



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0141

**Heard at Alexandra House, Manchester
On 8th January 2018**

Before

**JUDGE
FIONA HENDERSON**

**TRIBUNAL MEMBERS
MALCOLM CLARKE
JEAN NELSON**

**Between
J. NANKHONYA**

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

GENERAL MEDICAL COUNCIL

Second Respondent

DECISION AND REASONS

Introduction

1. This is an appeal against decision notice FS50656558 dated 22nd May 2017 which held that the General Medical Council (GMC) had correctly applied s40(2) FOIA (third party personal data) to the information request.
2. The information request made on 13 September 2016 related to decisions taken by the GMC in respect of the fitness to practice of a named doctor and was framed in the following terms

“Re Panel Member’s Bibliographical details

Kindly provide the above in relation to sessions dealing with a [specified complaint] which is appended for ease of reference.

We also enclose copy documentation from the GMC dated 5 December 2014 [case reference redacted]) and request bibliographical details for the “Case Examiners” referred to therein.”

3. The Tribunal has refused the appeal for the reasons set out below.

Background

4. Following a complaint that a named Doctor's fitness to practise was impaired, relating to the treatment given to a stroke patient, as is normal practice, 2 GMC Case Examiners determined that the allegation should be referred to a Fitness to Practise Panel (MPT Panel).¹ This decision was notified in a letter dated 5.12.14. The letter was signed by one of the Assistant Registrars of the Fitness to Practise Directorate but the 2 Case Examiners were not identified.
5. A MPT panel decides whether the doctor's fitness to practise is impaired and whether any sanction should be imposed on their registration. Hearings are usually in public² and the decisions published. The GMC have told the Appellant that in this case neither of the Case Examiners had expertise in the area of stroke, but that an Expert report from a stroke specialist had been obtained and was provided to the Case Examiners. The same Expert's report was held not to be reliable at the MPT hearing as it transpired that it relied upon matters that were not factually accurate.

The role of the Case Examiner

6. The Tribunal accepts that when a complaint is made it is investigated by an investigating officer who will draw together all the information necessary to consider a case. This may include an opinion from an external Expert if the case raises a specialist or complex medical issue. When the file has been compiled it is submitted to the Doctor who is the subject of the complaint for comment and then placed in an electronic queue to be considered by 2 Case Examiners, one of whom is medically qualified and one is a lay person. The GMC has approximately 20 Case Examiners³. Case Examiners are members of GMC staff responsible for making decisions within the investigation stage of complaints.
7. The cases are generally allocated to case examiners by "next cab off the rank rule" but always include one lay and one medical case examiner, However, sometimes a Case Examiner might be asked to give 'advice' during the course of an investigation (e.g reviewing medical records or assisting the Investigation Officer to understand them). If a Case Examiner has had previous involvement in a case, they may then be allocated that case when a decision is required, as they will already have a working knowledge of the case. There is no expectation that the medical Case Examiner will have expertise in the area that is the subject of a medical complaint. Lay Case Examiners by their designation are not expected to have medical expertise in any area. One Case Examiner picks up the case, makes an assessment and writes up their opinion. This will be passed on to the second Case Examiner who will review all of the papers to see if they agree with the first Case Examiner's opinion. They consider whether there is a realistic prospect of establishing that a doctor's fitness to practise is impaired to a degree justifying action on registration. If the Case Examiners do not agree a case will be referred for consideration

¹ Of the Medical Practitioners Tribunal service under rule 8(2) (d) of the GMC (Fitness to Practise) Rules 2004. Prior to 31.12.15 these were called Fitness to Practise panels, post 31.12.15 they are referred to as Medical Practitioners Tribunals.

² They may be in private if dealing with confidential matters.

³ The exact number was not available but we treat this as a "ball park" figure

to the Investigation Committee⁴ who have essentially the same powers as the Case Examiners.⁵

8. If both Examiners agree there are 4 possible outcomes:
 - i. Referral to the MPT panel,
 - ii. Agree undertakings,
 - iii. Issue a warning (or refer to the Investigation Committee for a hearing regarding whether to issue a warning),
 - iv No further action.

Information Request

9. The request was refused on 27th September 2016 relying upon s40(2) FOIA but in a letter dated 3rd October 2016 the GMC indicated that they had misread the request and would in fact be sending copies of the MPT members details to the Appellant.⁶ The Appellant requested a review of the decision to withhold the Case Examiners' details on 4th October 2016. The reliance on s40(2) FOIA was upheld on internal review in a letter dated 2nd November 2016.

