

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 July 2019

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

#### Decision (including any steps ordered)

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1. The complainant requested information from the General Medical Council ("GMC") relating to any investigation which may have been carried out into a named doctor. The GMC stated that under section 40(5B)(a)(i) of the FOIA it was not obliged to confirm or deny whether it held the requested information, as to do so would disclose the personal data of a third person in breach of the first principle of the Data Protection Act 2018.
2. The Commissioner's decision is that the GMC correctly relied on section 40(5B)(a)(i) of the FOI to refuse to confirm or deny whether it held information falling within the scope of the request.
3. The Commissioner does not require the GMC to take any steps as a result of this decision notice.

#### Request and response

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4. On 17 September 2018 the complainant made the following request for information under the FOIA:

*"I would like to request under the Freedom of Information act, the following:*

*A complaint was made to the GMC regarding [doctor's details redacted], concerning a number of patients including [redacted]. An FOI request from [redacted] made to the University Hospitals Coventry and Warwickshire was made for 'any and all documents, letters and*

*reports sent to or received from the General Medical Council.' The response from University Hospitals Coventry and Warwickshire was: 'There were no documents, letters or reports sent or received from the General Medical Council regarding [redacted].'*

*I would like to request therefore from the General Medical Council an answer as to whether there was any contact with the trust in any form of writing, electronic or paper regarding [redacted]?*

*Did the trust communicate in any way in writing with University Hospitals Coventry and Warwickshire regarding [redacted]?*

*Did the GMC communicate verbally with the trust regarding either [patient's name redacted]'s case or [redacted]?*

*What material investigations were undertaken with regard to [redacted]?*

*Once I have yes, no responses to the above questions, I would like to request material copies of any supporting evidence for those assertions."*

5. On 19 September 2018, the GMC responded. It refused to confirm or deny whether it held the information requested, under section 40(5B)(a)(i) of the FOIA (the updated provision replacing section 40(5)(b)(i), which was originally cited) – personal information.
6. The complainant requested an internal review on 19 September 2018. The GMC sent him the outcome of its internal review on 16 November 2018. It upheld its original position.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 11 December 2018 to complain about the way his request for information had been handled.
  8. The analysis which follows covers whether the GMC was correct neither to confirm nor deny whether it held information falling within the scope of the request.
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## Reasons for decision

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### Section 40 – personal information

9. Section 40(5B)(a)(i) of the 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 General Data Protection Regulation EU2016/679 (“GDPR”) to provide that confirmation or denial.
10. Therefore, for the GMC to be entitled to rely on section 40(5B)(a)(i) 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?*

11. Section 3(2) of the Data Protection Act 2018 defines personal data as:-

*“any information relating to an identified or identifiable living individual”.*
12. The two main elements of personal data are therefore that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. In this case, the request relates to whether or not the GMC corresponded about, and/or carried out an investigation into, an alleged complaint about a doctor. The doctor is named in the request.
15. As far as the Commissioner is aware, the doctor in question is alive. The Commissioner considers that confirming or denying whether information is held in this case would, in itself, reveal whether the doctor was the subject of a complaint and/or an investigation. This clearly relates to him or her, and he or she could be identified from this.

16. In summary, if it were disclosed whether information of this type was held, it would clearly relate to an identifiable living individual. 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.

*Would confirming whether or not the requested information is held contravene one of the data protection principles?*

17. 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. The Commissioner agrees that the most relevant data protection principle is set out at Article 5(1)(a) of the GDPR (Principle (a)).

18. Principle (a) states that:-

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."*

19. 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, fair and transparent.

*Lawful processing: Article 6(1) of the GDPR*

20. Article 6(1) of the 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"*.

21. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) of the 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"*.

22. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

(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.

23. 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

24. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

25. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

26. In this case, the complainant considers that it is a matter of public interest for the GMC to confirm whether or not it took action in a case where he has stated that he is aware of a complaint having been made to an NHS Trust about a specific doctor.

27. Indeed he considers that the GMC is "*hiding behind doctor confidentiality in order to conceal whether or not they have actually done anything*". He alleges that some information about the relevant doctor is already in the public domain, and it is reasonable to ask the GMC to confirm whether or not it took action about a matter that has already been reported on.

