

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2022

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

Decision (including any steps ordered)

1. The complainant made three requests for information regarding the professional qualifications of individuals who investigate and respond to complaints made to the GMC about doctors. The GMC refused to confirm or deny whether it holds information under section 40(5B)(a)(i) FOIA in relation to one request. It applied section 12 FOIA as it considers it would exceed the cost limit to comply with one request. In relation to one request it said that this request was not a valid request for recorded information under section 8 FOIA.
2. The Commissioner considers that the GMC was correct to apply section 40(5B)(a)(i) and section 12 FOIA in this case. It was also correct that one of the requests was not valid under section 8 FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made the following information requests to the GMC on 4 July 2022:

Request 1

"Please provide a full list of the professional qualifications and professional faculty /body registrations of the anonymous professional person who investigated a case related to the redacted name in this request. The GMC should include any medical qualifications and

registrations, any legal qualifications and registrations and any other professional qualifications in the answer to the request.”

Request 2

1. Do the GMC always use medically qualified professionals to construct written responses to patient complaints about doctors?
2. Do the GMC ever use legally qualified professionals to construct responses to patient complaints about doctors?
3. Do the gmc ever use professionals with both legal and medical qualifications to construct responses to patient complaints about doctors?
4. Have the gmc ever instructed a solicitor to respond to a patient complaint about a doctor?
5. Has the GMC ever responded to a patient complaint about a doctor without a clinically qualified medical professional authoring the response?

Request 3

1. Are GMC 'investigations' into patient complaints about doctors always undertaken solely as clinical investigations, conducted to GMC clinical standards of medical evidential review with the purpose of upholding medically proven facts, medical ethics and patient safety/the prevention of harm as their primary motive?
2. Are GMC 'investigations' into patient complaints about doctors ever undertaken as legal interpretations of evidence, conducted by adversarial considerations of certain or selected facts with the purpose or outcome of defending a medical professional against an allegation?
5. On 5 July 2022 the GMC responded to the requests. In relation to request 1 it refused to confirm or deny whether it holds the requested information under section 40(5B)(a)(i) FOIA. This is because GMC considers that 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. In relation to requests 2 and 3 it confirmed that no recorded information was held.
6. On 8 July 2022 the complainant asked the GMC to carry out an internal review of its responded. On 8 August 2022 the GMC provided the complainant with the result of the review it had carried out. In relation to request 1 it upheld its application of section 40(5B)(a)(i) FOIA. In relation to requests 2 and 3 it confirmed that recorded information was

not held but tried to provided information GMC considered may be useful to the complainant.

Scope of the case

7. The complainant contacted the Commissioner on 19 August 2022 to complain about the way the requests for information had been handled.
8. During the Commissioner's investigation, in relation to request 2 the GMC said it would exceed the cost limit under section 12 FOIA to comply with this request. In relation to request 3, it said that it did not consider this constituted a valid request for recorded information under section 8 FOIA. It communicated this change in position to the complainant.
9. The Commissioner considers the scope of his investigation to be to determine if the GMC was correct to refuse to confirm or deny whether the information in request 1 is held under section 40(5B)(a)(i) FOIA. He will also consider whether GMC was correct to apply section 12 FOIA to request 2. Finally he will determine whether request 3 is a valid request for recorded information under section 8 FOIA.

Reasons for decision

Request 1

Section 40 – personal information

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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
11. 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?

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. In this case the GMC has argued that confirming or denying whether the information is held would confirm or deny whether a complaint had been made about a particular doctor. Despite the name being redacted from the request the complainant knows the identity of the doctor.
16. GMC referred to the First-Tier Tribunal decision in respect of Rushbrooke v ICO and GMC (EA/2020/0150V) dated 7 January 2021. In that case it was agreed that the request was to be read in conjunction with previous correspondence as it would not be possible to respond to the request without doing this. The decision also highlighted the point that a requestor could (create and) publish any content which, alongside the GMC's response, even if the GMC response did not name the doctor, could tie the doctor to confirmation that there had been a complaint about them.
17. 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. The first criterion set out above is therefore met.
18. The fact that confirming or denying whether the requested information 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.
19. 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?

20. Article 5(1)(a) UK GDPR states that:- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
21. 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) UK GDPR), be fair, and be transparent.

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

22. 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" 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.
23. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK 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"¹
24. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

¹ 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) 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".

(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.

25. 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

26. In considering any legitimate interest(s) in the disclosure of the requested information under 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 interest(s) 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
27. The Commissioner recognises that there is a legitimate interest in protecting, promoting and maintaining the health, safety and well-being of the public. This extends to knowing whether doctors are the subject of any wrongdoing which requires an investigation to be conducted. It also extends to the transparency of GMC's procedures when handling complaints where an allegation is made that a particular doctor has fallen short of the standards required - and in understanding how those complaints have been investigated and disposed of.
28. The Commissioner therefore recognises that there is a legitimate interest that would be served by disclosure of the withheld information. Doctors hold a position of trust and are responsible for delivering appropriate care to their patients. If there are concerns over the care that is being provided, there is a legitimate interest in knowing what those concerns are and how they have been addressed.

