

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 June 2017

**Public Authority:** The Health & Care Professions Council  
**Address:** Park House  
184 Kennington Park Road  
London, SE11 4BU

#### Decision (including any steps ordered)

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1. The complainant requested information on employee standards and policies on personal data security. The Health & Care Professions Council (HCPC) provided much information but withheld some citing the exemptions under section 40(2) of the FOIA (third party personal data) and section 36 (prejudice to effective conduct of public affairs) as its basis for doing so. The Commissioner's decision is that the HCPC has correctly applied the exemptions under section 40(2) and section 36(2)(c) and does not require the HCPC to take any steps.

#### Request and response

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2. On 26 February 2016 the complainants made the following requests for information:

*'Please provide us with all and any information held by the HCPC in terms of policy, guidance and enforcement of acceptable standards of conduct of employees, including any 'acceptable internet policy'*

And

*'In order to assist us to evaluate the standards which your own organisation applies in relation to the implementation of Art 17 of Directive 95/46/EC we now request all and any information held by the HCPC setting out policy and practice in relation to measures taken to comply with the Seventh Data Protection Principle, whether technical or organisational in nature.'*

3. After the intervention of the Information Commissioner and her decision notice (reference FS50631370 dated 23 August 2016) the HCPC responded on 19 September 2016.

*'The HCPC takes its responsibilities for information security very seriously. We are certified for the international standard for Information Security; ISO27001...Please find enclosed copies of relevant policies, which have been redacted only in relation to non-senior staff names...under section 40(2) of the FOIA.*

*...The HCPC holds other documentation within its suite of documents relating to information security. However, we are unable to release these to you as we consider that the exemption within section 36(2)(c) of the FOIA applies to these documents.'*

4. On 20 October 2016 the complainants requested an internal review. They argued that
  - The document provided 'Doc A5 Information Security Policy' is version 1.2 issued on 29 March 2016 after the date of the request (26 February 2016)
  - There is clear public interest in data subjects being able to assure themselves that their personal data are being properly managed and safeguarded (section 36)
  - The names of the staff associated with an important policy should not be withheld under section 40.
5. On 5 January 2017 the complainants contacted the Commissioner as at that time they had not received a response to their request for an internal review. On 21 February 2017 the Commissioner wrote to the HCPC regarding this failure.
6. In a letter dated 12 January 2017 the HCPC provided the previous version of the HCPC's Information Security Policy and explained that redactions had been applied as explained in the original response. The internal review upheld the exemptions.
7. On 6 March 2017 a copy of this letter was provided to the Commissioner. The complainants also received a copy of this letter dated 12 January in an envelope postmarked 6 March 2017. On 21 March 2017 the complainants stated that they *'deplore this patient attempt at deception on the part of the authority'* and wished to continue with the complaint to the Commissioner.

8. The Commissioner wrote to the complainants on 28 March 2017 to set up a new case to deal with the new complaint about HCPC's application of exemptions and commented on the dating of the internal review:

*'We received a response from HCPC on 6 March 2017 confirming that it had provided its internal review response on 12 January 2017. You have stated that you did not receive this letter until 6 March and have queried why the letter has been post-dated+. It seems to me that the HCPC must have sent you a copy of its internal review response on the same day that it replied to us and I can only assume you did not receive its first response. HCPC would have been unaware you had not received its letter until we wrote to it. We can query this with them in order to confirm its position but as there is no legal timescale in which to conduct an internal review, even if the sending of its response was delayed, we cannot find a breach of the Act. However we can refer to unreasonable delays in a decision notice.'*

### **Scope of the case**

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9. Therefore the focus of the Commissioner's investigation is to determine whether HCPC is entitled to rely on sections 40 and 36 of the FOIA as a basis for refusing to disclose the withheld information.

### **Background**

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10. HCPC provided a background to the request. A complaint was made about a HCPC registered psychologist who worked at a prison. The concern was investigated but it was not taken forward as it did not meet the HCPC's standards of acceptance.

### **Reasons for decision**

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#### **Section 40(2) – Third party personal data**

11. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

#### **Is the withheld information personal data**

12. Personal data is defined by the DPA as any information relating to a living and identifiable individual.

13. In this case the redacted information is the names of the authors of the Information Security Policy and therefore the Commissioner is satisfied that this is personal data.

