

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 20 July 2009

**Public Authority:** The General Medical Council (The GMC)  
**Address:** 5<sup>th</sup> Floor  
St James's Building  
79 Oxford Street  
Manchester  
M1 6FQ

### Summary

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The complainant requested information about the internal correspondence that was held by the public authority about a panellist and their connection to organisations associated with Scientology over a period of five years. The public authority confirmed that they did hold information that was relevant to the request but that it was exempt from disclosure under section 40(2) (by virtue of section 40(3)(a)(i)). The Commissioner has considered the exempt information and has determined that section 40(2) (by virtue of section 40(3)(a)(i)) was correctly applied to the information. This was because it is the personal information of the named panellist and it would be unfair to the panellist for the information to be released. The Commissioner therefore dismisses the complaint.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. Due to the nature of the withheld information, the Commissioner's notice cannot be too specific in this case to protect the withheld information.

### The Request

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3. On 5 February 2009 the complainant made the following request for information to the public authority:

*'a) Please provide the minutes of Fitness to Practise Panel case of [Named individual A], held in June/July 2006.*

*b) Please provide details of any other cases in which [Named individual B] served on the panel.*

*c) Please provide copies of internal communications relating to [Named individual B] in connection with Scientology organisations, over the past 5 years.*

*By 'Scientology organisations', I mean organisations which promote, recruit members for, or raise money for, Church of Scientology, Religious Education College Incorporated (a US corporation which has been denied charitable status in the UK).*

*To the best of my knowledge a list of such organisations would include:*

*Citizens Commission on Human Rights (United Kingdom) Ltd / Citizens Commission on Human Rights International / Jive Aces / Church of Scientology Inc / Greenfields School / Greenfields Educational Trust / Hubbard Foundation / ABLE / Applied Scholastics International / Narconon / Criminon / The Way to Happiness Foundation International / Church of Scientology Religious Education College Inc / Office of Special Affairs (OSA) / Sea Org / Youth for Human Rights International'*

4. On 5 March 2009 the public authority provided the information requested in part (a) of the request. It also provided the information in part (b) except for the names of the complainants in the private hearings that [Named individual B] sat on. For request (c) it confirmed that it held relevant recorded information but that it was exempt by virtue of the section 40(2) exemption. It said that it felt that the release of this information would breach the first data protection principle of the Data Protection Act (DPA) in this instance.
5. On 5 March 2009 the complainant responded. He said that he was happy with the handling of parts (a) and (b) of the original request, but that he wanted an internal review to be conducted into the handling of part (c). He asked for more information to be provided about why disclosure would breach the First Principle of the DPA. In particular he believed that [Named individual B] had a reasonable expectation at the time he joined the Committee (essentially a public role) that information which could cast doubt upon his suitability for that role, or his general integrity, would not necessarily be kept confidential by the GMC. He also pointed to the Commissioner's guidance on personal data and said that he did not believe that [Named individual B] would have been 'deceived or misled' in the acquisition of this information should it be made public. He also made a new request for the transcript of the hearing covered in part (a) of his request.
6. On 20 March 2009 the public authority provided the transcripts of the hearing to the complainant in relation to the Fitness to Practice Panel of [Named individual A].

7. On 24 March 2009 the public authority provided a response to the complainant's request for an internal review. It said the following:

*'The First Principle requires that personal data shall be processed 'fairly and lawfully' and in order to legitimise the processing at least one of the conditions in schedule 3 must also be met. We consider the only possible condition for processing as far as personal data is concerned in this case would be likely to be Schedule 2(6)(1) which states that 'processing is necessary for the purposes of legitimate interest' and does not prejudice the rights and freedoms or legitimate interests of the data subject. However in this case we believe that this condition would not apply.*

*We do not agree with your contention that [Named individual B] would have had a 'reasonable expectation' that information concerning him would be disclosed. All parties involved in the process would have had an expectation of confidentiality and privacy in terms of their involvement. We do not believe that the disclosure of information under these circumstances is necessary for the purposes of satisfying the legitimate interests of the general public and would be unwarranted by reason of prejudice to the rights and freedoms of the panellist and any other individuals referred to within these data.*

*Given the subject matter it is likely that a Schedule 3 condition would also be required. Again we do [\*sic not] believe that such a condition exists in this case.*

*In conclusion we believe therefore that the information requested is exempt from the access provisions of FOIA through the exemption at section 40(2) leading to 40(3)(a)(i).'*

8. On 25 March 2009 the complainant asked if it was possible to redact the documents in order to not reveal the withheld information. On 30 March 2009 the public authority responded and indicated that it did not think that this could be done.

