

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

### **Decision notice**

**Date:** 9 March 2015

**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 information relating to the performance assessment of a doctor carried out by the General Medical Council (GMC). During that assessment the complainant provided a statement which the doctor then commented on. It is the doctor's comments on her statement that the complainant has requested. The GMC refused to provide the information under section 40(2) on the basis the comments constituted the personal data of the doctor and the disclosure would breach the principles of the Data Protection Act 1998 (DPA).
2. The Commissioner's decision is that section 40(2) is engaged and that the GMC was entitled to refuse the request.
3. The Commissioner does not require the public authority to take any further action in this matter.

#### **Request and response**

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4. The complainant exchanged a series of emails with the GMC regarding the statement she had provided in respect of a named doctor and the comments that the doctor had subsequently made as part of a performance assessment. On 3 June 2014, the complainant wrote to the GMC and requested information in the following terms:

"... can I also ask for the following information. When (the named doctor) was given statements what is the timeline given for comment from the GMC? How soon did the GMC receive comments to my

statements? Please may I request under FOI what those comments were?"

5. The GMC responded on 24 June 2014. It advised the complainant when her statement had been provided to the doctor and when he had provided the GMC with his comments. However it refused to provide a copy of the doctor's comments citing section 40(2) of FOIA on the basis that the comments were the doctor's personal data and disclosing them would breach the first data protection principle of the DPA.
6. Following an internal review the GMC wrote to the complainant on 29 September 2014. It maintained its position that the information was exempt under section 40(2).

### **Scope of the case**

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7. The complainant contacted the Commissioner 20 October 2014 to complain about the way her request for information had been handled.
8. The issue to be decided is whether the doctor's comments on the statement are his personal data and, if so, whether their disclosure would breach the first data protection principle.

### **Reasons for decision**

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#### **Section 40(2) - personal information**

9. So far as is relevant to this complaint, section 40(2) of FOIA states that information which is personal data of someone other than the person making the request is exempt if its disclosure, to a member of the public, would breach any of the data protection principles. In this case the GMC has claimed disclosing the information would breach the first data protection principle.
10. The first issue that needs to be considered is whether the information is the doctor's personal data. Personal data is defined in section 1 of the DPA as being information from which a living individual can be identified and which relates to that individual.
11. The doctor's comments relate to his performance within his practise. They focus on the actions he took and the role he played in that practise. The Commissioner is satisfied that the subject of those comments is the doctor himself.

12. The comments were provided through his representatives and the doctor is referred to in the third person throughout. The Commissioner is therefore satisfied that the information both relates to and identifies the doctor. As such the comments are his personal data.
13. The second issue is whether disclosing those comments would breach the first data protection principle. The first principle established three tests. It states that the personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions listed in Schedule 2 of the DPA is met. Processing personal data includes its disclosure.
14. All three of the tests have to be met in order that the personal data can be disclosed without breaching the first principle. The Commissioner will start by considering whether disclosing the comments would be fair. Deciding what is fair is not always straight forward. It is important to recognise that a disclosure under FOIA is considered to be a disclosure to the world at large and section 40(2) specifically sets out that information is exempt if its disclosure to "a member of the public" would breach any of the data protection principles. Therefore when considering whether the disclosure would be fair the Commissioner will not simply look at whether disclosing the information to the complainant would be fair, but whether disclosing this info to anyone and everyone would be fair.
15. In assessing whether the disclosure would be fair it is necessary to look at the nature of the information and the potential consequences disclosing the information would have on the doctor, together with what his expectations would be in respect of how the GMC would use information gathered during the performance assessment. These factors then have to be balanced against the legitimate interests of the public in having access to the doctor's comments.
16. The fact that the doctor has been the subject of a performance assessment is in the public domain as it resulted in the doctor agreeing to what are known as 'undertakings'. These undertakings can require a doctor to undergo training, place restrictions on their practice or behaviour. These undertakings are listed in a doctor's entry on the List of Registered Medical Practitioners (LRMP). This is a public document, published on the GMC's website. The GMC provided the Commissioner with a copy of the relevant registration entry and the undertakings give a flavour of the areas of the doctor's performance which were assessed.
17. Doctors are aware of the regulatory regime under which they operate and accept that some information about their conduct and performance will be made public by the GMC. They expect there to be a greater level of transparency than exists in many other professions because of the

nature of the work they do and the need for the public and their patients to have confidence in them. The GMC's authority to conduct performance assessments is derived from Rule 7(3) of the General Medical Council's (Fitness to Practise) Rules Order 2004 made under the Medical Act 1983.

