

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 6 March 2013

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested details, including names, of doctors who had passed away following a referral to the General Medical Council (GMC). The GMC provided some information but refused to disclose the names of those deceased doctors in respect of whose cases the regulatory processes had not been completed. This information was claimed to be exempt information under section 31(1)(g) leading to section 31(2)(d) (law enforcement) of FOIA. The Commissioner considers that the exemption is engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in maintaining the exemption. He does not therefore require any steps to be taken as a result of this notice. The Commissioner has, however, found that the GMC breached section 10(1) (time for compliance) by its handling of the requests.

#### **Request and response**

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2. On 19 April 2012 the complainant wrote to the GMC and requested information in the following terms (please note that the numbering set out below does not correspond with the numbering in the original request):
  1. *Please, provide the list of names of all doctors who died following referral to GMC under Freedom of Information Act 2000 up to present date.*
  2. *Please, state when you started collecting this data.*

3. *Please, provide ethnicity data.*
  4. *Please, state if you are aware that there is any ongoing investigation (not necessarily by GMC) into the deaths of any of those doctors who died following referral to GMC.*
  5. *Please, state if there has ever been any investigation into the deaths of those doctors by GMC.*
3. The GMC provided its substantive response on 25 July 2012. It confirmed that for the period in question a total of 92 doctors had an open to practise case concerning them when they were removed from the register as deceased. The GMC also provided an ethnicity breakdown of this group and named the six doctors that had been referred to a fitness to practise panel but who had died prior to the commencement of that hearing. The GMC, however, considered that section 31(1)(g) leading to section 31(2)(d) of FOIA applied to the names of the doctors who died whilst a fitness to practise case was ongoing and before any decision had been taken on the case. Finally, it confirmed that the GMC does carry out an investigation if a doctor who is in its fitness to practise procedures takes their own life; clarifying that there were three such investigations currently underway. It was not aware, though, of any ongoing investigations outside of the GMC.
  4. The complainant wrote to the GMC again on 31 July 2012 and challenged its decision to withhold information under section 31 of FOIA. The GMC subsequently carried out an internal review, the outcome of which was provided on 29 August 2012. This upheld the GMC's original position.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 24 September 2012 to complain about the way her request for information had been handled.
6. The terms of the complaint principally focused on the GMC's decision to withhold information, although the complainant also questioned the completeness of the ethnicity data provided by the GMC. This latter issue was disposed of during the course of the investigation and so it has been left to the Commissioner to consider whether the GMC correctly relied on the exemption provided by section 31 of FOIA.

## Reasons for decision

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### Section 31 – Law Enforcement

7. The GMC has argued that the names of those doctors whose cases were subject to an investigation at the time of their death are exempt from disclosure under 31(1)(g) of FOIA. This provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes described at section 31(2) of FOIA. The purposes that the GMC has argued would likely be prejudiced is set out at section 31(2)(d):

*(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on*

8. As a prejudice-based exemption, certain conditions must be met for it to be engaged. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interests described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure. Specifically, the public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.
9. The GMC has explained that it will disclose the fact that a complaint has been made against a doctor if it is decided that further regulatory action is required – for example, by the hearing of a case before a fitness to practise panel and/or action being taken on a doctor's registration. The GMC has argued that there is a real risk that disclosure of the names of doctors prematurely could undermine the relationship between doctors, their families, complainants and the GMC. The potential effects of this, according to the GMC, are two-fold. Firstly, it is likely that doctors' families and complainants would be unhappy about the information being placed in the public domain, the outcome of which is that it could make these parties more reluctant to make complaints to the GMC regarding other registered doctors in the future. Secondly, the GMC has claimed that disclosure may lead to doctors and other parties being less than candid and unwilling to share confidential information with the GMC during the course of an investigation; making the investigative process itself less effective.