Complaint to the Commissioner

10. The Appellant complained to the Commissioner about the GMC's failure to provide the biographical details of the Case Examiners on 20th November 2016.⁷ Following an investigation the Commissioner upheld the refusal and did not order any steps to be taken.

Appeal

11. The Appellant appealed by notice dated 16th May 2017. His grounds can be summarised as:
 - i. He argued that the Case Examiners misunderstood the treatment of stroke protocol and if their advice were followed this would put patients at risk.
 - ii. The Case Examiners were not sufficiently conversant with stroke treatment and their conduct did not conform to the GMC guidance upon the role of Expert witnesses.
 - iii. The Case Examiners own and should be held accountable for the decisions they make and advice they provide.
 - iv. The expectation that they would not be identified is not reasonable (in light of the far reaching consequences of their decisions) and there is no expectation for this in the GMC guidelines.
 - v. The GMC should provide a biographical summary for each Case Examiner as they do for the MPT panel.
12. The Commissioner opposed the appeal relying upon the contents of her decision notice. The GMC were joined by the Registrar and opposed the appeal relying upon their reasons for refusal before the Commissioner.

⁴ Rule 8(5) of the GMC Fitness to Practise Rules 2004

⁵ Email from GMC of 11.1.18

⁶ It became apparent during the currency of the appeal that these had not in fact been sent and that the Appellant was asking for the panel members of all hearings associated with the case. These have now been disclosed.

⁷The ICO believed that the panel member details had been provided and did not include this in her decision, as set out above these have now been served and are not an issue in this appeal.

13. The Appellant having originally asked for a paper hearing the case was nevertheless fixed for an oral hearing as requested by the GMC. The ICO indicated in her reply that she did not wish to attend, the Appellant did not make any representations at that time and it was assumed that he would attend. On the date of the hearing the Tribunal received an email from the Appellant who indicated that he would not be attending in accordance with his request for the appeal to be considered on the papers. He relied upon his Appeal Notice, Grounds of Appeal, supporting documents and further submissions (at pages 178 and 182 to 186 inclusive in the bundle).
14. The Tribunal considered whether it was appropriate to proceed in his absence pursuant to rule 36 *Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009*, and was satisfied that it had sufficient information having regard to the documentary bundle to proceed and that this was in the interests of justice (having regard to the overriding objective as set out in rule 2). The Appellant had been made aware that the GMC (and by default the Tribunal) had sought greater clarity over the scope of his appeal and that the burden was on him to satisfy the Tribunal that the Decision Notice was wrong.⁸ Additionally, he had been sent an attendance list which included a named witness/observer from the GMC and from this can be expected to have been alive to the fact that additional factual information might emerge at the hearing.
15. The Tribunal did not find it necessary to hear evidence from the proposed witness but sought some factual clarification relating to the structure of the GMC and information already in the public domain from Mr Sleight (GMC Policy Lawyer). Additional written information was provided at the Tribunal's request on 11.01.2018 and copied to all parties, none of whom have commented.
16. The GMC were represented by Mr Robin Hopkins of Counsel and the Tribunal was in receipt of an open bundle of documents comprising some 256 pages and a closed bundle as provided for in the case management directions. The Tribunal has had regard to all the evidence before it, even where not mentioned directly in this decision.

Scope

17. As set out above we are satisfied that the MPT panel biographies have been provided and that this is not therefore an issue on appeal.
18. The GMC have invited the Appellant to clarify the scope of his request, and the legitimate interest relied upon⁹ in order to enable disclosure under s40(2) FOIA. In her directions dated 7th November 2017¹⁰ the Registrar directed the Appellant to indicate:
 - What if any information he considered to be outstanding in respect of the two Case Examiners who referred [the] case for a hearing before an MPT,
 - what legitimate interest he considers would be served by the disclosure of the information
 - What he meant by the word “bibliographical” in his original request.

