

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 November 2016

**Public Authority:** Health and Care Professions Council (HCPC)  
**Address:** Park House  
184 Kennington Park Road  
London  
SE11 4BU

### Decision (including any steps ordered)

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1. The complainant has requested information relating to the HCPC's decision that a named healthcare professional had no case to answer following a fitness to practise investigation. The HCPC refused the request under sections 30(2) confidential sources, 31 – law enforcement, 40(2) – third party personal data and 41 – information provided in confidence.
2. The Commissioner's decision is that the HCPC is entitled to withhold the information under section 40(2).
3. The Commissioner does not require the public authority to take any further action in this matter.

### Request and response

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4. On 4 December 2015 the complainant wrote to the HCPC concerning a fitness to practise investigation into a named health care professional and made the following request:

"We therefore make a formal request under the freedom of information act for the reasons behind the Panel's decision that [named individual] had no case to answer to be provided to us ..."

5. On 5 January 2016 the HCPC responded. It refused to provide the requested information and cited the following exemptions as the basis for doing so:
  - Section 31(1)(g) – Law enforcement - in this particular case the HCPC argued that disclosure could prejudice its function to ascertain whether any person is responsible for improper conduct.
  - Section 40 the disclosure of third party personal data in breach of the Data Protection Act 1998 (DPA).
  - Section 41 – information provided in confidence.
6. The complainant requested an internal review on 4 February 2016. The HCPC provided the outcome of its internal review on 10 March 2016. HCPC revised its position. It now applied the exemption provided by section 30(2) – information relating to confidential sources, in addition to those already cited.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 28 June 2016 to complain about the way their request for information had been handled, however it was only after they submitted all the relevant documentation on 26 July 2016 that the complaint was accepted as being eligible for investigation.
8. The HCPC has provided the Commissioner with a copy of the information it identified as falling within the scope of the request. This consists of the 'Notice of Decision' produced by the HCPC's investigating Committee. Having read that document the Commissioner is satisfied that it sets reasons behind the decision that the healthcare professional had no case to answer and that therefore it fits the description of the information requested.
9. The Commissioner considers that the matter to be decided is whether the HCPC is entitled to withhold this information under any of the exemptions cited. She will start by looking at the application of section 40.

### **Background**

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10. The HCPC is a regulator set up to protect the public by ensuring that health and care professionals have the necessary training, skills, standards of behaviour and health required to perform their jobs. It

does this by maintaining a register of those who meet the required standards and investigating complaints against those on the register.

11. In this particular case the incident that led to the fitness to practise investigation involved the death of a patient who was attended to by the healthcare professional named in the request. The healthcare professional was identified in the subsequent inquest and the matter received national media coverage.

## Reasons for decision

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### Section 40(2) – personal data of a third party

12. Section 40(2) of FOIA states that information is exempt if it constitutes the personal data of someone other than the person making the request and its disclosure to the public would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).
13. The HCPC's arguments specifically relating to its application of section 40(2) are limited. However the Commissioner has the dual role of regulating both FOIA and the DPA and would not wish information to be disclosed under one that could be a breach of the other. Therefore it would be inappropriate for her to ignore arguments that had been raised by the HCPC in relation to the other exemptions cited which have a bearing on its application of section 40(2).
14. Personal data is defined as being information that both identifies and relates to a living individual. The Commissioner has read the Notice of Decision and is satisfied that it both identifies and relates to the healthcare professional named in the request. It therefore constitutes the personal data of that person. It does not form the personal data of the patient who sadly died.
15. In this particular case the HCPC has argued that disclosing the information would breach the first data protection principle which states that the processing of personal data shall be fair and lawful and shall not be processed unless one of the conditions in Schedule 2 of the DPA can be satisfied.
16. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
17. 'Fairness' is a difficult concept to define. It involves consideration of:

- The possible consequences of disclosure to the individual.
- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

18. The Commissioner understands that there are a number of stages to any fitness to practise investigation. Once a concern about a registered healthcare professional is accepted there is an initial investigation and after sufficient evidence has been collected a formal allegation against that individual is drafted and provided to them. The healthcare professional then has the opportunity to respond to those allegations. This part of the process culminates in a meeting of, what is referred to as, the 'Investigating Committee'. The Investigating Committee is tasked with making a decision as to whether the healthcare professional has a case to answer. This initial stage of the investigation is confidential. It is only if the Investigating Committee decides there is a case to be answered that the matter is made public with details of the allegations being published on the HCPC's website. The matter is then referred to an appropriate panel, depending on the nature of the allegations. Following a final hearing by that panel its decision is also published on the HCPC website.
19. In this particular case the Investigating Committee decided there was no case to answer and no further action was taken. Therefore normally, as the matter never progressed beyond the Investigating Committee neither the details of the allegations nor any of the evidence gathered would have been made public.
20. However the complainant has argued that in this case the initial stage of the HCPC's investigation was public. The Commissioner put this to the HCPC. The HCPC has said that it does not know why the complainant considers the information to be public and stated categorically that no information about the particular fitness to practise investigation has ever been placed on its website. In light of this assurance and in the absence of evidence to the contrary the Commissioner accepts that the information in question remains private between the parties involved in the investigation.
21. Having looked at the HCPC's website the Commissioner is satisfied that the process described in paragraph 18 is well-established and that healthcare professionals would fully understand the confidential nature

of its initial stages. She also took the opportunity to check that no information about this particular case was available on the site.