## The Investigation

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### Scope of the case

9. On 30 March 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- That section 40(2) should not apply because the information may relate to an individual's improper conduct in a public role.
  - That the Commissioner considers whether there is the possibility of the public authority releasing a redacted copy of the withheld information to show the internal process of the public authority.

- That the Commissioner notes that he was satisfied with the procedural matters in this case and the way that the staff of the GMC had engaged with him.
10. On 19 May 2009 the Commissioner wrote to the complainant to set the scope of his investigation at the handling of part (c) of the original request. On 21 May 2009 the complainant confirmed that he was satisfied with the scope of this case.

### Chronology

11. On 19 May 2009 the Commissioner wrote to the complainant and set the scope as above. He also asked the complainant to present additional arguments about why he felt section 40(2) was not appropriate in this case and why he believed that [Named person B] was connected to a scientology group.
12. The complainant responded on the 21 May 2009 and informed the Commissioner that he was happy with the scope. He also provided detailed submissions about why he believed that it would not be unfair to disclose the information and why he believe that [Named person B] was connected to a scientology group. These arguments will be considered in the findings of fact and analysis part of the Decision Notice.
13. On 21 May 2009 the Commissioner called the public authority on the telephone to inform it of the scope of the case and to ask to be provided a copy of the withheld information in this case. He consolidated what was said by email.
14. On 3 June 2009 the public authority sent the Commissioner a copy of the withheld information. It also detailed its arguments about section 40(2). These arguments will also be considered in the analysis part of the Decision Notice.
15. On 16 June 2009 the Commissioner presented his preliminary findings to the complainant and enquired whether he would withdraw the case or required a Decision Notice. On 17 June 2009 the complainant informed the Commissioner that he would require a Decision Notice.

### Findings of fact

16. This decision is based on the following facts already being in the public domain:
- That [Named Individual B] has been connected to the 'Citizens Commission on Human Rights (UK) Ltd', one of the organisations contained within the complainant's list within the request.
  - The transcript of the hearing of [Named individual A] that is within the public domain contains the following information about [Named Individual B] (at Page 153 ('D5/1')) where the Chair said:

*"Good morning. Before I ask the Legal Assessor to tender his advice I would wish to report that following on from a letter which was submitted to the Panel*

*yesterday, D17, the question was raised as to whether [Named Individual B] whose name featured in the left hand side of that page was the same person who originally started on this Panel on Monday of last week. As you recall, [Named Individual B] stood down.*

*Last night I had a telephone call from [Named Individual B] and he confirms that he is one and the same person who features on this letter. He was a Commissioner of the Citizens Commission on Human Rights, but he informs me that he resigned that position on 1 January 2001. This letter is dated 28 March 2001 and the explanation that was given to me was that his name featured on that document, because the Commission was using up old notepaper, but that his name has been removed from it subsequently. It does not alter the fact that he was a Commissioner on the Citizens Commission on Human Rights. That piece of information was not known to us last week when he stood down."*

This transcript confirms that [Named Individual B] was connected to 'Citizens Commission on Human Rights (UK) Ltd' and that the panel were unaware of this information before he stood down.

- That [Named Individual B] served as a panellist from 21 September 2001 to 21 June 2004. This information was disclosed in response to a separate request for information from the complainant.

## Analysis

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### Exemption

#### *Section 40(2)*

17. Section 40(2) provides an exemption for information which is the personal data of a third party. Section 40(2) is contingent on two conditions and the public authority has informed the Commissioner that it is withholding the recorded information under section 40(2) by virtue of section 40(3)(a)(i) of the Act. This condition requires firstly for the information to be personal information under the DPA and secondly that the disclosure of it would contravene a data protection principle.
18. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

Is the information 'personal data'?

19. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information 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 intention of the data controller or any other person in respect of the individual.'*

20. The Commissioner has viewed the information that was requested and is satisfied that the information relates to an identifiable living individual. The Commissioner accepts that information about an individual's affiliation with an organisation is the individual's personal data as defined by the DPA.
21. The Commissioner has explored the question of whether it would be possible to anonymise the information to such an extent that individuals would be not identified by releasing the information. The public authority informed the complainant that such a result was not possible. The Commissioner has considered the withheld information and agrees with its verdict.

Does the disclosure of the information contravene any data protection principles?