⁸ Registrar's directions dated 7th November 2017⁸

⁹ Para 46 of the GMC response

¹⁰ P161 OB

19. The Appellant was given another opportunity to address these issues by extension of the dates¹¹ but applied for the Registrar's directions to be reviewed by a Judge without answering the questions¹². An application to strike out his appeal under rule 8 was refused. The Appellant has not responded directly to all the issues raised and did not provide the clarification in the terms sought although he did make further submissions on 8th December 2017¹³.
20. The terms of the original request asked for "bibliographies", we are satisfied that this is a misuse of the word and not its intended meaning. It was treated as such by the ICO and GMC who have interpreted it as meaning "Biographies". In the absence of clarification in the terms sought, we are satisfied from the context of the request, the acceptability of the information provided relating to the panel members and the Appellant's expectations as set out in correspondence¹⁴ that this is the correct interpretation.

Sufficiency of the Closed material

21. The GMC explained that they do not hold biographical information relating to Case Examiners in a distilled form. They do hold biographical information for panellists and this information is routinely provided to Doctors prior to their panel hearings. Nevertheless, the same types of information are contained within the personnel file and the GMC provided relevant extracts from these files relating to the 2 Case Examiners whose data is the subject of this appeal. This formed the closed bundle and was provided to the Tribunal (and ICO) pursuant to rule 14 GRC rules.
22. The Tribunal having compared this to that disclosed for the panellists¹⁵ noticed some minor differences in the detail of information required and enquired as to whether additional information within specified parameters was available. The GMC confirmed that information of the type identified by the Tribunal was available and following investigation during the hearing provided an oral summary of the outstanding information. The Tribunal was satisfied that this was sufficient to enable it to proceed to determine the case. The outstanding information was of the same type as the information already identified, effectively adding detail, it did not alter the issues in dispute or the application of the law. Consequently, the Tribunal was satisfied that there was no need to adjourn the case for this to be put in documentary form.

Personal Data

23. Section 40 FOIA provides that:

...

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data [which does not relate to the data requester] 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 Data Protection Act 1998, that the disclosure

¹¹ case management directions dated 24th November 2017

¹² Upheld by the Acting Chamber President on 11.12.17

¹³ P182 et seq

¹⁴ See paragraph 24

¹⁵ P44 OB

of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, ...

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the 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.

24. The Appellant argues that he is not asking for “*personal or other demographic data*”¹⁶ but professional information. However, the Tribunal is satisfied that professional versus private is not material as to whether it constitutes personal data but relevant to whether disclosure is unfair or unwarranted. Personal data is defined as¹⁷:

... 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;

25. The Appellant variously defines his request as a request for “*the professional qualifications and suitability for the roles*” of the Case Examiners and “*the name, professional qualifications, position or rank, names(s) of the organisation he or she works for ..*”¹⁸ We are satisfied that the type of information in scope is similar¹⁹ to the types of information in the MPT biographies²⁰ which includes name (and from this often gender), qualifications, educational and work history and dates (which indicates locational information), length of service with GMC and any concurrent roles held. Through the context of the request, it can be linked to a specific decision made by the data subject, consequently we are satisfied that it is personal data.²¹

26. The Tribunal has considered redacting the information but is satisfied that this would not be possible. Even if the name were removed, we consider it likely that due to the detail of institutions attended and positions held that the information would not be anonymous, this is in particular because there are only around 20 Case Examiners and their names are in the public domain.

27. We have gone on to consider whether disclosure would breach one of the data protection principles. The first data protection principle provides that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, ...

