

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2012

Public Authority: Rotherham NHS Foundation Trust

Address: Rotherham Hospital
Moorgate Road
Rotherham
S60 2UD

Decision (including any steps ordered)

1. The complainant requested information contained within referrals made by Rotherham NHS Foundation Trust (the Trust) to the General Medical Council (GMC) concerning a named individual and the outcome of those referrals. He also asked what information the Trust had shared with another NHS organisation where the named individual was subsequently employed. Finally, he asked for details of compensation payments made by the Trust relating to procedures carried out by the named individual.
2. The Commissioner's decision is that section 31(1)(g) with section 31(2)(b) and section 31(2)(j) of the Freedom of Information Act 2000 (FOIA) were not engaged in relation to any of the withheld information. The Commissioner considers that section 36(2)(c) of the FOIA was engaged in relation to the information contained within the referrals made by the Trust to the GMC and the information the Trust provided to the NHS organisation where the named individual was subsequently employed. He considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
3. In relation to the information outlining the outcome of the GMC's investigation the Commissioner draws a distinction between the information that confirms the outcome of the GMC's investigation and certain details of what was taken into account as part of the investigation, and the remainder of the information contained within the GMC's letter to the Trust. The Commissioner does not consider that section 40(2) with section 40(3)(a)(i) of the FOIA applies to the information confirming the outcome of the GMC's investigation and certain details of what was taken into account as part of the investigation. Therefore, the Trust is required to disclose the information identified in confidential annex B to the complainant. In relation to the

remainder of the information the Commissioner considers that section 40(2) with section 40(3)(a)(i) of the FOIA applies as disclosure of the information to the public otherwise than under the FOIA would breach the Data Protection Act 1998 (DPA). Detailed reasons for this are outlined in confidential annex A.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified in confidential annex B to the complainant.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 26 September 2011, the complainant wrote to the Trust and requested the following information:

1. I would need to know when Rotherham referred [named individual] to the GMC.

2. I would also like to know why [named individual] was referred on each occasion and what the outcome was.

3. I would have thought Rotherham holds a record of the referrals and I would like a copies [sic]. I do not require information relating to names of patients which I would expect to be redacted.

4. I would also think the GMC sends some kind of formal finding and I would like copies of those.

5. As regards the payments, do they each mean Rotherham accepted liability for clinical negligence in those individual cases or were any settled on a no admission of liability basis. If some were the latter, I would be grateful if you could identify which payments these were.

6. Finally, I would like to be clear on what Rotherham told Mid Yorkshire when he applied to work there or what information has been shared with Mid Yorkshire since.

7. I should have previously asked but am I right in presuming that all these cases were hip operations?

8. Finally, do I understand that the three outstanding claims currently with the trust are disputed in some way or in the process of being settled?'

7. The Trust responded on 24 October 2011. It provided the complainant with information about the date on which the Trust made its two referrals to the GMC, details relating to the compensation claims made against the Trust and the nature of the compensation claims. It refused the remaining information under section 40(2) with section 40(3)(a)(i) of the FOIA, section 31(1)(g) with section 31(2)(b) and (j) of the FOIA and section 36(c) of the FOIA.
8. The complainant requested an internal review on 24 October 2011.
9. Following an internal review the Trust wrote to the complainant on 28 November 2011. It upheld the Trust's original response in relation to the exemptions that had been applied and provided some further information in relation to the compensation claims made against the Trust.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the Trust was entitled to withhold the information he requested in parts 2, 3, 4 and 6 of his request (the disputed information). The information is contained within the following documents:
 - a referral made by the Trust to the GMC concerning the named individual in December 2009 and related documentation;
 - a referral made by the Trust to the GMC concerning the named individual in July 2010 and related documentation; and
 - a letter from the GMC to the Trust outlining the outcome of the GMC's investigation into the named individual.
11. The Commissioner considers that the scope of his investigation is to consider:
 - whether the Trust was entitled to rely on section 31(1)(g) with section 31(2)(b) and (j) of the FOIA to withhold the information within the scope of parts 2, 3 and 6 of the complainant's request (excluding information concerning the outcome of the GMC's investigation).