10. The initial point to consider is whether the arguments are relevant to the exemption being relied on. For this to be the case, the Commissioner requires the function identified by the GMC for the purposes of section 31(1)(g) of FOIA to be a function which is: (i) designed to fulfil the purposes specified in section 31(2)(d); (ii) imposed by statute; and (iii) specifically entrusted to the GMC to fulfil.
11. The GMC's role as the regulator of doctors, and particularly their fitness to practise, is set out by section 35 of the Medical Act 1983. This confirms that the powers of the GMC shall include the power to provide, in such manner as the GMC thinks fit, advice for members of the medical profession on –
  - (a) standards of professional conduct;
  - (b) standards of professional performance; or
  - (c) medical ethics.
12. The Commissioner is satisfied that the GMC is therefore the body formally tasked with ascertaining a person's fitness, in this instance a doctor's fitness, in relation to his or her practise of medicine. Equally, the Commissioner is prepared to accept that the prejudice arguments advanced by the GMC are relevant to its regulatory role and therefore to section 31(2)(d) of FOIA. Consequently, he has gone on to consider the next stage of the prejudice test; that is whether there is a causal relationship between disclosure and the prejudice being argued by the GMC. To do this, the Commissioner has looked at each of the GMC's arguments in turn.
13. Regarding the first argument, which points to the possibility that disclosure would deter parties from making complaints, the Commissioner has not been provided with any evidence to support this point. Nor, in the absence of such evidence, can he conceive how a link can reasonably be made between disclosure and the prejudice described.
14. This is because there is no suggestion that the release of the names of the doctors would relay anything about the party who made the complaint to the GMC or any other person. Furthermore, the party making the complaint would do so in the knowledge that the name of a doctor could be released at some point in the process. As no disadvantage to the complaining party could therefore arise, the Commissioner considers there is little to substantiate the view that disclosure would put off parties from making referrals to the GMC in the future. Consequently, it is the view of the Commissioner that the GMC

has failed to establish a causal link between disclosure and the prejudice and so he has gone on to assess the GMC's second argument.

15. As stated, it is the view of the GMC that disclosure would make doctors less likely to co-operate fully with the regulator in the future. This is because it would go against the expectation of a doctor that, following a complaint to the GMC, his or her name would only be published in connection with the complaint if it was decided that the case should be progressed. This is on the basis that it would not be fair for a doctor to be linked with a complaint before the GMC's preliminary investigation had been completed.
16. When a complaint is received by the GMC a preliminary investigation will be carried out, the findings of which will be considered by two 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 the Medical Practitioners Tribunal Service (MPTS) for a fitness to practise panel hearing
  - agree undertakings with the doctor
17. The GMC will publish the names of those doctors whose cases will be heard by a fitness to practise panel, with the decision of the panel also being placed in the public domain. Where the GMC considers that a warning is sufficient in the circumstances, the fact that a warning has been issued will be recorded on the List of Registered Medical Practitioners (LMRP) and disclosed to any enquirer for a five year period. An undertaking, on the other hand, is an agreement between the GMC and the doctor about the doctor's future practice, with the doctor's employer being informed of the agreed steps. Undertakings that relate solely to a doctor's health are kept confidential. All other undertakings, such as restrictions on practice, will be disclosed to any enquirer in the same way as conditions or restrictions on a doctor's registration.
18. The Commissioner recognises that the GMC's argument for the engagement of the exemption throws up two immediate questions. Can prejudice reasonably be claimed given that the deaths of the doctors' rules out the possibility of further regulatory action being taken against them? Does the GMC have powers to compel engagement in the regulatory process and, if so, do these mean the chances of prejudice occurring are effectively removed?

19. The GMC has confirmed that under section 35A of the Medical Act 1983, as amended, it has statutory powers which in broad terms allow it to require disclosure of information in circumstances where it is considered necessary for the purpose of assisting it, or any of its committees, in carrying out functions in respect of fitness to practise. This then would appear to weaken the claim which says that disclosure could impact on the GMC's ability to discharge its functions. This is because doctors and other parties would ultimately have no choice but to co-operate with an investigation.
20. However, the Commissioner has previously accepted the argument which says that disclosure could have a prejudicial effect where there is the real possibility that it will slow down or otherwise impede regulatory activity. This point was made in the Commissioner's decision on FS50184898, involving the Charity Commission, where he stated the following at paragraph 94:

*"In reaching this conclusion the Commissioner recognises that the Charity Commission's argument is more sophisticated than suggesting that the disclosure of information in response to the this request will result in trustees refusing to communicate with the Charity Commission at all. Rather it is the nature of these communications that will change and thus both the Charity Commission's formal and informal methods will be affected, as well as its ability to gather/receive wider intelligence."*
21. The Commissioner considers that the same principle applies here. The Commissioner understands that, with the GMC's formal powers, there is no question of a doctor, or any other party, refusing to co-operate with an investigation. However, the Commissioner further understands that the GMC will be at its most effective when a party, including a doctor's employer, has faith in the confidentiality of the preliminary investigation process and thus are willing to participate fully in the investigation. This effectiveness would consequently be placed at risk through disclosure, the upshot of which is that the GMC would likely be hampered in carrying out its functions in a timely fashion.
22. The Commissioner has therefore found that there is a causal relationship between the disputed information and the prejudice being claimed. Accordingly, he must next consider whether there is a real risk of the prejudice occurring. In this case the GMC has confirmed it is relying on the limb of the exemption which says that the prejudice 'would be likely' to occur. Although this places a lower evidential burden on a public authority than the 'would' prejudice limb of the exemption, it nevertheless connotes that the risk of prejudice is substantially more than remote.

