

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 14 October 2009**

**Public Authority:** General Medical Council  
**Address:** Regents Place  
350 Euston Road  
London  
NW1 3JN

### Summary

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The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the General Medical Council (the "GMC") for information as to which individual or committee of individuals within the GMC took the initial decisions to bring two referenced cases against a named doctor. The GMC refused the complainant's request as it stated that the information was exempt from disclosure by virtue of section 40(2) of the Act. The Commissioner considers that the GMC correctly applied the section 40(2) exemption to withhold the requested information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant made a request to the GMC on 14 March 2008 for information as to "which individual or committee of individuals within the GMC took the initial decisions to bring these cases against [named doctor]". The complainant provided the case reference numbers of the cases he was referring to.
3. On 7 April 2008 the GMC wrote to the complainant and stated that it held the information he had requested however it stated that the information was subject to an exemption which prevented disclosure. It explained that the relevant exemption was that contained at section 40(2) of the Act which relates to third party personal data and

disclosure would be a breach of the Data Protection Principles.

4. As the complainant was dissatisfied with the GMC's response he made a request for an internal review to be carried out on 19 April 2008.
5. On 8 May 2008 the GMC wrote to the complainant with the result of the internal review it had carried out. The GMC upheld its decision to withhold the information the complainant had requested upon reliance of the exemption contained at section 40(2) of the Act. In its response the GMC provided the complainant with some background information in relation to its investigation processes which it believed would assist in his understanding as to why the requested information could not be released. The GMC also provided the complainant with a detailed explanation with reference to the Data Protection Principles as to why it considered it would be unfair to release the requested information. Finally the GMC referred the complainant to a previous Decision Notice issued by the Commissioner under reference FS50090630 which covered similar grounds as his request and in which the Commissioner upheld the GMC's use of the section 40(2) exemption.

## The Investigation

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### Scope of the case

6. On 22 May 2008 the complainant made a formal complaint to the Information Commissioner's Office as he was dissatisfied with the result of the internal review. The Commissioner has therefore considered whether the GMC correctly applied the section 40(2) exemption to withhold the requested information.

### Chronology

7. The Commissioner contacted the GMC on 29 June 2009 in order to discuss its handling of the complainant's request and to establish whether or not the section 40(2) exemption had been correctly applied in this case.
8. On 17 July 2009 the GMC responded to the Commissioner. The GMC provided its submissions in relation to its application of the section 40(2) exemption.
9. On 23 July 2009 the Commissioner contacted the GMC again to obtain further arguments in support of the submissions it had made in relation to its application of the exemption contained at section 40(2) of the Act.
10. On 5 August 2009 the GMC provided the Commissioner with its further arguments in support of its application of the section 40(2) exemption.

## Analysis

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### Exemption

#### Section 40(2)

11. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*“Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied.”*

12. Section 40(3)(a)(i) of the Act states that:

*“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 of the information to a member of the public otherwise than under this Act would contravene-*

- (i) any of the data protection principles, or*  
*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),”*

13. The full text of section 40 can be found in the legal annex attached to this decision notice.
14. In this case the GMC has argued that the requested information constituted the personal data of the Case Examiners and the Assistant Registrar who are the individuals relevant to the complainant's request. It has argued that the information was therefore exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i) as to release the information would breach the data protection principles. In order to reach a view on the GMC's arguments the Commissioner has first considered whether the withheld information is the personal data of a third party. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
- from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data

controller.

In this instance the information withheld is the identities of the Case Examiners and the Assistant Registrar who took the initial decisions to bring specified cases against a named doctor. The Commissioner believes that individuals would be identifiable from this information and is therefore satisfied that it is the personal data of identifiable individuals.