- whether the Trust was entitled to withhold the information contained within the letter outlining the outcome of the GMC's investigation into the named individual under section 40(2) with section 40(3)(a)(i) of the FOIA (this information falls within the scope of parts 2 and 4 of the complainant's request).
12. If the Commissioner concludes that the Trust was not entitled to withhold the disputed information under section 31(2)(b) and (j) of the FOIA he will go on to consider:
- whether the Trust was entitled to withhold the information within the scope of parts 2, 3, and 6 of the complainant's request (excluding information concerning the outcome of the GMC's investigation) under section 36(2)(c) of the FOIA.
13. The Commissioner has taken into account all of the arguments made by the complainant and the Trust including those that are not specifically referenced within this decision notice.

Reasons for decision

Information covered by parts 2, 3, and 6 of the complainant's request (excluding information concerning the outcome of the GMC's investigation)

Section 31(1)(g) with section 31(2)(b) and (j) of the FOIA

14. The Trust has withheld all of the information within the scope of parts 2, 3, and 6 of the complainant's request under section 31(1)(g) with section 31(2)(b) and (j) of the FOIA. It has argued that disclosure of the information would make it more difficult to conduct internal investigations and would prejudice the Trust's ability to investigate the conduct of an employee. The Trust has stated that in order to ensure that investigations are robust those involved must be assured that the detail of those investigations will not be published.
15. The complainant has argued that the information does not relate to internal Trust investigations as the information he has requested is contained within the referrals the Trust made to the GMC. In the alternative he argues that the public interest favours disclosure of the information.
16. Section 31(1)(g) with section 31(2)(b) and (j) of the FOIA state the following:

'31.— Law enforcement.

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice— [...]

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

(2) The purposes referred to in subsection (1)(g) to (i) are— [...]

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper, [...]

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.'

Section 31(1)(g) with section 31(2)(b) of the FOIA

17. The Commissioner accepts that the withheld information relates to the Trust investigating whether any person is responsible for any conduct which is improper. Although the information consists of referrals the Trust made to the GMC the Trust would not have made these referrals unless it considered that they were warranted. It was therefore necessary for the Trust to conduct its own enquiries into the matters referred to the GMC before the referrals were made. However, the Commissioner considers that in order for section 31(1)(g) with section 31(2)(b) of the FOIA to be engaged the Trust must be responsible for 'ascertaining' whether any person is responsible for any conduct which is improper.
18. The Commissioner considers that the word 'ascertaining' under section 31(1)(g) with section 31(2)(b) of the FOIA means to determine definitely or with certainty and therefore in the context of the exemption the public authority should be empowered to make, rather than merely have input into, the decision in question. Accordingly, the Commissioner considers that the use of the word 'ascertaining' limits the application of this exemption to those cases where the authority, in relation to whom the prejudice is being claimed, has the power to formally ascertain whether any person's conduct is improper.
19. Although the Trust has conducted its own enquiries and provided evidence to the GMC the Commissioner is not satisfied that it had the power to 'ascertain' whether the named individual's conduct was improper and whether any sanctions were appropriate in relation to the matters raised within the referrals to the GMC. The GMC is the expert

regulatory authority charged with this responsibility. The GMC's website states the following in relation to its functions:

'The General Medical Council is the independent regulator for doctors in the UK. Our statutory purpose is to protect, promote and maintain the health and safety of the public by ensuring proper standards in the practice of medicine.

We have strong and effective legal powers designed to maintain the standards the public have a right to expect of doctors. We are not here to protect the medical profession - their interests are protected by others. Our job is to protect patients.

Where any doctor fails to meet those standards, we act to protect patients from harm - if necessary, by removing the doctor from the register and removing their right to practise medicine.¹

20. The Commissioner also notes that the named individual was no longer employed by the Trust at the time of the referrals to the GMC and so the Trust would not have been able to take any direct action against the named individual if it considered that his conduct was improper.
21. The Trust has not argued that there would be any prejudice to the GMC's functions for the purposes of 'ascertaining' whether any person is responsible for any conduct which is improper in this case (which is now concluded) or to any future GMC investigations. Therefore, the Commissioner does not consider that section 31(1)(g) with section 31(2)(b) of the FOIA is engaged.

