

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2013

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

Decision (including any steps ordered)

1. The complainant has requested a list of medical experts used by the GMC for its activities. The GMC refused this request as it considered the information to be the personal data of third parties (section 40(2)) and that disclosure would be likely to prejudice the GMC's regulatory functions, in this case its investigation of doctor's fitness to practice (section 31(1)(g) leading to 31(2)(d)).
2. The Commissioner's decision is that the GMC has correctly applied the section 31(1)(g) exemption and the public interest favours withholding the requested information.

Request and response

3. On 1 July 2012, the complainant wrote to the GMC and requested information in the following terms:
"full list of medical experts used by the GMC in respect of GMC activities."
4. The GMC responded on 27 July 2012. It stated that the information held would not be disclosed as to do so would be likely to prejudice the GMC's regulatory functions and would be likely to impact on the GMC's fitness to practice function. The GMC also explained it considered some of the information to be third party personal data.
5. Following an internal review the GMC wrote to the complainant on 23 October 2012. It stated that it upheld the decision to withhold the information on the basis of section 31(1)(g) leading to 31(1)(d) and section 40(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 23 October 2012 to complain about the way his request for information had been handled. The complainant did not consider that section 40(2) would apply as the medical experts have high profile public roles and he also stated his view in relation to section 31 that the information should be disclosed to create a more open fitness to practice function.
7. The Commissioner considers the scope of his investigation to be to determine whether the GMC has correctly applied the stated exemptions to refuse to provide the requested information.

Reasons for decision

8. Section 31(1)(g) of the FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the exercise by a public authority of any of its functions listed in subsection (2). The GMC has relied on subsection (2)(d). This subsection applies where the purpose of ascertaining a person's fitness or competence in relation to a profession which he is carrying out would, or would be likely to be, prejudiced by disclosure.
9. The Commissioner has issued previous decisions on the GMC's use of the section 31(2)(d) subsection in relation to fitness to practice hearings¹. In these cases the Commissioner did find that the exemption was engaged and he has taken this into account to the extent that it is relevant in this case. However, he must consider each case on its own merits and therefore to determine whether the exemption is engaged he has first considered whether the potential prejudice argued by the GMC relates to the interests identified in the exemption. When considering this, the Commissioner has looked at whether, if the prejudice occurred, it would relate to the GMC's regulatory function of ascertaining a person's fitness to practice.
10. The GMC's role as the regulator of doctors is set out in section 35 of the Medical Act 1983. This confirms that the powers of the GMC shall include the power to provide, in such a manner as the GMC thinks fit, advice for members of the medical professions on –

¹ FS50268922 and FS50465587

- a. Standards of professional conduct;
 - b. Standards of professional performance; and
 - c. Medical ethics.
11. The Commissioner is satisfied that the GMC is therefore the body formally tasked with ascertaining a person's fitness in relation to his or her practice of medicine. The Commission must now consider if the prejudice arguments advanced by the GMC are relevant to its regulatory role and if so whether there is a causal relationship between disclosure and the prejudice being argued by the GMC.
 12. The withheld information in this case is a list of medical experts used by the GMC to produce reports for use in fitness to practice hearings. These medical experts are associated with a specific area of medicine and where the area is particularly specified the GMC only has a limited number of experts it can call on to produce a report. Having viewed the withheld information the Commissioner accepts that in some specialised areas there are very few experts the GMC is able to use.
 13. The GMC argues that if it were to disclose the list of experts it would allow individuals involved in fitness to practice investigation processes, both doctors and complainants, to know which expert may be asked to provide a view on the circumstances of the complaint. The Commissioner accepts there is a real possibility of this especially in specialist areas where the GMC only uses one or two experts, as such he is satisfied the potential prejudice relates to the interests identified in the exemption in that the list of medical experts used to produce reports for fitness to practice hearings clearly relates to the GMC's functions as set out in subsection 31(2)(d).
 14. The Commissioner has now considered whether the GMC has sufficiently demonstrated a causal link between the potential disclosure and the prejudice. When evidencing a causal link a public authority should be able to demonstrate that the prejudice would be "real, actual or of substance"²
 15. On this point the GMC has stated it has evidence that the medical experts it has used in fitness to practice hearings have been contacted by interested parties following the conclusion of hearings. The GMC argues therefore that it is reasonable to conclude that if the names of

² Hansard HL (VOL. 162, April 20, 2000, col. 827)

medical experts used by the GMC were made public there is a possibility of interested parties contacting those experts prior to hearings.

