

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

### **Decision notice**

**Date:** 18 August 2022

**Public Authority:** Health and Care Professions Council

**Address:** 184 Kennington Park Road  
Kennington  
London  
SE11 4BU

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

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1. The applicant has requested a complaint case file. The Health and Care Professions Council (HCPC) provided a response under the data protection legislation. It also provided a response under FOIA, relying on section 30, section 31 and section 40 of FOIA which concern investigations, law enforcement and personal data respectively. HCPC has subsequently confirmed that it is relying on section 40(5B) of FOIA to neither confirm nor deny it holds the requested information.
2. The Commissioner's decision is as follows:
  - HCPC is entitled under section 40(5B)(a)(i) of FOIA to neither confirm nor deny it holds the requested information as to do so would disclose the personal data of a third person.
3. The Commissioner does not require HCPC to take any corrective steps.

#### **Request and response**

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4. On 18 June 2021 a firm of solicitors wrote to HCPC on behalf on behalf of the applicant and requested information in the following terms:

"My client, [redacted] has asked me to make a Freedom of Information Act request on his behalf for a copy of his complaint file regarding [redacted].

In particular, but not exclusively he wishes to see [redacted]'s response to the HCPC's final allegations, as well as any correspondence from [redacted] where she refers to him. Any correspondence from the HCPC to [redacted] that refers to [redacted] should also be included, together with any professional opinions obtained from independent psychologists, if these exist.

I'm happy to receive any documentation in electronic format and look forward hearing from you within the next 20 days."

5. HCPC responded on 26 July 2021. It provided a response under the data protection legislation. HCPC also referred to exemptions under section 30 and section 40 of FOIA. HCPC said it would also rely on section 31 if necessary.
6. Following an internal review HCPC wrote to the applicant on 23 September 2021. It upheld its position.

### **Scope of the case**

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7. On behalf of the applicant, the complainant (not the firm of solicitors) contacted the Commissioner on 8 October 2021 to complain about the way the request for information had been handled.
8. In its submission to the Commissioner HCPC has confirmed that, in addition to sections 30 and 31, its position is that it neither confirms nor denies it holds the requested information under section 40(5B)(a)(i) of FOIA as to do so would disclose the personal data of a third person.
9. The Commissioner's investigation has focussed on HCPC's reliance on section 40(5B). If necessary, he will consider whether the appropriate subsections of section 30 and/or 31 are engaged.

### **Reasons for decision**

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#### **Section 40 – personal data**

10. Under section 1(1)(a) of the FOIA anyone who requests information from a public authority is entitled to be told whether or not the authority holds the information – this is known as 'the duty to confirm or deny'.

11. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether the authority holds the information does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR')
12. For HCPC to be entitled to rely on section 40(5B)(a)(i) the following two criteria must be met:
  - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data;  
and
  - providing this confirmation or denial would contravene one of the data protection principles.

**Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?**

13. Section 3(2) of the Data Protection Act 2018 defines personal data as "any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
16. HCPC considers that confirming or denying if the requested information is held would disclose to the world at large whether or not a complaint had been received about a named registrant; the registrant named in the request.
17. With regard to the two criteria above, the Commissioner is therefore satisfied that it is possible that a registrant could be identified from the requested information, if held, and that the requested information, if held, would relate to that registrant. He is therefore satisfied that confirming whether or not the requested information is held would disclose that registrant's personal data as it would indicate to the wider world whether or not they have been subject to a complaint and investigation by HCPC.

**Would confirming or denying the information is held contravene one of the data protection principles?**

18. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

19. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
20. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

21. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
22. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child” .

23. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
  - **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information.
  - **Necessity test:** Whether disclosure of the information/confirmation or denial is necessary to meet the legitimate interest in question.
  - **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject – the registrant in this case.
24. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

25. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the

requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

26. In the circumstances, the Commissioner appreciates that the applicant has an interest in the specific information that was requested on their behalf. The Commissioner considers their interest to be entirely valid but that it is a private interest. There is, however, a general, wider public interest in transparency around how medical professionals practice.

**Is disclosure/confirmation or denial necessary?**

27. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information, or confirmation or denial that it is held, unnecessary. Disclosure/confirmation or denial under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
28. The applicant's interest is very specific to them. The Commissioner notes that HCPC has also handled the request under the data protection legislation and the Commissioner considers that is the appropriate approach, and a less intrusive means of the applicant achieving their aim.
29. Regarding the wider public interest in transparency, HCPC has advised the Commissioner that a process exists for considering any fitness to practise concerns about registrants. If a concern reaches HCPC's threshold criteria for a complaint it will be sent to an independent Investigating Committee Panel (ICP). The ICP will decide on the material presented whether there is a case to answer. In situations where there is found to be no case to answer, the case will be closed.
30. The Commissioner understands from material HCPC sent to him that in instances where there is found to be a case to answer, the case can be heard by a Competence and Conduct Committee or Health Committee with the outcome of these hearings published on HCPC's website. The Commissioner considers that this process satisfies the wider public interest in transparency around how medical professionals practice.

31. The Commissioner has decided in this case that confirmation or denial is not necessary to meet the legitimate interest in disclosure. He has therefore not gone on to conduct the balancing test. As confirmation or denial is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
32. Given the above conclusion that confirmation or denial would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent.

**The Commissioner's view**

33. The Commissioner has decided that HCPC is entitled to neither confirm nor deny it holds the requested information under section 40(5B)(a)(i) of FOIA.
34. As such, it has not been necessary for the Commissioner to consider HCPC's reliance on section 30 and 31. He noted, however, that provision also exists under both of these exemptions to neither confirm nor deny information is held.

## 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

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

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire SK9 5AF**