Section 31(1)(g) with section 31(2)(j) of the FOIA

22. The Trust has argued that it has a common law duty to investigate incidents, which is sufficient to engage the exemption under section 31 of the FOIA. It relies on the Information Tribunal decision in *Galloway v Information Commissioner* in support of its position.²
23. The Commissioner is aware that healthcare authorities have specific statutory duties to protect the health and safety of patients against risks

¹ <http://www.gmc-uk.org/about/role.asp>, last accessed 1 March 2012.

² *Galloway v Information Commissioner*, [http://www.informationtribunal.gov.uk/DBFiles/Decision/i299/Galloway%20v%20IC%20&%20C&NW%20London%20NHS%20\(EA-2008-0036\)%20Decision%2020-03-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i299/Galloway%20v%20IC%20&%20C&NW%20London%20NHS%20(EA-2008-0036)%20Decision%2020-03-09.pdf), March 2009.

posed by the delivery of healthcare services. He notes that section 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 places a duty on all NHS bodies to:

'put and keep in place arrangements for the purposes of monitoring and improving the quality of health care provided by and for that body.'

24. The Commissioner considers that this function places a duty on the Trust to protect the health and safety of patients against risks arising out of, or in connection with, the actions of its employees. Therefore, he is satisfied that the Trust performs a relevant function for the purposes of section 31(1)(g) of the FOIA. Having concluded that the Trust performs a relevant function for the purposes of section 31(1)(g) with section 31(2)(j) of the FOIA the Commissioner will go on to consider whether that function would or would be likely to be prejudiced if the Trust were to disclose the disputed information.
25. The Trust has argued that its function to protect the health and safety of patients against risks arising out of, or in connection with, the actions of its employees would be likely to be prejudiced as disclosing the information would make future investigations more difficult to conduct. It considers that in order to ensure a robust investigation those involved in the investigation need to be provided with assurances that the detail will not be published. The Trust considers that publication is likely to deter staff from participating in investigations especially as the medical community is close-knit.
26. In order to engage the exemption under section 31(1)(g) with section 31(2)(j) of the FOIA the Trust must be able to demonstrate prejudice which is real, actual or of substance, to show some causal link between the potential disclosure and the resulting prejudice and to show that the prejudice is at least likely to occur. The Commissioner is mindful that in this case he is considering whether disclosing the specific disputed information would harm the Trust's ability to protect the health and safety of patients in the future due to individuals in the medical profession being reluctant to come forward as witnesses or to conduct investigations into fellow medical practitioners.
27. The Commissioner considers that the information sought from witnesses in this case is relatively routine and is not of a particularly sensitive nature. Based on the content of the witness statements in this case, the Commissioner considers it unlikely that witnesses would be unwilling to make statements in the future if this particular information were to be disclosed and considers that employees would expect to make statements such as these as part of their job roles. Therefore, he does not consider that disclosing the information in this case would be likely

prejudice the Trust's ability to protect the health and safety of patients from the actions of its employees by deterring witnesses from coming forward. The Commissioner will go on to consider whether it is likely that disclosing the disputed information would lead to medical practitioners being reluctant to conduct investigations into fellow medical practitioners.

28. As the Trust has a statutory duty to protect the health and safety of patients the Commissioner considers that it was under a duty to make enquiries into the issues raised by the Trust in the referrals to the GMC. The Trust would have had to ensure that the person making these enquiries had an appropriate level of experience and expertise. The Commissioner accepts that it is possible that some employees of the Trust could be more reluctant to become involved in conducting internal investigations in the future if the disputed information were to be disclosed as this indicates the possibility that the findings of future internal investigations may also be disclosed. He will go on to consider whether this would be likely to prejudice the Trust's ability to perform its relevant function.
29. Although the Commissioner considers that some individuals may be less willing to become involved in conducting internal investigations if the disputed information were to be disclosed he considers that the impact is likely to be minimal. He does not consider that this, in itself, would be likely to prejudice the Trust's ability to protect patients from the risk to health or safety arising out of or in connection with the actions of its employees. The individuals conducting the investigations for the Trust in this case are senior members of staff who should be accountable for their actions and would be aware that they may have to investigate colleagues conduct in the wider interests of the health and safety of patients. The Trust has a duty to make enquiries where there may be a risk to patient health and safety and it has discretion about how to perform this duty. In the unlikely event that the Trust could not find any suitable employee within the Trust to make the necessary enquiries, and this was not required by any of its employees' job descriptions, there would be other options available to the Trust. For example, it could engage an external consultant to conduct the relevant enquiries.
30. Although the Commissioner considers that some individuals may be less willing to conduct investigations into fellow medical practitioners if the disputed information were to be disclosed the Trust has not provided sufficient evidence to indicate that the prejudice to its relevant function would be real, actual or of substance or that this prejudice would be likely to occur. He does not consider that the Trust has demonstrated to the necessary standard that disclosing the disputed information in this case would deter its employees from conducting internal investigations

to the extent that it would be likely to prejudice its function to protect the health and safety of patients.