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

29. '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. 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.
30. The information which the GMC normally discloses about doctors is set out in its Publication and Disclosure Policy. This makes clear that the GMC does not routinely publish simply whether or not an investigation has been carried out into any specific doctor. Whether or not any information about an investigation is published on the medical register depends on the outcome in each case.
31. The Commissioner notes that if a case progresses to a public hearing, or the doctor receives a sanction on their registration, certain information may be made publicly available by the GMC on its website for a particular timeframe.
32. In this case the Commissioner is not aware that any such information was publicly available at the time of the request.
33. The Commissioner is satisfied in this case that there are no less intrusive means and therefore it is necessary in order to meet the legitimate interest to confirm or deny whether the requested information is held.

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

34. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' 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 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 information is held.

35. Before personal data can be disclosed, it is necessary to balance the 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 the 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.
36. 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.
37. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed or that the public authority will not confirm whether or not it holds their personal data. 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 individuals, and the purpose for which they provided their personal data.
38. It is also important to consider whether disclosure (or confirmation or denial) would be likely to result in unwarranted damage or distress to that individual.
39. The GMC explained that any public disclosure of information regarding complaints, including whether or not any have been received, is governed by its Publication and Disclosure Policy:

<https://www.gmc-uk.org/-/media/documents/dc4380-publication-and-disclosure-policy-36609763.pdf>

This sets out disclosure expectations for all parties involved in a complaint including the length of time that Tribunal hearing outcomes and sanctions on a doctor's registration will be publicly available. This is dependent on various factors including the type of hearing, the sanction imposed, if any, and the registration status of the doctor.

40. In the Commissioner's opinion disclosure could result in an interference with the rights and freedoms of the doctor who is the subject of this request. The Commissioner considers that the doctor, would not have any expectation that their personal data would be disclosed to the world at large.
41. The Commissioner also considers that there is some legitimate interest in the public being able to scrutinise whether the GMC has taken action in a particular case.
42. However, while he considers there is a legitimate interest in maintaining public confidence in the GMC's complaints handling procedures, the Commissioner is not persuaded that revealing under the FOIA the details of whether the named doctor was the subject of a complaint is required in order to maintain that public confidence given the GMC's clear Publication and Disclosure Policy.
43. The Commissioner is satisfied that confirmation or denial at this time would cause damage and distress to the doctor who is the subject of the request.
44. 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 confirmation or denial as to whether the requested information is held would not be lawful.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent.
46. In this instance, the Commissioner has decided that GMC has demonstrated that the exemption at section 40(5B)(a)(i) FOIA applies to request 1.

Request 2

Section 12

47. Section 12(1) of FOIA allows a public authority to refuse a request if fulfilling it could exceed the appropriate cost limit. The limit for the GMC is £450 or 18 hours work.
48. GMC explained that whilst it is not its usual process for a solicitor to respond, the only method to provide an answer would be to conduct a manual check of every complaint to see if any fits this criteria; there is no meaningful way to narrow down the scope of this search.

49. The complainant has not set a timeframe for the request so as an example, in 2021 alone GMC received 9,074 complaints. To manually search one patient complaint to establish if it instructed a solicitor to respond to a patient complaint would take approximately 10 mins. To search all complaints in 2021 alone , would take approximately 1,512 hours. Based on an hourly rate of £25 per hour (which is set by the Freedom of Information (Fees and Appropriate Limit) Regulations 2004) this exercise would cost GMC significantly in excess of the 'appropriate limit' to process.
50. The time/cost estimate provided by GMC appears to relate to part 4 of the request, however under section 12 FOIA multi-part requests such as this can be aggregated and so if it would exceed the cost limit to comply with part 4 of the request, GMC would not be obliged to any parts of the request.
51. Based upon the fact that to comply with part 4 of the request GMC would be required to manually search all complaints and due to the fact there is no specified timeframe it would exceed the cost limit under section 12 FOIA to comply with request 2.

Section 16

52. Where it would exceed the cost limit to comply with a request under section 12 FOIA a public authority has an obligation to provide advice and assistance as to how a request could be refined to fall within the cost limit (if this is possible) under section 16 FOIA.
53. In this case GMC advised the complainant that it in relation to part 5 it holds some information and the request could therefore be refined to part 5.
54. GMC has therefore complied with section 16 FOIA.

Request 3

55. The GMC does not consider that this request is valid under section 8 FOIA as it asks for explanations rather than recorded information.
56. The GMC referred to a recent decision notice IC-157159-X6B1 which confirmed that FOIA provides a right of access to recorded information which is held. This right of access does not extend to the right to request answers to questions or to be provided with explanations, unless the answers to those questions or explanations are held in recorded form already, which in this case they are not.

57. The GMC has explained to the complainant that the FOIA is not the best route to obtaining explanations for particular scenarios. Although it does not hold the specific information requested, it explained that it does hold recorded information about its fitness to practise decision-making process and the roles of those responsible for making those decisions, and provided information which it holds about its processes to the complainant. It has also advised the complainant of the correct route to obtaining explanations to his questions.

58. The Commissioner is satisfied that this request is not a valid request for recorded information under section 8 FOIA as it would require explanations to respond as the GMC has already provided the recorded information it holds about its fitness to practise decision-making process and the roles of those responsible for making those decisions.

Right of appeal

59. 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

60. 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.
61. 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
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