

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 October 2016

**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 identity of a Council employee following an allegation of misconduct. Under section 40(5) of the FOIA the General Medical Council (GMC) neither confirms nor denies that it holds this information, which it says would be the personal data of the requester and third parties. The Commissioner's decision is that the GMC is correct to neither confirm nor deny that it holds the requested information, and that the exemption under section 40(5) is engaged. The Commissioner does not require the GMC to take any steps.

#### Request and response

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2. On 15 June 2016, the complainant wrote to the GMC and requested information in the following terms:  
*'I'm hereby requesting GMC under DPA and FOI act to disclose the identity of the author of this email to me. I understand the author is a social worker from Nottingham county council.'*
3. The GMC considered the request under both FOIA and the Data Protection Act (DPA) and the information was withheld under both.
4. On 11 July 2016 the GMC responded and refused to confirm or deny that it held the requested information under section 40(5)(b)(i) of the FOIA. The GMC believed that to confirm or deny the existence or non-existence of the information sought under FOIA would breach the principles of the DPA.

5. The GMC also responded on 22 July 2016 under the DPA to confirm that, after undertaking the balancing exercise provided for by section 7(4) – (6) of the DPA, the information would not be disclosed via that route. The GMC explained that *'the only involvement of the Nottingham County Council employee in this matter was to pass to the GMC a referral that had been made to their department at Nottingham Council.'*
6. The complainant contacted the Commissioner on 24 July 2016 to complain about the way his request for information had been handled.
7. The Commissioner provided her initial view to the complainant on 30 August 2016 that it was highly likely that the GMC was correct in its refusal to disclose this information under FOIA. However, the complainant declined to withdraw his case.
8. During the Commissioner's investigation, the GMC reviewed the response provided under FOIA and informed the complainant on 5 October 2016 that it was now citing an additional exemption:

*'Section 40(5)(a) of the FOIA. This applies where the information, if held, would be the personal information of the requester. This exemption states that the requestor should make their request under the DPA. We have considered your request under the Data Protection Act (DPA) and a response has been provided.'*

*'Section 40(5)(b)(i) of the FOIA. This relates to third party personal data and states that the duty to confirm or deny whether information is held does not arise if the act of confirmation or denial would breach any of the principles of the DPA. I believe that to publicly confirm or deny whether we hold the information would breach the first principle of the DPA, which requires that the processing of personal data is fair and lawful. I believe the conditions in Schedule 2 of the DPA, which are about the processing of personal information, are not met and therefore giving you the information would be unlawful.'*

9. The GMC further explained that it did not believe that it should confirm or deny whether it held information regarding a complaint about a named doctor, when no details about the existence of that complaint would be publicly available. The information requested relates to a named doctor and an employee of Nottingham County Council and the GMC believed that it is appropriate to apply the personal data exemptions set out above in relation to public disclosure under the FOIA.

## Scope of the case

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10. The Commissioner has focussed her investigation on whether the GMC is correct to neither confirm nor deny it holds the information that has been requested, under section 40 (5) of the FOIA.

## Reasons for decision

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11. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the Act to tell the requester whether it holds the information. This is called “the duty to confirm or deny”. However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a “neither confirm nor deny” response.
12. Section 40(5) of FOIA sets out the conditions under which a public authority can give a “neither confirm nor deny” response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester [Section 40(5)(a)] and personal data about other people [Section 40(5)(b)(i)].

### Section 40(5)(a)

13. Section 40(5) states that:

*“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*

14. The GMC has stated that it believes section 40(5)(a) applies as confirming whether or not the information is held would publicly disclose information about a named doctor that it does not consider appropriate for public disclosure.
15. The GMC stated that the information requested for the name of an individual relevant to the case was considered under DPA where the information could properly be considered the personal data of the requester and a third party. A response under DPA was provided on 22 July 2016.
16. Releasing information under the FOIA is effectively releasing it to the world at large. In previous, similar decisions – such as FS50565027 - the Commissioner has said that she considers that individuals who are

involved in or subject to internal investigation are generally entitled to expect that their personal information would not be disclosed into the public domain. Otherwise, public authorities as employers would find it more difficult to encourage staff to engage with disciplinary or similar internal procedures.

17. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
18. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
19. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard. The GMC has confirmed that, if an investigation did take place, any relevant information would have been treated confidentially.
20. In a previous decision notice reference [https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623925/fs\\_50597418.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623925/fs_50597418.pdf) the Commissioner upheld the GMC's decision that doctors do not expect information about any complaints to be released to the public:

*'24. Based on the GMC's submission, the Commissioner is prepared to accept that any doctors relevant to this request would not expect the GMC to confirm or deny it holds information on any complaints about them. The Commissioner also considers that the doctors may well be distressed if this information was confirmed or denied. He therefore considers that the GMC is correct when it says that it would be unfair to confirm or deny the existence of this information, and a breach of the first data protection principle.'*

21. The Commissioner is satisfied that similar arguments will apply in this case and that the GMC has correctly cited section 40(5)(a) as the information is the personal data of the requester.

Section 40(5)(b)(i)

22. The GMC also explained that if any other individual made a request for this information it would be refused under section 40(5)(b)(i) as publicly confirming the existence of a complaint against a doctor would be a breach of the DPA.

23. Section 40(5) states that:

*(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 Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded.*

24. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.

25. It is necessary to first consider whether confirming or denying that the requested information is held would involve the disclosure of personal data. If this test is met then the Commissioner will go on to consider whether this would breach any of the data protection principles.

*If held, would the information be personal data?*

26. The Data Protection Act categorises personal data as data that relates to a living individual from which that individual can be identified.

27. The GMC has explained to the Commissioner that, if held, the information would relate to living and identifiable individuals. The Commissioner is satisfied that the requested information would be personal data. If held, it would tell the public something about those individuals, namely whether in their professional roles, they have been involved in any investigation or complaint.

*Would confirming or denying the information is held breach any of the data protection principles?*

28. The GMC has said that the condition under subsection 40(5)(b)(i) applies, namely that confirming or denying it holds the information would contravene the first data protection principle – that personal data should be processed fairly and lawfully.

29. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
30. The GMC has said that doctors have a reasonable expectation that if a complaint is made about them, information concerning such a complaint would not be published, unless it had reached a stage at which it would normally be expected to be disclosed to the wider public. Complaints finding no impairment remain confidential and no information confirming the existence of the case would be released into the public domain.
31. The Commissioner recognises that information relating to personnel matters such as discipline or health carry a strong general expectation of privacy for all parties concerned. Issues may be relatively innocuous but will still be personal to the individuals involved, whether they are under investigation or forwarding information (albeit from another source) to the GMC.
32. The Commissioner accepts the GMC's argument that those involved in a complaint procedure would expect their personal data to be treated fairly. It would be reasonable for them to have an expectation of confidentiality that would extend to the GMC refusing to confirm or deny whether the complaint existed. The Commissioner is therefore satisfied that the GMC is correct to apply to the request the absolute exemption at section 40(5)(b)(i).
33. In conclusion, the Commissioner finds that the GMC was entitled to refuse the request on the basis of sections 40(5)(a) and 40(5)(i)(b) of the FOIA.

## Right of appeal

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34. 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)

35. 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.
36. 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**