31. As the Commissioner does not consider that section 31(1)(g) with section 31(2)(b) or (j) of the FOIA is engaged he will go on to consider the Trust's reliance on section 36(2)(c) of the FOIA.

Section 36(2)(c) of the FOIA

32. The Trust is relying on section 36(2)(c) of the FOIA in order to withhold the disputed information (excluding information concerning the outcome of the GMC investigation). It has argued that releasing the disputed information would be likely to prejudice the Trust's ability to manage existing and future compensation claims made against the Trust relating to procedures carried out by the named individual.

33. Section 36(2)(c) of the FOIA states the following:

'36.— Prejudice to effective conduct of public affairs.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act— [...]

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

34. Section 36(2)(c) of the FOIA states that the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for the Trust is the Chief Executive. The Trust has provided the Commissioner with evidence to demonstrate that the opinion of the Chief Executive of the Trust was sought and provided. The Commissioner will go on to consider whether the opinion of the Chief Executive was a reasonable one.

35. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following:

'The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or

*absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*³

36. In order to determine whether section 36(2)(c) was engaged the Commissioner will consider:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
37. The Commissioner accepts that the management of existing and future compensation claims made against the Trust is an issue that requires effective management by the Trust in order to mitigate or control the effects on the public purse and the diversion of resources from the Trust's other functions. It is clear from information available in the public domain, including local and national press coverage, that the Trust has already made a number of compensation payments relating to procedures carried out by the named individual, that there are a number of claims in progress and that there may be further claims against the Trust in the future.
38. The Commissioner's view is that the nature of the information and the timing of the request are such that the disclosure of the information and surrounding media coverage is likely to impact upon the Trust's ability to manage existing and future compensation claims made against the Trust. He considers that the effect of disclosing the information, together with previous and surrounding media coverage, would be likely to increase the administrative burden of handling multiple claims at any given time and divert resources from the Trust's other functions.
39. The Trust has provided sufficient evidence to illustrate that the Chief Executive had prior knowledge of the issues to which the information relates. It is clear that the Chief Executive was provided with a draft response and a covering email explaining that he was required to form a reasonable opinion in relation to the application of section 36(2)(c) of

³ Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

the FOIA to the information withheld by the Trust in this case. It is clear that having reviewed the draft response the Chief Executive formed the opinion that the disclosure of the withheld information would be likely to prejudice the Trust's ability to manage existing and future compensation claims against the Trust.

40. For the reasons outlined above the Commissioner is satisfied that the opinion of the Chief Executive of the Trust is a reasonable one. Therefore, he considers that section 36(2)(c) of the FOIA is engaged. The Commissioner has included further reasoning explaining why the exemption under section 36(2)(c) of the FOIA is engaged in confidential annex A. He will go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
41. The Trust has argued that the public interest factors in favour of disclosing the information are:
 - the public interest in transparency;
 - the public interest in accountability;
 - the public interest in the spending of public money - it is clear from the information in the public domain that significant sums have been spent and further payouts may be made; and
 - the public interest in promoting public confidence in the NHS and those who work within it.
42. The Trust has argued that the public interest factors in favour of maintaining the exemption are:
 - a full investigation was carried out by the GMC in relation to the issues to which the information relates following the Trust's referrals;
 - some details about how the Trust handled this issue (in particular that it twice referred the named individual to the GMC and the dates of those referrals) is already in the public domain; and
 - the court disclosure rules will ensure that information is disclosed if it is relevant to any claims or possible claims.
43. The complainant has argued that there is significant public interest in disclosing information about the issues the Trust raised with the GMC as the Trust has paid over one million pounds in compensation relating to procedures carried out by the named individual. He argues that the seriousness of the issues involved increases the public interest in

disclosure so as to demonstrate whether the Trust acted appropriately and referred all of the relevant issues to the GMC.