22. When providing arguments in respect of its application of sections 30, 31 and 41 the HCPC emphasised the fact that the healthcare professional would have understood the fitness to practise investigation would remain confidential until it was decided there was a case to answer. They would have a clear expectation that if the matter did not progress beyond the Investigating Committee stage no information would be disclosed to the public in respect of the allegations. This expectation would be reinforced by the formality of the process and the potential seriousness of the consequences of such an investigation.
23. The Commissioner understands from the HCPC's website that following the Investigating Committee's meeting the person who raised concerns about the healthcare professional is informed of the reasons for its decision. It is not clear whether this means the 'Notice of Decision' is disclosed in full to whoever raised the concern, but it appears likely that at least some of its content is made available to them. This would also be understood by the healthcare professional who was the subject of the investigation. However this would not undermine their expectation that there would be no wider disclosure of the information. It is important to recognise that the test when applying section 40(2) is whether a disclosure to a member of the public would be a breach of the data protection principles.
24. Considering the nature of the withheld information ie that it relates to serious allegations about the professional competence of the healthcare professional concerned, the Commissioner is satisfied that its disclosure would be detrimental to the healthcare professional. This is the case even though the information records that there was no case to answer.
25. The Commissioner accepts that there is already some information relating to the healthcare professional available through media reports of the inquest in to the patient's death. Therefore it could be argued that the individual's professional reputation is already tarnished. Nevertheless the Commissioner considers it would still be detrimental to the individual concerned if the volume of information available on this matter was added to.
26. Not only is it possible that disclosing the information would have a longer term impact on the health professional concerned, regard should be had for the immediate impact disclosing the information would have on the health professional. The Commissioner considers it highly likely that making the 'Notice of Decision' available to the public would have generated fresh media interest in the issue which would have been distressing to that individual.

27. The third factor taken into account when considering fairness is the legitimate interests of the public in having access to the requested information. These interests then have to be balanced against the rights and freedoms of the healthcare professional. The Commissioner is satisfied that the events which led to the fitness to practise investigation raise legitimate concerns about the standard of care received by the patient. There is also a value in understanding how the HCPC operates and whether it is an effective regulator. However the HCPC has argued in respect of its application of the other exemptions cited, that its ability to conduct investigations would be impaired if it was seen to disclose information where a case had not progressed beyond the Investigating Committee ie where it was decided there was no case to answer. The HCPC has only limited powers to compel the subject of an investigation to give statements or provide evidence. In the majority of investigations it has to rely on the voluntary cooperation of the healthcare professional. If it was to disclose information about an investigation where it had been found there was no case to answer this would discourage individuals from cooperating with investigations in the future. This is because it would undermine the trust healthcare professionals had in the ability of the HCPC to maintain confidentiality. The Commissioner accepts this argument. So although there is a legitimate interest in having access to the 'Notice of Decision' this is eroded by the damage that disclosure would have on HCPC's investigatory process.
28. This legitimate interest then has to be weighed against the rights and freedoms of the healthcare professional named in the request. Due to the nature of their work, healthcare professionals are subject to a regulatory regime and in certain circumstances could be struck off the HCPC's register, so ending their career. The Commissioner considers that the healthcare professional named in the request has a right to expect that in performing its regulatory functions the HCPC will adhere to its stated operated procedures and honour its assurances to keep allegations affecting their career confidential. This provided them with the best opportunity to defend their position in front of the Investigating Committee.
29. The Commissioner recognises that those affected by the events which gave rise to the fitness to practise investigation have a particular interest in understanding the decisions of the HCPC. However, this is met, at least in part, by the explanation provided by the HCPC when it wrote to them following its decision that there was no case to answer.
30. In light of the above the Commissioner finds disclosing the information to a member of the public would clearly be against the reasonable expectations of the healthcare professional named in the request. The Commissioner recognises that the individual has already been identified

in the press, but considers the disclosure of any further information would still have detrimental consequences for the individual. Although there is a legitimate interest in disclosing the information, these have to be considered against the potential harm that would be caused to the HCPC's regulatory process and balanced against the interests of the healthcare professional. The Commissioner finds that disclosing the information would be unfair and so breach the first data protection principle. The HCPC is entitled to rely on section 40(2) to refuse the request.

31. Finally, the complainant has suggested that it may be possible to anonymise the information so that its disclosure would not be unfair. However the Commissioner is satisfied that the 'Notice of Decision' in its entirety is the personal data of the health care professional who was the subject of the fitness to practise investigation. As that person was named in the request it is impossible redact it in a way that would not allow them to be identified as the subject of the investigation. Redacting the Notice of Decision in such a way as it removed the information relating to that individual which would be unfair to disclose would render the document completely meaningless.

## Right of appeal

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32. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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