

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

### **Decision notice**

**Date:** 17 December 2019

**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 the GMC to disclose the evidence base for its refusal to investigate a complaint brought to it. The GMC refused to confirm or deny whether the requested information is held citing section 40(5A) and 40(5B)(a)(i) of the FOIA.
2. The Commissioner's decision is that the GMC is entitled to refuse to confirm or deny whether the requested information is held in this case in accordance with section 40(5B)(a)(i) of the FOIA. She does not require any further action to be taken.

#### **Request and response**

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3. On 28 November 2018, the complainant wrote to the GMC and requested information in the following terms:  
  
"1--If an evidence base [ie 'facts' and 'information'] for the GMC refusal to investigate exists then please show this to me.  
  
2--If there is no such evidence base, then please state such."
4. This request has been the subject of a previous investigation. The Commissioner issued a decision notice on 30 September 2019 requesting the GMC to respond to the request in accordance with its obligations under FOIA.

5. The GMC complied with the notice and issued a response to the complainant on 24 October 2019. It refused to confirm or deny whether the requested information is held citing section 40(5A) and 40(5B)(a)(i) of the FOIA.
6. The complainant contacted the Commissioner on 25 October 2019 to make a fresh complaint.

### **Scope of the case**

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7. As stated above, the complainant contacted the Commissioner on 25 October 2019 to complain about the way her request for information had been handled. She stated that she does not consider the GMC's reasons for its refusal to comply are valid. The complainant does not consider the requested information is personal data and requires to know if the requested information is held and if it is to have a copy.
8. The Commissioner decided to exercise her discretion and accept the complaint under section 50 of the FOIA without an internal review. This was because of the delays the complainant has already suffered to date in obtaining a response to her request from the GMC and the likelihood of an internal review making no material difference to the GMC's position.
9. The Commissioner considers the scope of her investigation to be to determine whether the GMC is entitled to refuse to confirm or deny whether the requested information is held in accordance with section 40(5B)(a)(i) of the FOIA.

### **Reasons for decision**

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#### **Personal data – section 40**

10. 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.
11. Therefore, for the GMC to be entitled to rely on section 40(5B)(a)(i) 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?**

12. Section 3(2) of the DPA 2018 defines personal data as:-

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. The requested information if it is held would relate to a complaint submitted to the GMC about third parties. Confirming or denying if the information is held would disclose to the world at large whether or not the GMC has received a complaint about these third parties. That confirmation or denial is information relating to those data subjects, it would be linked to them and if indeed the requested information is held they would be its main focus.
16. 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 third party personal data. The first criterion set out above is therefore met.
17. The fact that confirming or denying whether the requested is held would reveal the personal data of a third party does not automatically prevent the GMC from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
18. The Commissioner agrees that the most relevant data protection principle is principal (a).

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

19. Article 5(1)(a) GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

20. In the case of a 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 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 (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

### **Lawful processing: Article 6(1)(f) GDPR**

21. 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.
22. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“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>1</sup>”.

23. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

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<sup>1</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 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”.

(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

(ii) Necessity test: Whether confirmation as to whether the requested information is held (or not) 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.

24. 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*

25. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

26. 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.

27. The GMC stated that there is a legitimate interest in confirming or denying the existence of information given the general duty towards openness and transparency. The Commissioner notes that the complainant has her own legitimate interests in pursuing the request and considers it has wider societal implications.

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

28. 'Necessary' means more than desirable but less than indispensable or absolute necessity. 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 intrusive. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

29. The complainant is of the view that her legitimate interests cannot be met by any other means. The Commissioner is also not aware of any

less intrusive means by which the legitimate interests identified could be met.

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

30. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subjects 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 information is held.
31. The GMC commented that there is an inherent tension between the objective of the FOIA and the objective of protecting personal data. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy.
32. It also stated that when information is disclosed under FOIA, the public authority loses control of it. It said that it must be fair and reasonable towards doctors and respect their rights to privacy. The GMC confirmed that it cannot see anything unique about this request which would persuade it to depart from the clear and consistent precedents set by the Commissioner herself; particularly in light of the principle that the FOIA is applicant blind.
33. The GMC referred the Commissioner to the First-tier Tribunal hearing of *Iain Foster v Information Commissioner and the GMC*, EA/2016/0249, in particular paragraph 19 where the tribunal stated:

"The Tribunal considered that there was considerable merit in the GMC's approach in this case – namely to only confirm or deny that a complaint has been made against a particular doctor if that complaint had been referred to a MPT or if the complaint had resulted in warnings or restrictions being placed on the doctor's registration – that is if the complaint was deemed to have some merit even if it had not been upheld by a MPT. The Tribunal considered that this struck an appropriate balance between the complaints with some merit – where their existence should be disclosed – and complaints which were likely to be without merit or indeed even malicious and where disclosure of their existence would cause unjustified distress to the doctor in question which was not warranted. The Tribunal concluded that to confirm or

deny the existence of the latter type of complaint would be unfair to the doctor in question and thus in breach of the data protection principles.”

34. The GMC also referred the Commissioner to the Publication and Disclosure Policy it implemented on 26 February 2018. It confirmed that that this policy details the full extent of what information it will publish and for how long and this is binding on all doctors equally. It said that this policy says it will not disclose the existence or any details of complaints received which do not cross the threshold of investigation. It stated that this is the reasonable expectation of all doctors.
35. The GMC advised that in this instance confirming or denying whether the information is held would communicate to the world at large whether or not a complaint had been made about the data subjects concerned. It considers the data subjects 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. Confirming or denying whether the requested information is held would deviate away from its own policy and the established view of the Commissioner on such requests and would cause the data subjects involved distress.
36. For these reasons the GMC considers there is insufficient legitimate interest to outweigh the data subjects’ fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
37. The Commissioner accepts that confirming or denying whether the requested information is held would disclose to the world at large whether or not the GMC has received a complaint about the data subjects concerned. She notes the GMC’s clear policy on the disclosure of such information which is binding on all doctors and is of the view that the data subjects concerned would hold a reasonable and fair expectation that this type of information (even its existence not just the contents of any complaint) would remain private and confidential. Confirming or denying whether the requested information is held would therefore cause the data subjects distress and upset and constitute an unwarranted intrusion into their rights of privacy.
38. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects’ fundamental rights and freedoms, and that confirming or denying whether or not the requested information is held would not be lawful.

## **Fairness**

39. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner is of the view that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. 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(5)(B) of FOIA.



## Right of appeal

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40. 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](mailto:grc@justice.gov.uk)

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

41. 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.
42. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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