23. In practice, the Commissioner considers that to find that the specified threshold of prejudice has been met it must be judged, firstly, that there is a real possibility that the circumstances giving rise to the prejudice would occur and, secondly, that the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote. It is the Commissioner's view that both of these conditions are satisfied here. This is because he considers that the convention only to disclose the names of doctors in specific situations following the completion of a preliminary investigation represents an important part of the relationship that the GMC has with doctors, employers and other third parties. It is precisely this which the Commissioner accepts is likely to be harmed through the release of the information, to the detriment of the GMC.
24. For the reasons set out above, the Commissioner has decided that disclosure would be likely to result in the prejudicial effect to the purposes of the GMC described at section 31(2)(d). Thus, the exemption is engaged. As section 31 is a qualified exemption, it is left for the Commissioner to consider and weigh up the public interests in favour and against disclosure.

### **Public interests arguments in favour of disclosure**

25. The GMC considers that the release of the information in question will neither inform public opinion to any meaningful extent nor make its processes more open. Consequently, it has not presented any arguments which weigh in favour of disclosure. In contrast, the Commissioner considers that some weight should always be placed on transparency and the accountability that arises from this.
26. The complainant has also raised a number of arguments in favour of disclosure, all of which have been considered by the Commissioner even if they are not discussed in detail here. Of these, the complainant has particularly stressed the need for the information to be placed in the public domain so that independent enquiries can be made to ascertain whether doctors were being offered adequate care and protection through the process - particularly in connection with the ethnicity of doctors. Furthermore, as the doctors are deceased, the complainant considers there is no question of withholding the information on the basis of any concern for the reputations of the doctors themselves.

### **Public interest arguments in favour of maintaining the exemption**

27. The GMC considers that any public interest in this area of its functions has already been addressed by its decision to provide not only the numbers of doctors who had died with an open case against them but also the names of those doctors who had been referred to a practise

panel hearing but had died before its commencement. To go further than this, the GMC has claimed, would have the unwelcome effect of not only prejudicing the GMC's own investigatory abilities but also causing unnecessary grief and further suffering to the families of the doctors.

### **The balance of the public interest arguments**

28. The Commissioner considers that the public interest arguments in favour of withholding the information are very strong in this case. The arguments in favour of disclosure, on the other hand, suffer in comparison.
29. Firstly, the Commissioner does not share with the complainant the view that disclosure would allow the public to learn significantly more about the welfare of doctors. In particular, he cannot reasonably envisage how having access to the names of the deceased doctors would enable a member of the public to better gauge how the GMC, or any other body, is performing. The Commissioner is more impressed by the GMC's claim that the public interest in accountability has already been met by the disclosure of the other information asked for by the complainant.
30. Secondly, the Commissioner does not agree with the complainant that it would be inappropriate to consider the reputation of a doctor and the distress that could arise through disclosure. As mentioned above, the GMC will normally only consider disclosing the name of a doctor against whom a complaint has been made when a decision has been made that further action is needed to be taken - including referring a doctor to a fitness to practise panel. The reason for the confidentiality is to ensure that a doctor is not unfairly associated with a complaint before a preliminary investigation on its merits has been carried out.
31. The Commissioner considers that this principle of confidentiality should remain even after the death of a doctor. This is because to disclose the name of a doctor in connection with a complaint before any decision had been reached by the GMC - information which would otherwise be withheld - would unreasonably tarnish the reputation of the doctor and clearly be upsetting to those closely associated with the doctor.
32. Allied to this is the significant public interest in ensuring that the GMC, in its role as a regulator of doctors, is able to operate effectively and efficiently - something which the Commissioner has decided would be affected through disclosure. Against this, the Commissioner does not consider that the arguments for disclosure are compelling.
33. The Commissioner has therefore concluded that, in all the circumstances, the weight of the public interest rests with the maintaining of the exemption.



## **Procedural issues**

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### **Section 10 – time for compliance**

34. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days. The Commissioner has found that the GMC did not respond within the statutory timeframe and so breached section 10(1).

## Right of appeal

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35. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

36. 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.
37. 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 .....**

**Rachael Cragg**  
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**Information Commissioner's Office**  
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