¹⁶ Sic p 184 OB

¹⁷ S1(1) DOA 1998

¹⁸ P183 OB

¹⁹ P184

²⁰ P44 OB

²¹ *Edem v IC and FSA [2014] EWCA Civ 92*

28. The GMC have invited the Tribunal to look first at whether a schedule 2 condition is met. Schedule 2 condition 6 is the only one that appears to be in scope in light of the facts of this case. It provides:
- 6(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*
29. We have applied the approach as set out in Goldsmith International Business School v the Information Commissioner and the Home Office 2014 UK UT 0563 (AAC). From this we consider first whether the data controller, third party or parties to whom the data are disclosed pursuing a legitimate interest or interests. In defining a legitimate interest we are satisfied that this can be a public or a private interest but that it must have a genuine purpose rather than merely satisfying a curiosity.
30. As set out above the Appellant has been asked to specify the legitimate interest he considers would be served by the disclosure of the information and has not provided a clear answer, we have however, identified the following themes from his submissions:
- i. Scrutiny: The GMC are a public body which should be transparent, accountable and show strict subservience to governance at all times.
 - ii. Accountability: There is a legitimate interest in the Case Examiners being held to account when the consequences are so significant to the Doctor under investigation²².
 - iii. Competence: The GMC's role is to protect the public and patients and uphold standards. The public and those involved in the process should have confidence in the competence of those charged with investigating clinical matters.
 - iv. Transparency: It is apparent that the Appellant believes that the Case Examiners reached the wrong decision in this case and he believes that the MPT decision was wrong. He argues disclosure would provide transparency and by implication assist in challenging the Decision and holding the GMC to account.
31. Whilst not raised explicitly by the Appellant, the Tribunal was satisfied that the facts of this case raised the legitimate interest in ensuring that there is no conflict or suspicion of bias arising from personal knowledge of those involved in a complaint or the organisations involved.
32. The Commissioner accepted and the GMC does not dispute that there are legitimate public interests in transparency and accountability in respect of the GMC's actions and that ensuring the decisions it takes are well founded. We move on then to consider whether the disclosure is reasonably necessary²³ for the purposes of those interests. In doing so we have considered the extent to which there are alternative measures to achieve the legitimate aim with something less than disclosure of personal data.

Scrutiny

33. We are satisfied that the GMC followed their procedure for consideration by the Case Examiners as publicised on the GMC website, there is no evidence that the strict rules of governance have not been followed, neither in our judgment would disclosure of the

²² Referral to MPT (even if in the long term the case is resolved in their favour) prolongs the process and has personal and professional ramifications for the Doctors under investigation

²³ (defined as more than desirable but less than indispensable or absolute necessity)

disputed information further this aim. The GMC do not dispute that the names of the Case Examiners should be in the public domain²⁴ and that from this information biographical and career information can be attributed (e.g. from internet searches against a medical licence number). Their objection is not to the identity of their Case Examiners being known but to the linking of the Case Examiner to a particular decision. We are satisfied that there is already scrutiny surrounding the suitability of Case Examiners for the role. They are appointed on a competency basis and in addition to their identity being known the job description is published.²⁵ The disputed information is limited to 2 Case Examiners and their involvement in the administrative processing of one case. In our judgment it sheds little light on the adequacy of the GMC recruitment and allocation and determination process, or the case itself.

Accountability

34. The Appellant argues that Case Examiners ought not to have immunity from disclosure of their details when the consequences are so significant to the Doctor under investigation. His case is that the GMC should provide a summary for each Case Examiner as they do for the MPT panel. It is outside the remit of this appeal to comment on GMC policy and our consideration is limited to the facts and disclosure requested in this case. The Tribunal accepts that referral to MPT prolongs a case and that whilst the case is waiting to be determined the Doctor is “under a cloud” even if in the end the outcome is favourable. We accept that this will take a personal and professional toll on the Doctor concerned and we are satisfied that there is a legitimate interest in ensuring that the decision-making process is rigorous and fair at all stages. However, we are satisfied that the role of the Case Examiner is a preliminary triage function and not judicial²⁶. None of the outcomes at the Case Examiner stage are determinative of a complaint unless the parties agree. If a Doctor does not agree to accept a warning, the case will be referred to the MPT panel. If a complainant does not accept that no further action should be taken the case will be referred to an Assistant Registrar for reconsideration. Their decisions are not judicially reviewable as they are not the final phase of any decision, we are satisfied that they provide a form of triage during the investigation phase.

35. Even when referred to IOP or MPT there is always scope to invite the GMC to review this decision and we accept that there is also a complaints process which is applicable to all GMC staff members. The evidence relied upon by the Case Examiner is provided to the parties. In light of the evidence relating to the appointment to the role, the disclosure of the evidence relied upon, and the test applied by the Case Examiners, we are not satisfied that the information requested is necessary to further this legitimate interest.

Competence

36. To the extent that the Appellant’s arguments challenge the way that Case Examiners are allocated cases; the methodology would not be revealed by disclosure, being limited to information relating to 1 case. The GMC general policy of “next cab off the rank” allocation is both public knowledge and its validity is not within the scope of this Tribunal.

37. The Appellant took time to explain in detail to the Tribunal the specialist area involved in the treatment of stroke. His clear expectation is that the Case Examiners ought to have

²⁴ the names of medical Case Examiners were disclosed on 22 August 2016, and both medical and lay Case Examiners names were disclosed on 23 November 2016.

