the complainant wrote to the GMC and requested the following information:

"I wish to make a Freedom of Information request for the qualifications and area of psychiatry of the Expert who provided advise into [the Doctor's name redacted] conduct.
6. The GMC responded on 23 December 2019. It relied on the exemption under section 40(5) of the FOIA to refuse to confirm or deny that the GMC held the requested information.
7. The complainant requested an internal review of the GMC's decision on 23 December 2019.
8. Following an internal review, the GMC wrote to the complainant on 29 January 2020 maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 24 February 2020 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation is to consider whether the GMC can rely on section 40(5B)(a)(i) of the FOIA to neither confirm nor deny that it holds the information that has been requested.

Reasons for decision

Section 40 - personal information

11. 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 General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.

12. Therefore, for the GMC to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

13. Section 3(2) of the Data Protection Act 2018 (DPA 2018) defines personal data as: -

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. The request concerns the qualifications and area of psychiatry of the Expert. In its submission to the Commissioner, the GMC has explained that the disclosure of the requested information is contingent on it acknowledging that it had received a complaint about the Doctor.
17. The Commissioner considers that confirming or denying whether information is held in this case would, in itself, reveal whether the Doctor was the subject of a complaint and/or an investigation. This information clearly relates to the Doctor and they could be identified from this.
18. For the reasons set out above, the Commissioner is satisfied that if the GMC confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data (specifically, the existence of a complaint against the Doctor). The first criterion set out above is therefore met.

19. The fact that confirming or denying that the requested information is held would reveal the personal data of a third party does not automatically prevent the GMC from refusing to do so. The second element of the test is to determine whether the disclosure resulting from such a confirmation or denial would contravene any of the data protection principles.
20. The Commissioner considers that the most relevant data protection principle is the one contained in Article 5(1)(a) of the GDPR.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

21. 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”

22. In the case of an FOIA request, the personal data in question is processed when it is disclosed in response to the request. This means that the information can only be disclosed (or, as in this case, the public authority can only confirm whether or not it holds the requested information) if doing so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) of the GDPR), fair, and transparent.

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

23. 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”* conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
24. The Commissioner considers that the condition most applicable on the facts of this case would be the one contained in Article 6(1)(f) of the GDPR, which states that processing is lawful if:

“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”¹.

¹ Article 6(1) goes on to state that: -

25. When considering whether Article 6(1)(f) of the GDPR applies to 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 confirmation or denial that the requested information is held is necessary to meet the legitimate interest in question.

(iii) **Balancing test:** Whether the above interests override the legitimate interests or fundamental rights and freedoms of the data subject.

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

(i) Legitimate interests

27. When considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that 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. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate (bearing in mind that any disclosure under the FOIA is not a disclosure to the requester alone, but to the general public).

“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 2018) 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”.

Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

28. The complainant has explained that he is keen to establish whether the Expert was suitably qualified.
29. The complainant has also explained that the disclosure of the Expert's qualifications would go some way to help him understand what happened to his close relative whilst providing assurance that the GMC took the matter seriously.
30. The GMC has stated that there is a legitimate interest in confirming or denying the existence of information, given the general duty towards openness, as afforded in "The Seven Principles of Public Life"², and compliance with the FOIA insofar as it does not engage an exemption.
31. The Commissioner agrees that confirming or denying whether the requested information is held in this case would go some way towards informing the public about the GMC's accountability in terms of the investigations it carries out. She therefore recognises that there is some legitimate interest in the confirmation or denial in this case.

(ii) Is confirming whether or not the requested information is held necessary?

32. "Necessary" means more than desirable but less than indispensable or absolutely necessary. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures and so 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 under the FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The GMC has stated that as the confirming or denying of the requested information falls at the most basic level (the existence of a complaint about the Doctor), it does not believe that there is an alternative approach that it can take which would satisfy the legitimate interest in this matter.