15. In other cases, such as FS50178633 (GMC), FS50180310 (Nursing & Midwifery Council) and FS50141015 (Department for Work and Pensions), where requests have been made for information about the details of complaints, or the existence of complaints, the Commissioner has reached the view that section 40(5)(b)(i) provides an exemption for the public authority from the duty to confirm or deny whether it holds any information relating to those requests. This is because he has reached the view that it would be a breach of the first data protection principle for the public authority concerned to even confirm whether there had been any complaints against that individual.
16. However in this case the Commissioner has not followed this approach. During the investigation of the case it came to his attention that the named doctor had put some detail of the GMC cases quoted in the request into the public domain (including the GMC case reference numbers quoted by the complainant in the original request) by publishing this information on the internet. For this reason the Commissioner has reached the view that in the circumstances of this case it would be within the named doctor's reasonable expectations that the GMC would confirm that it had been investigating those cases against them.
17. Therefore, due to the individual circumstances of this case, the Commissioner does not believe that section 40(5)(b)(i) applies to the withheld information. As such he is of the view that the GMC was correct, again in these circumstances, to confirm that it holds information relevant to the request.
18. The Commissioner has therefore gone on to consider whether the GMC was correct to withhold the information in question. He has first considered whether the condition listed at section 40(3)(a)(i) applies in this case. Specifically he has gone on to consider whether disclosure of the withheld information would be in breach of the data protection principles, namely the first principle of the DPA.
19. The GMC has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully".

20. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following:-

### **Reasonable Expectation of the Data Subject**

21. The GMC has explained that the role of Assistant Registrar and the role of the Case Examiners are not public facing which supports its assertion that these individuals would not expect their identities to be released.
22. Furthermore the GMC has stated that it asked the relevant individuals for consent to disclose their identities and consent was refused.
23. The Commissioner understands that the Assistant Registrar and Case Examiners are not public facing roles. They do not come into contact with individuals who make a complaint to the GMC as part of these roles. They assess evidence collated by colleagues who are in contact with individuals who make a complaint to the GMC but are not in contact with those individuals themselves. Taking this into account and the fact that the relevant Assistant Registrar and Case Examiners refused consent to disclosure of their identities, the Commissioner consider that the data subjects would not have expected the requested information to be released into the public domain.

### **The effect which disclosure would have on the Data Subject**

24. The GMC referred the Commissioner to a previous decision notice issued under case reference FS50090630 in which it provided the Commissioner with examples of Screeners (the predecessors to the Case Examiners) being contacted outside of the GMC setting. In that decision notice it is stated that, "...on previous occasions when names of screeners had been disclosed the right to privacy of these screeners had been compromised by contact outside of the GMC working environment." In that decision notice the Commissioner found that the GMC had sufficiently demonstrated that there was a risk of harassment and of being contacted outside of the GMC working environment which would be detrimental to the screeners. Similarly in this case the Commissioner considers that disclosure may pose a similar risk of detriment to the Assistant Registrar and Case Examiners.

### **Legitimate Interests**

25. The Commissioner must carry out a balancing exercise to decide whether the legitimate interests of the public in knowing the name or names of the individuals concerned outweighs the data subject's legitimate interests. Consideration of the legitimate interests of the public can often inform whether the disclosure is fair.

26. In the previous decision notice highlighted above (FS50090630) it was suggested that there was a legitimate interest in the public knowing the names of screeners in connection with decisions made by them to enable individuals to pursue potential complaints against screeners. However because the GMC confirmed that it was possible to investigate such a complaint without a complainant being able to provide the name of a particular screener the legitimate interest of the public could be met without disclosure of the requested names.
27. Bearing this in mind along with the likely expectations of the data subjects and the potential detrimental effect that disclosure may have, the Commissioner considers that the legitimate rights of the data subject outweigh the legitimate interests of the public and therefore disclosure would be unfair.

### **The Decision**

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28. The Commissioner's decision is that the section 40(2) exemption was correctly engaged in this case.

### **Steps Required**

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29. The Commissioner requires no steps to be taken.

## Right of Appeal

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30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 14th day of October 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### Personal information.

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“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 of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides 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



- (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, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

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.