44. The Commissioner considers that there is a public interest in disclosing the information as it would make the Trust's monitoring arrangements more transparent. He agrees with the Trust that there is a public interest in promoting confidence in the NHS and that disclosing the information would allow the public to determine whether the Trust had acted appropriately in this case thereby increasing its accountability. He has afforded some weight to these factors. However, in light of the content of the referrals made by the Trust to the GMC and the information provided to the NHS organisation where the named individual was subsequently employed he considers that these arguments are not as strong as they may have been if there was evidence to suggest the Trust had acted in any way inappropriately.
45. In the Commissioner's view, disclosing the information contained within the referrals to the GMC would allow the public to assess the evidence provided by the Trust to the GMC and to consider whether the GMC acted appropriately in this case. He has afforded some weight to this factor. He also considers that there is a public interest in disclosing information that relates to matters which have led to the Trust spending significant public funds on compensation payments, especially as partial liability has been accepted in some of those cases. He has afforded particular weight to this factor.
46. The Commissioner is mindful that in considering the public interest he is considering the wider public interest rather than the interests of those individuals who may have the right to pursue compensation claims against the Trust. He does not consider that there is a public interest in disclosing the information for the purposes of supporting any individuals existing or future claims against the Trust. He considers that this may be in the private interests of the individual claimants or potential claimants but not in the wider public interest. Therefore, he has not afforded any weight to this factor. In any case the Trust would have to disclose this information to an individual claimant if it was relevant to their claim and the relevant court disclosure rules applied.
47. The Commissioner has considered the public interest in maintaining the exemption. Having taken into account the content of the information he considers that the prejudice to the Trust's ability to manage existing and future claims against the Trust, which in the reasonable person's opinion is likely to result from the disclosure of the disputed information, could be significant. He considers that the likely increase in the administrative burden of handling multiple claims at any given time and diverting resources from the Trust's other functions would be likely to have a highly detrimental effect on the Trust's ability to effectively manage

current and future claims. In turn, he considers that the Trust's ability to mitigate or control the effects on the public purse would be likely to be severely prejudiced. The Commissioner notes that significant compensation payments have already been made by the Trust and current or future claims could potentially lead to similar payments being made. The Commissioner has afforded significant weight to this factor.

48. The Commissioner also considers that the likely effect of disclosure would result in the Trust having to divert resources from its other functions. He considers that in addition to the likely prejudice being significant it could persist for some time given the amount of time it can take for compensation claims to progress. He has afforded some weight to this factor.
49. Having taken into account the public interest factors outlined above, and a further public interest factor outlined in confidential annex A, the Commissioner considers that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Trust is therefore not obliged to disclose the information contained within the Trust's referrals to the GMC or the information the Trust provided to the NHS organisation where the named individual was subsequently employed. Therefore, it is not necessary to go on to consider the Trust's reliance on section 40(2) with section 40(3)(a)(i) of the FOIA to withhold this information.

Part 4 of the complainant's request - the outcome of the GMC investigation

Section 40(2) with section 40(3)(a)(i) of the FOIA

50. The Trust has argued that the information contained within the letter outlining the outcome of the GMC's investigation is exempt under section 40(2) with section 40(3)(a)(i) of the FOIA as the information is the personal data of the named individual and its disclosure would breach the first data protection principle. The Trust does not consider that it could satisfy a condition under schedule 2 of the DPA in order to disclose the information to a member of the public otherwise than under the FOIA.
51. Section 40(2) of the FOIA provides an exemption for information which is the personal data of an individual other than the requester, where one of the conditions listed in sections 40(3) or 40(4) of the FOIA is satisfied.
52. In this case the relevant condition is contained in section 40(3)(a)(i) of the FOIA - this applies where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.

Section 40(2) with section 40(3)(a)(i) of the FOIA is an absolute exemption and is therefore not subject to a public interest test.