16. In considering this argument the Commissioner has been mindful of the limited number of experts used by the GMC in certain fields. Due to this he does accept that disclosure of the experts used could allow interested parties to contact experts in more specialist fields prior to hearings. In those fields where the number of experts that could be used is much greater the Commissioner considers this to be less likely as it would be difficult to know which expert might be called upon to produce a report. However, whilst it may be more difficult it would not be impossible and a determined party could contact all experts used by the GMC in a particular field knowing that one of them would be the expert in the upcoming fitness to practice hearing.
17. The GMC has stated that if experts could be contacted prior to being asked to consider the matter by the GMC this would not only be unfair to the medical experts but also may lead to the experts being pressurised or influenced. On this basis, the Commissioner would accept that disclosure of the medical experts used by the GMC could result in a real level of prejudice occurring to the GMC's functions as described in section 31(2)(d) as it may impair the impartiality of the fitness to practice process and the GMC's ability to determine if individuals are fit to practice medicine.
18. The complainant has argued that the experts should not be open to being influenced and therefore even if there is a possibility of them being contacted due to the release of the withheld information there is no reason to believe there would be likely to be any prejudice to the fitness to practice hearings. The Commissioner is not in a position to comment on the character of the experts in order to determine whether they may be able to be pressurised or influenced but, as he has acknowledged the release of the information increases the likelihood of experts being able to be contacted, he also accepts that should experts be contacted prior to producing reports there is a possibility they could be influenced.
19. In terms of the likelihood of this prejudice occurring, the GMC considers the lower threshold of "would be likely" to apply. Based on the arguments presented the Commissioner's view is that the likelihood of the prejudice occurring is fairly low and it is difficult to estimate how often, if at all, interested parties would go to the lengths of attempting to contact the experts used by the GMC prior to a fitness to practice hearing in order to pressurise or influence. However, the Commissioner does acknowledge that the GMC's function of assessing the fitness to practice of doctors is reliant on the process being impartial. Therefore even if only one expert was contacted prior to a hearing this could have

a real and significant effect on the GMC's ability to carry out impartial hearings and assess the fitness to practice of doctors.

20. As section 31 is a qualified exemption the Commissioner has now gone on to consider the public interest arguments in relation to the withheld information.

Public interest arguments in favour of disclosure

21. The GMC has not presented any arguments in favour of disclosing the requested information. However, the Commissioner considers that some weight should always be given to the argument that disclosure of information held by public authorities will enhance transparency and accountability.
22. The complainant has also stated that he considered there was a public interest in disclosure of the experts used by the GMC as greater transparency would assist in the production of the reports used in the fitness to practice hearings. The complainant considered that there had been cases of biased and unfair opinions being provided by experts and that the current process allowed for experts to cover up wrongdoings and should be opened up to public scrutiny.

Public interest arguments in favour of maintaining the exemption

23. The ability of the GMC to carry out its functions effectively, efficiently and without prejudice is in the public interest and the Commissioner considers by accepting there is a likelihood of prejudice to these functions and therefore the exemption is engaged, he also accepts there is a strong weight attributed to the GMC being able to operate impartial and unprejudiced fitness to practice hearings.
24. The GMC's main arguments in favour of maintaining the exemption focus on the public interest in ensuring a robust and fair investigation process and consequently ensuring that doctors are properly assessed in their fitness to practice.
25. As a counter to these arguments the complainant has stated that whilst the GMC may have provided evidence that experts have been contacted in the past at the conclusion of hearings there has been no evidence put forward to suggest that the contact that was made with these experts resulted in any prejudicial opinion.

Balance of the public interest arguments

26. The Commissioner has considered the complainant's point that the current process allows for experts to cover up wrongdoing and the process should be open to scrutiny. Having considered this he does not agree that disclosure of a list of experts used by the GMC would allow the public to better scrutinise the production of reports and opinions for use in fitness to practice hearings. Specifically, he cannot reasonably envisage how knowing the names of doctors who could potentially be used would allow for increased scrutiny or allow a member of the public to better assess how the GMC is performing or whether the experts used are providing fair and balanced reports and opinions.
27. Having considered the arguments in favour of disclosure the Commissioner does not consider there are any strong arguments in this case beyond the general argument that disclosure of information relating to a public authority's functions would increase transparency.
28. However, balanced against this is the significant public interest in ensuring that the GMC in its role as a regulator of doctors is able to operate effectively and efficiently. Any release of information which could potentially influence the GMC's ability to robustly and fairly carry out its regulatory duties is unlikely to be in the public interest and the Commissioner therefore accepts there is a strong public interest in withholding the information in this case.
29. In summary, on the particular circumstances of this case the Commissioner finds that, on balance, the prejudice that would be likely to occur to the GMC's functions and the public interest in the GMC remaining an efficient and effective regulator outweighs the public interest in the disclosure of the information specifically withheld under section 31(1)(g) of the FOIA. The Commissioner therefore finds that the GMC correctly withheld this information. As the Commissioner has upheld the application of section 31 he has not gone on to consider whether section 40(2) would have provided a valid basis for refusing to provide the information.

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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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