² <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2>

34. The Commissioner therefore accepts that confirmation or denial would be necessary in this case to achieve the legitimate interest that has been identified.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

35. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the interests or fundamental rights and freedoms of any data subject to whom the information relates. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether the information is held.
36. In its submission to the Commissioner, the GMC has referred to paragraph 29 of the First-tier Tribunal decision for EA/2019/0203, which states:
- "The appellant also submits that publication would enhance the performance of doctors overall, if they knew more information would be available. We do not agree with this. Publication of information about complaints which have not been substantiated would be unfair to the doctor, and in our view, would be more likely to inhibit a doctor's practice than enhance performance."*
37. The GMC stated that the Doctor is a medical professional who has a reputation to uphold. It stated that any public criticisms about their clinical practise could potentially damage their ability to secure employment and/or hinder their professional performance. The GMC is therefore of the view that the requested information relates to the Doctor's public and private life as the two are intrinsically linked.
38. The GMC stated that the information it publishes about a doctor's fitness to practise history is explained in its 'Publication and disclosure policy'. It stated that this policy does not say it will disclose the existence of complaints which did not cross the threshold of investigation.
39. The GMC believes that all doctors have a reasonable expectation that the GMC will abide by its own policies. It stated that it is vital that it does, so as to ensure it maintains the trust and confidence of those it regulates.

40. The GMC has stated that it is clear that the complainant is unhappy with its handling of the allegations he raised against the Doctor. It confirmed that the appropriate forum to challenge this is in the Courts. It stated that informing the public about the existence of his complaint, its Expert's qualifications, and the area of their expertise, will not cause the GMC to reverse its decision.
41. The GMC has stated that it cannot identify any wider public benefit to disclosing the information the complainant has requested, not least at the expense of the Doctor's right to privacy.
42. The GMC therefore believe the privacy rights of the data subject outweigh the legitimate interest identified above.
43. For the avoidance of doubt, the Commissioner would like to make clear that whilst the information requested relates to the Expert (i.e. information about the Expert's qualifications), confirming or denying that it is held would disclose the personal data of the Doctor (in particular, the fact that a complaint had been made about the Doctor).
44. It is also important to remember that disclosure of information (or confirmation or denial that it is held) under the FOIA is to the general public rather than solely to the requester. It is the disclosure of the existence of a complaint against the Doctor to the public at large that the GMC believes would breach data protection legislation in this case.
45. Therefore, whilst the requester is already aware that a complaint against the Doctor exists by virtue of it being his complaint, the GMC (and, by extension, the Commissioner when considering this complaint), must consider the privacy implications of disclosure to the general public.
46. The Commissioner is satisfied that the Doctor would not have a reasonable expectation that the existence of a complaint against them would be put into the public domain as a result of an FOIA request. The Commissioner is also satisfied that confirming or denying whether or not the requested information is held may potentially cause damage and distress to the Doctor named in the request. This is because the GMC's policy is to not publicly disclose the existence of a complaint unless it meets a particular threshold, which it has not in this case. Confirming or denying the existence of the requested information would circumvent this policy.
47. The Commissioner has weighed this against the legitimate interests in disclosure in this case.
48. As stated above, the Commissioner accepts that there is some legitimate interest in confirming or denying whether the requested information is held in this case, as it would go some way towards

informing the public about the GMC's accountability in terms of the investigations it carries out, and could contribute to maintaining public confidence in the GMC's complaints handling process.

49. The Commissioner also acknowledges that the complainant has a personal legitimate interest in obtaining the requested information, as he believes it would go some way to help him understand what happened to his close relative and provide him assurance that the GMC took the matter seriously.
50. However, whilst the Commissioner accepts that the above legitimate interests exist, she is not persuaded that they outweigh the privacy rights and legitimate interests of the Doctor in this case. She accepts that doctors acting in their professional capacity should expect a certain level of scrutiny of their actions, particularly in view of the position of responsibility they hold. However, that must also be balanced against their own rights, freedoms and legitimate interest. The GMC's policy of only naming doctors subject to a complaint if the complaint meets a certain threshold is intended to provide this balance, and the Commissioner therefore believes that there is a strong interest in upholding this policy.
51. The Commissioner also notes that the GMC does publish the outcomes of investigations where sanctions are found to have been necessary, and that this contributes to public confidence in the GMC's complaints process. Whilst it may be a matter of interest to scrutinise the GMC's decision-making process at an earlier stage, particularly to individuals involved in a particular case, the Commissioner does not consider that this would significantly add to increasing public confidence in the GMC's complaints process over and above the information that it already publishes.
52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in confirming or denying whether the requested information is held to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would therefore not be lawful.

The Commissioner's view

53. The Commissioner has therefore decided that the GMC was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

Right of appeal

54. 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

55. 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.
56. 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