²⁵ Email of 11.1.18 enclosed the job descriptions from January 2016

²⁶ We rely upon the facts as set out in paragraphs 6-8 above.

expertise in the area of medicine relevant to a complaint in order to enable them to make their decision. In our judgment he has misunderstood the role of the Case Examiner. In his submissions, the Appellant appears to equate the Case Examiners' role with that of an expert witnesses.²⁷ He argues that experts give opinions and the GMC have published guidance on what they expect of professional witnesses and expert witnesses in Medical Practice. He argues that disclosure is necessary to demonstrate whether they comply with this guidance. The Tribunal observes that on the facts of this case the Case Examiners were not providing the evidence as experts, they were assessing the evidence provided by others. They were not held out as Experts and disclosure of the biographical information requested would not shed light upon whether the decision maker was conversant with principles of Good Medical Practice (a booklet published by the GMC and relied upon by the Appellant.)

38. We accept that there would be a legitimate interest in knowing whether either Case Examiner had case specific expertise and has relied upon that rather than an outside expert in reaching their decision. However, we take into account that the information relied upon by the Case Examiner is disclosed to the parties so it would be apparent whether an outside expert has been brought in. We take into account that the disclosure in this case only relates to a single decision and in that case the Appellant has been told that the Case Examiners did NOT have stroke specific expertise. The Appellant is therefore in a position to lobby to change GMC policy in that regard, if that is his aim. We repeat our findings about the competence basis for appointment and the sharing of evidence. We also rely upon the opportunity to challenge the case as viewed by the Case Examiners at a MPT panel held in public after which written reasons are provided. Disclosure of the disputed information in our judgment is not necessary with regards to quality assurance of competency of this decision or GMC Case Examiners in general.

Transparency

39. It is outside the remit of this Tribunal to consider whether decisions by Case Examiners or the MPT panel were correct or not. We have had regard to the existence of a complaints process and the generally public MPT hearing processes. The Tribunal was satisfied that disclosure was not necessary to ensure that there is no conflict or suspicion of bias arising from personal knowledge of those involved in a complaint or the organisations involved. We accept that the current safeguard relates to "self assessment" by the Case Examiner concerned who is expected to identify whether there is any reason why they should not work on a case. However, we take into consideration that the name of all Case Examiners is in the public domain and that they number only 20 or so; as set out above their biographical details in our judgment are attributable. There is nothing to prevent a party to looking at the list and identifying whether there are any Case Examiners that they believe would be biased or conflicted in their case. Representations could then be made on the grounds that IF the named individual is or was the Case Examiner they should recuse themselves and the reason for this. This would be a less intrusive and more proportionate way of meeting this legitimate interest and in consequence the withheld information is not reasonably necessary.

Unwarranted

40. As set out above we are satisfied that disclosure is not reasonably necessary for the legitimate interests identified in light of the restricted nature of the information requested

²⁷ E.g. email 3.11.17 p212, p227

and the other information already in the public domain. However, if we are wrong, we are satisfied that in any event disclosure would not further the legitimate interests such as to override the interest of the Case Examiners and would be unwarranted by reason of prejudice to their rights and freedoms and legitimate interests.

41. The Appellant argues that being questioned about one's professional duties is not akin to invasion of privacy and enduring any associated distress is part of that role. We accept that this is scrutiny relating to professional duties however, as set out above there are other processes for ensuring competency and scrutiny which are less intrusive. We note that the information concerned has come from application forms and personnel files and are satisfied that there is no expectation that this would be made publicly available. Unlike the MPT panel members there is no established policy of disclosing biographies, their decisions are not sent out in their name and in our judgment, this is evidence of the expectation that they would not be identified in any particular case. In addition, we take into account our findings in paragraph 34 and 35 above and are satisfied therefore that the role is not forward facing, and being: administrative, not determinative without consent and not judicial; it is not of a seniority where individual public scrutiny would be expected.
42. The GMC's concern was that disclosure would enable Case Examiners to be publicly identified in relation to a specific case, and contacted, pursued or otherwise the subject of comment by the public, journalists or those involved in the complaint. They relied upon the emotive nature of many complaints and the associated publicity. We accept these arguments and take into consideration that the associated level of scrutiny and exposure in our judgment would be disproportionate with the nature of the role performed and hence unwarranted.

Conclusion

43. For the reasons set out above, we refuse the appeal.

Signed Fiona Henderson

Judge of the First-tier Tribunal
Date of Decision: 26.02.2018

Date Promulgated: 27.02.2018