

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 October 2008

Public Authority: General Medical Council
Address: 5th Floor
St James' s Building
79 Oxford Street
Manchester
M1 6FQ

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the General Medical Council (the "GMC") for "all correspondence between the GMC, [named doctor] and his employers". The GMC confirmed or denied whether it held that information under section 1(1)(a) of the Act. After considering the case, the Commissioner finds that the GMC was not obliged to respond under section 1(1) (a) by virtue of the provisions of section 40(5)(b)(i). This is because in responding to the request it has disclosed information which constitutes the personal data of the named doctor. The Commissioner does not require the GMC to take any further steps in relation to the complainant's request.

The Commissioner's Role

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.
2. In considering this case, the Commissioner has also taken into account his dual role as regulator of the Data Protection Act 1998 (DPA). As a result the approach he has adopted in this case together with his findings encompasses and reflects his remit under both pieces of legislation.

The Request

3. On 16 August 2007 the complainant made a request for "all correspondence between the GMC, [named doctor] and his employers".

4. On 12 September 2007 the GMC replied to the complainant's request of 16 August 2007. The GMC confirmed or denied whether the information was held under section 1(1)(a) of the Act.
5. A full text of section 1 is available in the Legal Annex at the end of this notice.
6. Further correspondence occurred between the complainant and the GMC in relation to the request as set out at paragraph 2 above.

The Investigation

Scope of the case

7. On 30 September 2007 the complainant contacted the Commissioner to make a complaint in relation to the GMC's response to his request.

Chronology

8. The Commissioner contacted the GMC on 17 June 2008 in order to discuss its handling of the complainant's request.
9. In a letter dated 1 July 2008 the GMC responded to the Commissioner. The Commissioner has considered the GMC's response.
10. A full text of section 1 is available in the Legal Annex at the end of this notice.

Analysis

Exemption

11. Section 40(5) sets out the following:-

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).
- 12. The information was requested under the Act as a result of previous correspondence between the complainant and the GMC about [named doctor]. This prompted the Commissioner to consider whether the GMC would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
- 13. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
- 14. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemptions in section 33A(1) of that Act were disregarded.
- 15. A full text of section 40 is available in the Legal Annex at the end of this notice.
- 16. In this instance the information requested is "all correspondence between the GMC, [named doctor] and his employers". Within the GMC's response of 1 July 2008 it provided the Commissioner with background information which has enabled him to conclude that if the requested information was held it would contain the personal data of a third party. The nature of the request also meant that the GMC's response in accordance with its duty under section 1(1)(a) inevitably disclosed whether or not a complaint had been made against the [named doctor].
- 17. The Commissioner is of the general view that whether or not a complaint was made against a named individual acting in their professional capacity is information which constitutes the personal data of that individual.
- 18. 'Personal data' as defined under section 1(1) of the DPA is data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
- 19. At the time the request was made, the Commissioner is satisfied that the [named doctor] was alive and at the time of drafting this Notice, there is nothing to suggest that this is no longer the case.
- 20. Whether or not a complaint was made against [named doctor] is clearly the personal data of the doctor as it relates to an identifiable living individual.

21. The Commissioner would like to clarify however that strictly speaking, the complainant's request was not to know whether or not a complaint had been made against [named doctor]. Rather, it is the fact that responding to such a request would reveal this information which prompted him to consider the case in the manner that he has.
22. In light of the above findings, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
23. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether a complaint had been made against [named doctor] in the context of the request for the correspondence concerning the [named doctor], his employers and the GMC would contravene any of the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

24. The first data protection principle states in part; '*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met...*'
25. A full text of the first data protection principle is available in the Legal Annex at the end of this Notice.
26. The Commissioner considers the most applicable condition for processing in this case is likely to be Schedule 2 (6)(1) which states;

'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.'
27. In considering whether or not confirming or denying whether a complaint had been made against [named doctor] would contravene the first data protection principle, the Commissioner took into account the reasonable expectations of [named doctor], the legitimate interests of the public at large, as well as the rights and freedoms of [named doctor].
28. Without disclosing any more detail than is necessary in order not to defeat the intention of section 40, the Commissioner is satisfied that in the context and background of this request, the [named doctor] would have had a reasonable expectation of privacy and would not have expected the public to have access to information which discloses whether or not a complaint was made against him/her.
29. The Commissioner considers the public has a legitimate interest in knowing that an individual providing a medical service(s) is fit and proper to do so. For instance

- where an allegation against a medical professional's fitness to practice has been proven to be founded via a complaints investigation process, and all available appeal rights have been exhausted, then the public has a legitimate interest in knowing that such an allegation was made, as well as the details of the allegation and actions taken as a result by the relevant public bodies. Therefore, there could be in effect a legitimate interest in knowing whether or not an individual was the subject of a complaint to the extent that it confirms that there have been legitimate and proven concerns about their fitness to practise.
30. The Commissioner is however aware that it is inherent in the nature of their role for medical professionals to be the subject of complaints (founded or unfounded) The public interest however is in knowing they are competent enough in their roles and meet all the expected standards. In the Commissioner's view therefore this interest is not satisfied by merely knowing their complaints history, rather, it is the existing mechanisms in place to ensure standards are maintained that satisfy the public's legitimate interest.
 31. It is the role of the GMC to ensure that doctors always maintain the required fitness to practice standards. Generally speaking therefore, the public interest in ensuring these standards are maintained is satisfied by the role carried out by these bodies rather than by knowing an individual's complaints history. Specifically in this case, the legitimate interest of the public would not be satisfied by responding to a request for information in a manner which would reveal whether or not [named doctor] had been the subject of a complaint. The disclosure is therefore not necessary for the purposes of satisfying the legitimate interests of the public.
 32. From the facts available to him, the Commissioner is satisfied that disclosing whether or not [named doctor] was the subject of a complaint is not necessary for the purposes of legitimate interests of pursued by the public and this disclosure would be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the nurse in question.
 33. The Commissioner is therefore satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the Act would contravene the fairness element of the first data protection principle.
 34. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he has not gone on to consider the other data protection principles.
 35. He therefore finds that the GMC was not obliged to have responded to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i). The Commissioner will not proactively seek to consider such exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has duty to consider the rights of data subjects. These rights, set out in the Data Protection Act are closely linked to article 8 of the Human Rights Act and the Commissioner would be breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without

having considered these rights, even if the public authority has not cited the exemption.

The Decision

36. The Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained at section 40(5)(b)(i).

Steps Required

37. The Commissioner requires no steps to be taken.

Other Matters

38. The Commissioner acknowledges that this has been a complex case and can comprehend the GMC's failure to correctly apply section 40(5)(b)(i) on this occasion. However he would encourage the GMC and other public authorities to always consider the application of section 40(5)(b)(i) when considering its response to a request of this nature in the future.

Right of Appeal

39. 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.

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 22nd day of October 2008

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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) he 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.