

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2022

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 a tribunal hearing relating to a named doctor. The General Medical Council (GMC) withheld the requested information under section 40(2) of FOIA on the basis that the requested information is third party personal data, and its disclosure would breach data protection law.
2. The Commissioner's decision is that the GMC is entitled to withhold this information in accordance with section 40(2) of FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 13 April 2021, the complainant wrote to the GMC with the following request for information:

"Under the freedom of information request please can you tell me how many times [doctor's name and GMC reference number redacted], has been referred to the GMC for alleged wrongdoing.

Please can you tell me how many times this resulted in investigations by the GMC and what the outcome of those investigations were.

Finally, please could you provide me with the outcome of a [year redacted] GMC tribunal hearing against the same doctor in which he faced six allegations relating to a post mortem examination he carried out at [hospital name redacted] on a patient referred to in the GMC case as [patient name redacted].

Please provide the outcome of the hearing, including any sanctions and available judgements."

5. The GMC responded on 10 May 2021. It stated:

"Publicly available information about a doctor's registration is on the Medical Register and this includes certain information about a doctor's fitness to practise, in accordance with our Publication and disclosure policy."

6. The GMC referred to the named doctor's entry in the Medical Register which stated that the named doctor is currently subject to Interim Conditions which restricts the named doctor's registration pending an ongoing investigation by the GMC.
7. The GMC advised the complainant that it was unable to provide any further information, relying on section 40(2) of FOIA as it considered that disclosure would contravene the UK data protection principles, specifically the first principle (which requires personal data to be processed lawfully, fairly and transparently).
8. The complainant wrote to the GMC on 13 May 2021 requesting an internal review of its decision to withhold the second part of their request for information, ("Please could you provide me with the outcome of a [year redacted] GMC tribunal hearing against the same doctor in which he faced six allegations relating to a post mortem examination he carried out at [hospital name redacted] on a patient referred to in the GMC case as [patient name redacted]. Please provide the outcome of the hearing, including any sanctions and available judgements."). The complainant argued:

"This was an open court hearing, which the public and the media were able to attend, and the judgement was a public document. A public account of a public court case cannot be covered by GDPR.

Furthermore, the public interest and the interest of open justice should override these considerations even if GDPR was engaged, which it is not.

The GMC has been strongly criticised by family members of those whose post mortems were carried out by [doctor's named redacted] for allowing him to continue to practice despite catastrophic failings.

To hide behind a wrongly applied refusal on the ground of GDPR to refuse to reveal the outcome of a public court case will exasperate the view that the regulator is covering up its own failings."

9. Following an internal review the GMC wrote to the complainant on 17 May 2021 maintaining its original position.

Scope of the case

10. The complainant contacted the Commissioner on 17 May 2021 to complain about the way their request for information had been handled.
11. The complainant stated that they accepted the refusal of part of their request for information but did not believe that the General Data Protection Regulations (GDPR) could be relied upon to refuse to provide the judgement of a tribunal which was held in public and attended by the press at the time.
12. The Commissioner considers the scope of his investigation to be to consider whether the GMC is entitled to withhold the judgement of the tribunal under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

13. Section 40(2) of 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)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 ("the DP principles"), as set out in Article 5 of the UK General Data Protection Regulation ("UK GDPR").
15. 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 FOIA cannot apply.

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

16. Secondly, 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?

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

“any information relating to an identified or identifiable living individual”.

18. The two main elements of personal data are that the data must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. The complainant’s request specifically names the doctor and the withheld information, in relation to a specific GMC tribunal hearing, 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 the tribunal hearing both relates to and identifies the named doctor.
22. The Commissioner is therefore satisfied that the information falls within the definition of “personal data” in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a) of Article 5 of the UK GDPR.

Would disclosure contravene principle (a) of Article 5 of the UK GDPR?

25. 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”.

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

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

27. 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.

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 UK GDPR in the context of a request for information under 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;

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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

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

- 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 interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be considered “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. Legitimate interests may be either compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
32. The complainant has argued that there is a huge public interest in the actions of the GMC in this case, as they allowed the named doctor to continue practising and it is alleged that the named doctor continued to make catastrophic errors in their post mortems which have denied families justice.
33. The GMC accepts that there is a legitimate interest in being open, both generally and in relation to understanding how the tribunal disposed of the requested hearing.
34. The Commissioner accepts that there is a legitimate interest in disclosure and has therefore gone on to consider whether this is necessary in order to meet the legitimate interest.