28. In addition, the complainant has argued that legitimate interest in confirming or denying in this case stems from the interest in public authorities' accountability. He stated: "*identifying whether a regulatory body is doing its job is fundamentally in the public interest*".

29. The Commissioner agrees that confirming or denying whether information is held in this case would go some way towards informing the public about the GMC's accountability in terms of the investigations which it carries out, and therefore there is some legitimate interest in the confirmation or denial in this case.

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

30. '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; 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.
31. The information which the GMC normally discloses about doctors' fitness to practise is set out in its Publication and Disclosure Policy<sup>1</sup>. 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.
32. The Commissioner notes that the medical register is in the public domain and that it is possible to search against a doctor's name to find whether there are any active orders or sanctions in force. However, the register does not record simply whether or not an investigation has been carried out. As the above policy states, *"the fact that a doctor is the subject of an investigation will not be routinely disclosed to general enquirers (apart from current or new employers/responsible officers) or the media unless and until a warning is issued, undertakings are agreed or a hearing takes place. The exception to this is where it is necessary for the MPTS to impose an interim order to restrict the doctor's practice as a precautionary measure"*.
33. The Commissioner is, therefore, aware that it would not normally be in the public domain whether or not an investigation into a named doctor has been carried out. She is therefore satisfied that disclosure would be

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<sup>1</sup> <https://www.gmc-uk.org/-/media/documents/dc4380-publication-and-disclosure-policy-36609763.pdf>

necessary in this case in order to meet the legitimate interest in confirmation or denial of whether the requested information was 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, 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. The GMC has argued that, in this case, the data subject would have no reasonable expectation that the GMC would confirm or deny whether it held the requested information, since, as is clear from the GMC's established policies and practices, and as set out above, information simply about whether an investigation has been carried out is not normally published.
36. The GMC has explained that it commonly receives more than 7000 complaints per year, and that over 1000 investigations a year are carried out. It does not consider that the complainant has demonstrated that there is an overriding public interest in whether or not it has taken action over any specific complaint which may have been made about the named doctor in this case.
37. The GMC has stated that any investigation that it may have carried out would have resulted from allegations that could potentially cause reputational harm or professional embarrassment to the data subject. It therefore considers that it is unfair to the data subject to confirm or deny whether any investigation may have been undertaken, since this would reveal whether or not such allegations had been made.
38. The Commissioner is satisfied that the data subject would have no reasonable expectation that the GMC would confirm or deny whether it held the information that has been requested in this case. She is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the data subject.
39. She has therefore weighed this against the legitimate interests in disclosure in this case.
40. The Commissioner considers that there is some legitimate interest in disclosing whether an investigation was carried out since this would



inform the public as to whether a complaint was made about the named doctor. She 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.

41. However, while she considers there is a legitimate interest in maintaining public confidence in the GMC's complaints handling procedures, she is not persuaded that revealing under the FOIA whether the GMC carried out an investigation in this particular case is necessary in order to maintain that public confidence. The GMC publishes the outcomes of investigations where sanctions are found to have been necessary and, while it may be a matter of interest to scrutinise the GMC's decision-making process at an earlier stage, the Commissioner does not consider that this carries significant weight in the circumstances of this case.
42. The Commissioner has considered her decision alongside a number of previous decision notices which have been issued in similar circumstances to the GMC, and alongside the decision of the First-tier Tribunal in *Foster v Information Commissioner and General Medical Council EA/2016/0249*<sup>2</sup>.
43. Based on the circumstances of this case, and in line with the decisions above, the Commissioner has determined that there is insufficient legitimate interest in this case to outweigh the data subject's fundamental rights and freedoms.
44. She has therefore determined that confirming whether or not the requested information is held would not be lawful.

*Fairness/Transparency*

45. Given the conclusion the Commissioner has reached above on lawfulness, which included considerations of fairness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and/or transparent.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2022/Foster,%20Iain%20EA-2016-249%20\(31.05.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2022/Foster,%20Iain%20EA-2016-249%20(31.05.17).pdf)



46. The Commissioner has determined that the GMC correctly refused to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

## Right of appeal

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47. 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](mailto:grc@justice.gov.uk)

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

48. 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.
49. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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