18. The GMC has provided the Commissioner with a copy of its 'Publication and disclosure policy' fact sheet in respect to fitness to practice investigations, which performance assessments form a part of. This policy makes it clear that any sanctions imposed on a doctor, including any undertakings agreed to, will be published on the LRMP. The GMC argue that the doctor's expectations as to what information will be disclosed in respect of performance assessments will be shaped by their understanding of that policy. The policy is the result of the GMC's consideration of the level of detail it is appropriate to publish, and balances the public's need to be protected against poor practice, together with its need to have confidence in the profession, against the rights of doctors. Since the GMC's disclosure policy has identified what information should be published following full consideration of the issues, the Commissioner accepts that if this policy excludes information gathered during a performance assessment, it is reasonable for a doctor to expect such information would not be disclosed.
19. Furthermore the GMC has provided the Commissioner with a copy of its letter to the doctor inviting him to comment on the statements. That letter explains that his comments would be passed to the Assessment Team, but does not refer to any wider disclosure. In light of this the Commissioner is satisfied that the doctor would not expect his comments to be made available to the general public.
20. The Commissioner has also considered the nature of the withheld information and what impact its disclosure would have on the doctor. The comments were provided by the doctor as part of his defence against the concerns raised about his performance. As such they are not critical of his performance, but the matters they address do provide some insight into the aspects of his performance that were investigated. Although some indication of what those matters were can be gleaned from the undertakings listed in the LRMP, the requested information would provide further detail. There is a risk that disclosing such information to the public could lead to speculation about the nature of the allegations. This could be stressful for the doctor and there is at least some potential for the disclosure to have a negative impact on his career.
21. In light of the above the Commissioner is satisfied that disclosing the information could be detrimental to the doctor and would be counter to his reasonable expectations.

22. These factors now need to be balanced against the legitimate interest in the public having access to the information. There is clearly a legitimate interest in the public being informed about a doctor's performance where there is a risk to patients. When initially dealing with the request the GMC considered whether there was any scope for making the information available outside the scope of FOIA. Under section 35 of the Medical Act 1983 the GMC may disclose information if it is in the public interest to do so. The GMC explained that the focus of the public interest was on patient safety. It found there were no patient safety concerns that could justify a discretionary disclosure under the Medical Act. In light of this the Commissioner accepts that there is no pressing legitimate interest in disclosing the information on the grounds of patient safety.
23. There is also a legitimate interest in the public having confidence both in the performance of doctors and the GMC's ability to regulate doctors. Disclosing information around the disciplinary process could serve that interest. However having viewed the actual information, the Commissioner is satisfied that it would do little to inform the public about that process. Account also has to be taken of the impact such a disclosure could have on the GMC's investigatory process. The later, more formal, stages of the disciplinary process, dealing with more serious concerns, are often public. However the loss of confidentiality in respect of performance assessments could hinder the GMC's efficient handling of other concerns. This would not be in the public interest.
24. The Commissioner has also taken account of the fact LRMP already reveals the fact that the doctor has been the subject of a performance assessment and lists the undertakings which he has agreed to as a consequence. This serves the public interest in providing information to patients and promotes confidence in the regulation of the medical profession.
25. In this particular case the complainant was a party to the investigation and has an interest in the information being disclosed. However the test that has to be applied is whether disclosing the information would be a benefit to all, not just to the person making the request.
26. The Commissioner has found that disclosing the information would be against the reasonable expectations of the doctor and that the disclosure could be detrimental to him. The Commissioner has found that there is little value in disclosing the actual information that has been requested and that the interests of protecting patients and promoting confidence in the regulation of doctors is better satisfied by the information already published in the LRMP. Therefore the legitimate interests of the public in having access to the information do not outweigh the unfairness caused to the doctor by disclosing information

against his expectations and the limited detriment the disclosure could cause. The Commissioner finds that the disclosing the information would be unfair and so breach the first data protection principle. The GMC is entitled to rely on section 40(2) to refuse the request. The Commissioner does not require the public authority to take any further action in this matter.

## Right of appeal

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27. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

28. 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.
29. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**