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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

36. With regards to the legitimate interest in generally being open, accountable and transparent, the GMC has stated that it makes Fitness to Practise information available in line with its publication and disclosure policy for this type of information, which it believes meets this legitimate interest.
37. It also argues that openness, accountability and transparency was demonstrated by holding a public hearing. It stated that the outcome of the hearing would have been published in line with the publication and disclosure practice at the time. The GMC stated that the policy at the time was the same as the current policy - that information published on the recent decisions page of the GMC website remains there for a period of one year. The GMC has stated that it is not of the view that it is proper to routinely acknowledge past investigations and outcomes on receipt of concerns about a doctor, especially while they are still being investigated, to achieve openness, accountability and transparency.
38. The information which the GMC normally discloses about doctors is set out in its Publication and Disclosure Policy. This makes it clear that the GMC publishes decision on its website for one year. As the decision to which the requested information in this case was made over a decade ago, it is no longer available on the GMC's website in accordance with its Publication and Disclosure Policy.
39. Although there is already information in the public domain about the named doctor, as far as the Commissioner is aware, there was nothing available in the public domain at the time of the request which reveals the information being sought here.
40. The Commissioner is therefore satisfied that, in this case, there are no less intrusive means of achieving the specific legitimate interest that the requester is pursuing, and therefore it is therefore necessary to release the information in order to satisfy that legitimate interest.

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

41. It is necessary to balance any 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 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.
42. 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.
43. In the Commissioner's view, a key issue is whether the individual concerned has 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 an individual, and the purpose for which they provided their personal data.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The GMC has confirmed that the named doctor has not been asked if they consent to the disclosure of the requested information. In addition, the GMC has stated that it is not aware of the named doctor making any public comments on the current investigation and has not made any public comments about their fitness to practise history. The GMC are of the belief that the named doctor would oppose disclosure.
46. The GMC has argued that the named doctor's reasonable expectations would be that the GMC would follow the publication and disclosure policy for Fitness to Practise information.
47. The GMC is also of the view that it is likely that the named doctor would object to the GMC releasing historic fitness to practise information about them during an ongoing investigation where no findings have yet been made. The GMC stated that there are reasonable arguments the named doctor may deploy as to how the release of the information may cause them procedural unfairness, especially if the matter was referred to a hearing. The GMC would also expect that the named doctor would feel a measure of distress about being singled out for additional disclosure, especially while the GMC was investigating other matters, and that the name doctor may reasonably feel that the GMC is conducting a 'witch hunt' against them.
48. The GMC accepts that the matters under consideration occurred in relation to the named doctor's employment while performing a public role, but this is balanced by the fact that the conclusion of the

investigation was over a decade ago and the incidents to which they relate longer ago still.

49. The GMC stated that it is important to set out that it accepts that the expectations of the named doctor may be altered in the future, for example as a result of the ongoing investigation, should, for example, they be sanctioned by a Tribunal in relation to the current investigation. The GMC also understands that it is possible that the named doctor's fitness to practise history may be referenced in a future tribunal, which if it went ahead would be available for at least one year. The GMC accepts that something may come out of a future Tribunal that raises additional legitimate interests which would override the named doctor's interests.
50. However, the GMC does not consider that the legitimate interests identified outweigh the rights and interests of the named doctor and therefore does not feel that the lawful basis of legitimate interests applies.
51. However the GMC has also acknowledged that it makes clear it provides information when legally required to do so. It explained that nothing in the publication and disclosure policy for Fitness to Practise information could reasonably lead a doctor to infer that disclosure would not go ahead in any circumstances.
52. The Commissioner notes the complainant's argument that there is a significant public interest in previous decisions made against the named doctor, particularly as, at the time of the request, the name doctor was subject to Interim Conditions which restricts their registration pending an ongoing investigation by the GMC. The Commissioner also considers there is some legitimate interest in the public being able to scrutinise whether the GMC has taken action in a particular case.
53. The Commissioner notes that the information has previously been publicly available and, at the time the information was created, the named doctor would have had a reasonable expectation that this information would have remained in the public domain for one year, in line with the GMC's Publication and Disclosure Policy.
54. However, and importantly, the Commissioner has 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.
55. The GDPR has brought about a significant shift in the obligations placed on organisations and the 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.

56. 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.
57. In the Commissioner’s view this would have had the effect of shifting the named doctor’s reasonable expectations further towards the information being withheld.
58. The GMC has clearly decided that publishing decisions indefinitely is not necessary and proportionate for achieving any legitimate interest there may be in verifying a doctor’s fitness to practise.
59. 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 introducing 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.
60. 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, as the Commissioner has previously made clear, having a policy of indefinite disclosure would be problematic from a data protection point of view. It would therefore be inappropriate for him to take a diametrically opposed view for the purposes of disclosure of that data under FOIA.
61. The Commissioner considers that disclosure of such information, some ten years after it was first created, would be contrary to the reasonable expectations that the named doctor would have had, most particularly since the GMC’s policy stated (and continues to state) that it would be published for one year. The Commissioner therefore considers that disclosure would be likely to cause a degree of distress to the named doctor.
62. In all the circumstances, the Commissioner considers that publication of this information would not strike the right balance between the rights of the named doctor and any legitimate interests necessitating disclosure under FOIA. He therefore considers that such disclosure would be both unlawful and also unfair to the named doctor.

63. 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 would not be lawful.

The Commissioner's view

64. 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

65. 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

66. 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.
67. 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

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