53. The information concerning the outcome of the GMC investigation into the named individual is contained within a letter sent from the GMC to the Trust.
54. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information is the personal data of a third party. Personal data is defined in section 1(1) of the DPA as data about a living individual who can be identified from those data, or from that information and other information in the possession of, or likely to come into the possession of, the data controller. The Commissioner considers that the information clearly relates to the individual named in the request and that he is identifiable from it. Therefore, he is satisfied that the information is the personal data of a third party.
55. The Commissioner has gone on to consider whether the disclosure of the information concerning the outcome of the GMC's investigation into the named individual, otherwise than under the FOIA, would constitute a breach of the first data protection principle. The first principle of the DPA requires that personal data is processed fairly and lawfully.
56. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - the individual's reasonable expectations of what would happen to their information; and
 - whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subject.
57. The Trust has stated that a full investigation was carried out by the GMC into these matters, that they are the relevant expert regulatory body and that it would be unfair to the named individual to disclose information outlining the outcome of the GMC's investigation. It has stated that the named individual and the GMC have asked the Trust not to disclose the information and that the named individual had a reasonable expectation that details of the communications between the Trust and the GMC would remain confidential. However, it has also stated the following:

'The outcome of the GMC's investigation is indirectly disclosed

through the inclusion of [the named doctor] in the GMC register with no conditions attached to his registration.'

58. The Commissioner notes that there are four possible outcomes of a GMC investigation. The following information is taken from the GMC's website:

'At the end of the investigation by the GMC of allegations against a doctor, the case will be considered by two senior GMC staff known as case examiners (one medical and one non-medical). They can:

- conclude the case with no further action;*
- issue a warning;*
- refer the case to a Fitness to Practise (FTP) Panel;*
- agree undertakings.⁴*

59. The information on GMC's website goes on to explain that a warning would be placed on an individual's entry on the List of Registered Medical Practitioners (LRMP) and disclosed to any enquirer for a five year period. Undertakings would be disclosed in the same way. If a doctor is referred to a Fitness to Practice Panel the outcome of the hearing would be searchable on the GMC website regardless of the outcome.⁵

60. The fact that the referrals were made by the Trust to the GMC is already in the public domain as is the fact that the named individual appears on the public register without any conditions attached. It is therefore possible to determine from information already in the public domain that the outcome of the GMC's investigation was to conclude the case with no further action. If this was not the outcome of the GMC's investigation then at the time of the request there would have been some indication of the action taken by the GMC on the named individual's LRMP entry or any relevant Fitness to Practise Panel decision would be available. The Commissioner considers that this is significant when considering whether there would be any detriment to the named individual and what the named individual's reasonable expectations would be at the time of the request.

⁴ GMC website, http://www.gmc-uk.org/concerns/the_investigation_process/investigating_concerns.asp#at_th.

⁵ GMC website, http://www.gmc-uk.org/concerns/hearings_and_decisions/fitness_to_practise_decisions.asp.

61. The Commissioner considers that the outcome of the GMC's investigation is, in effect, already in the public domain. Therefore, in light of the outcome of the GMC's investigation, he does not consider that there would be any detriment to the named individual concerned in disclosing the information in the GMC's outcome letter that confirms the outcome of the GMC investigation along with certain details of what was taken into account as part of the GMC's investigation. This is especially the case as the fact that two referrals were made by the Trust to the GMC is already in the public domain. This could cause unfair inferences about the named individual if the outcome of the GMC's investigation is not known.
62. The Commissioner has also considered what the named individual's reasonable expectations would be at the time of the request. He considers that as it is in the public domain that the Trust made two referrals to the GMC, in light of the outcome of the investigation, the individual would have expected the Trust to disclose the information that confirms that the outcome of the investigation was in his favour.
63. As the Commissioner considers that the disclosure of the information would be fair he will go on to consider whether the Trust could meet a condition for processing in Schedule 2 of the DPA.
64. The Commissioner considers that the public has a legitimate interest in the outcome of the GMC's investigation especially due to the Trust's expenditure of significant public funds on compensation payments made in relation to procedures carried out by the named individual. He considers that the disclosure of the information concerning the outcome of the GMC's investigation is necessary to meet these interests. He does not consider that there would be any prejudice to the named individual in disclosing the outcome of the GMC's investigation which would render the processing unwarranted as this can already be determined from information available in the public domain.
65. For the reasons outlined above the Commissioner considers that disclosing information confirming the outcome of the GMC's investigation, along with certain details of what was taken into account as part of the GMC's investigation, would be fair to the named individual. However, he draws a distinction between this information and the remainder of the information contained within the GMC's letter to the Trust outlining the outcome of its investigation. The Commissioner considers that it would be unfair to the named individual to disclose the remainder of the information in the GMC's letter. The reasons why it would be unfair to the named individual to disclose the remainder of the information are outlined fully in confidential annex A. The Commissioner also considers that it would be unfair to disclose the identity and contact

details of the GMC employee that sent the letter to the Trust. The reasons for this are outlined below.