22. Having concluded that the information falls within the definition of 'personal data', the Commissioner must then consider whether disclosure of the information breaches any of the eight data protection principles as set out in schedule 1 of the DPA.
23. In this case the public authority has informed the Commissioner that it is the first data protection principle that it believes would be contravened by releasing the withheld information.
24. The first data protection principle requires that the processing of personal data should be fair and lawful and that at least one of the conditions in Schedule 2 of the DPA must be met. The term 'processing' has a wide definition and includes disclosure of the information under the Act to a third party.
25. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The individual's reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
  - Whether this expectation would be removed by the seniority of the individual and accompanying expectation that this sort of information would be available;
  - Whether the information in the public domain indicated in the 'findings of fact' section above reduces the expectation of privacy in this case;



- Whether disclosure would cause any unnecessary or unjustified damage to the individual and whether the individual has refused to consent to disclosure; and
  - Legitimate interests of the public in knowing about any possible process that is in force and the necessity for the public to have confidence in Fitness to Practise panellists. The fact that they are paid out of the public purse enhances these interests.
26. The public authority stated that disclosure of the withheld information would be unfair. It informed the Commissioner that it believed that the release of the withheld information would be unfair to the data subject. It does not think that the data subject would have had a reasonable expectation of the withheld information being released in this case. Instead there was an expectation of confidentiality and privacy. The Commissioner having looked at the withheld information is convinced that the reasonable expectations are a persuasive factor in indicating that the release of this information would be unfair.
27. The Commissioner's guidance on the application of section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:
- 'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'*
28. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act. This approach is supported by the Information Tribunal decision (*House of Commons v Information Commissioner and Norman Baker MP* EA2006/0015 and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:
- 'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'* (at paragraph 78).
29. The Commissioner also believes that a distinction can be drawn between the information which senior staff should expect to have disclosed about them compared to what information junior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds. In relation to this part of the investigation, the Commissioner notes that the request

is for information about a relatively senior figure – a past panellist in a series of Fitness to Practice hearings. This must be considered as a factor that suggests that the release of the information might not be unfair.

30. In addition the Commissioner has considered the contract of service and notes that it imposes an obligation for a panellist to declare any interests. The Commissioner acknowledges that the complainant is correct that any failure to declare interests implies improper conduct and there is a clear public interest in knowing whether or not people in significant public roles act with probity. This factor also suggests that the release of the information might not be unfair.
31. The Commissioner has considered in detail the submissions of the public authority and in particular whether it felt that the release of the information would cause unnecessary or unjustified damage to the individual involved. Having considered the information the Commissioner is satisfied that the release of it could potentially cause unnecessary and unjustified damage in this case. His view is that while it is right that an individual in such a role should be subject to a degree of public scrutiny, the Commissioner believes that the potential detriment to the data subject outweighs this interest in this instance.
32. The Commissioner has considered the information in the public domain (in the findings of fact section above) and has determined that the information available does not affect the fairness or otherwise of releasing the withheld information in this case.
33. In finally considering the legitimate interests of the public, the Commissioner notes that the public authority has released information about the dates the individual has served alongside the minutes referred to in paragraph (a) of the complaints request. The release of this information has gone some way into accounting for the public money that has been spent on [Named Individual B]'s salary. In addition on the facts there is no suggestion of the hearing of [Named Individual A] being prejudiced in this case. The Commissioner appreciates that it is important that the public authority can be seen to be considering action when issues become apparent but does not see this factor as outweighing the individual's privacy interest in this case.
34. In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subject. The central reason for this conclusion is that the legitimate expectations of the individual are that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
35. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.



36. The Commissioner therefore upholds the public authority's application of section 40(2) by virtue of section 40(3)(a)(i) in relation to part (c) of the original request.

### **The Decision**

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37. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act and that section 40(2) (by virtue of section 40(3)(a)(i)) was applied correctly to the withheld information.

### **Steps Required**

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38. The Commissioner requires no steps to be taken.

## Right of Appeal

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39. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 20<sup>th</sup> day of July 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Section 1 - General right of access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

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### Section 40 – Personal information

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
- (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).
- (5) 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 [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

## **Data Protection Act 1998**

### **Section 1 - Basic interpretative provisions**

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
  - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
  - (b) is recorded with the intention that it should be processed by means of such equipment,
  - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
  - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means 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;

- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
  - (a) organisation, adaptation or alteration of the information or data,
  - (b) retrieval, consultation or use of the information or data,
  - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
  - (d) alignment, combination, blocking, erasure or destruction of the information or data;
- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.