66. The Commissioner will now go on to consider whether disclosure of the information that confirms the outcome of the GMC's investigation, along with certain details of what was taken into account as part of the GMC's investigation, would be lawful for the purposes of the first principle of the DPA. Whilst the Trust has not relied on section 41 of the FOIA to withhold the information it has stated that the information is confidential in nature.
67. The Commissioner considers that there will be an actionable breach of confidence where:
- the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - where there was an unauthorised use of the information to the detriment of the confider.
68. This test is taken from *Coco v Clark*⁶. All of the elements of the test need to be satisfied for a disclosure of information to constitute an actionable breach of confidence.
69. The Commissioner does not consider that the information that confirms the outcome of the GMC's investigation has the necessary quality of confidence. As the Trust has confirmed that two referrals had been made to the GMC concerning the named individual, in light of the outcome of the GMC's investigation, the information is in effect already in the public domain. For this reason and for the reasons outlined above in relation to section 40(2) with section 40(3)(a)(i) of the FOIA the Commissioner also considers that there would be no detriment to the named individual or to the GMC in the information identified in confidential annex B being disclosed. Therefore, as these elements of the test are not satisfied, the Commissioner does not consider that disclosing the information would expose the Trust to a claim for an actionable breach of confidence.
70. The Commissioner therefore considers that disclosing the information that confirms the outcome of the GMC's investigation would be fair and

⁶ *Coco v Clarke* [1969] R.P.C. 41.

lawful and a disclosure otherwise than under the FOIA would not constitute a breach of the first principle of the DPA. The Commissioner requires the Trust to disclose the information identified in confidential annex B.

71. For the reasons outlined in confidential annex A the Commissioner considers that section 40(2) with section 40(3)(a)(i) of the FOIA applies to the information in the GMC's outcome letter that is excluded from confidential annex B. The Trust is not required to disclose this information.

The identity and contact details of the GMC employee that sent the outcome letter to the Trust

72. The Commissioner has taken into account the same considerations as outlined in paragraph 56 above when considering if the disclosure of the name and contact details of the GMC employee that sent the outcome letter to the Trust would be fair for the purposes of the first principle of the DPA.
73. The Commissioner considers that due to the local and national press coverage of compensation payments made by the Trust relating to procedures performed by the named individual there is a risk that were this information to be disclosed the GMC employee could be targeted by the media or other interested parties, such as those who may not be satisfied with the GMC's decision. He notes that the GMC employee was responsible for communicating the outcome of the investigation but that the decision was made by more senior GMC colleagues and the individual communicating the decision would not be directly accountable for the outcome of the investigation. The Commissioner considers that as the case is closed any subsequent contact regarding this case by third parties could cause the GMC employee unnecessary and unjustified damage and/or distress. The Commissioner does not consider that the GMC employee would have had a reasonable expectation that his name and contact details would be disclosed into the public domain as a result of his involvement in this case.
74. The Commissioner considers that the public has a legitimate interest in the GMC being transparent and being able to determine whether the GMC has taken appropriate action in response to the referrals it receives. However, the Commissioner does not consider that the public's legitimate interest is significant in this case given that the withheld information is the name and contact details of a GMC employee that would not ultimately be accountable for the decision made by the GMC. The public's legitimate interests in receiving information have to be balanced against any negative impact to the rights and freedoms of the individual concerned. Taking into account his findings that the disclosure

of this information would risk the GMC employee being inappropriately targeted, the Commissioner finds the arguments in favour of withholding this information outweigh the legitimate interests in disclosure.

75. The Commissioner considers that section 40(2) with section 40(3)(a)(i) of the FOIA applies to the name, signature and contact details of the GMC employee and the Trust is not required to disclose this information.

Right of appeal

76. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

77. 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.

78. 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

**Gerrard Tracey
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Information Commissioner's Office
Wycliffe House
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SK9 5AF**