### **Would disclosure breach the Data Protection Principles?**

14. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
15. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

### **Reasonable expectations**

16. The view of the Commissioner is that there is an expectation that an employee in a public authority will have a certain amount of information about them disclosed.
17. The Commissioner has issued guidance about requests for personal data about public authority employees: [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)
18. This guidance talks about whether the information requested relates to them as an individual or in their professional role, and is information contained in their personnel file as opposed to actions they have taken in carrying out their job.
19. It also suggests consideration should be given to whether the employees are senior within the organisation or have a public facing role. The more senior the individual and/or the more public facing their roles are the greater their expectation should be that information about them would be released and the more likely it would be to conclude that it would be fair to do so.
20. The complainants have argued that the information is not sensitive personal data or private data. They referred to tribunal decisions which emphasised employee competence and honesty.
21. The Commissioner notes that on page 7 of the HCPC Information Security Policy document provided to the complainants that 'the Information Security Manager is the owner of this document and is responsible for ensuring that this procedure is reviewed in line with the

review requirements of the ISMS...This document was approved by the Chief Executive & Registrar.'

22. HCPC have stated that the staff who drafted the policy are not senior managers and do not undertake interactions with members of the public. The authors are not accountable for the policy and do not have responsibility for approving the policy. The employees would not reasonably expect that their names would be disclosed through FOI. The policy is owned by the senior manager and was approved by a board.
23. Therefore the Commissioner understands that HCPC would not routinely make public the names of the authors of the policy.

### **Consequences of disclosure**

24. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individuals. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
25. In this case the Commissioner is satisfied that the individuals would have a reasonable expectation that the disputed information would not be placed into the public domain by disclosure under the FOIA. Therefore she considers that disclosure of this information would be an unfair invasion of the privacy of the individuals, and as such may cause them some distress.

### **Balancing the rights and freedoms of the individual with the legitimate interests in disclosure**

26. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
27. Notwithstanding the employee's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
28. However, the Commissioner considers that the public's legitimate interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of the member of staff concerned. The Commissioner has considered whether there is a legitimate interest in

the public (as opposed to the private interests of the complainant) accessing the withheld information.

29. The complainants have stated that the names of the staff associated with an important policy should not be withheld under section 40:

*'It may be that disclosure of the identity of the author of the policy would impact on our ability to pursue our complaint about the manner in which a psychologist registered by the HCPC used our "personal data" contrary to what we believe to be commonly understood "acceptable internet" standards.'*

30. HCPC have stated that there is no public interest in the names being released under FOIA and that it does not 'see any individual interest from the requestors'.
31. The Commissioner notes that the request is for the names of the members of staff (not senior managers) who drafted the policy but have no responsibility for the ownership or approval of the policy.
32. The Commissioner accepts that there is a legitimate interest in the overall transparency in the way a public authority such as the HCPC conducts its business. However, there is no presumption that this should automatically take priority over personal privacy. The Commissioner judges each case on its merits.
33. In this case, the Commissioner is not convinced that the specific information requested is of sufficient wider public interest to warrant overriding the protection of the third party personal data.
34. Having considered the HCPC's submission and the views of the complainants the Commissioner is satisfied that the complainants' arguments for disclosing the specific information in this case are not as compelling as those that HCPC has put forward for protecting the individuals' personal data, namely:
- the individuals' likely expectation about how their personal data will be managed, implicit in their role as non-senior members of staff
  - the individuals' lack of consent to its release; and
  - the possible negative consequences to the individuals of releasing the information.
35. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the employees and that it would not be fair to disclose the requested information in this case. Therefore, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection

principle as it would be unfair to the individuals concerned. The Commissioner upholds HCPC's application of the exemption provided at section 40(2) of the FOIA.

### **Section 36(2)(c) – prejudice to the conduct of public affairs**

36. Section 36(2)(c) of the FOIA states that information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs.
37. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the HCPC, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
  - Ascertain who the qualified person is,
  - Establish that they gave an opinion,
  - Ascertain when the opinion was given, and
  - Consider whether the opinion was reasonable.
38. The HCPC provided the complainants with links to relevant information on their website and the following documentation as it could be provided without jeopardising their arrangements for information security:
  - Information asset management policy
  - IT policy
  - Information security policy
  - Information classification and handling policy
  - Complaint and redundancies policy
39. The HCPC withheld the following documentation:
  - Segregation of networks
  - Access list for disaster recovery and business continuity
  - Improvement log (identifies weaknesses for correction)
  - Operations security (classed as highly confidential)
40. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an



effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.

41. The HCPC stated that it holds and processes a lot of sensitive data as part of its statutory regulatory remit. Information security precautions are essential to protect this data. The HCPC is certified for the international standard for Information Security; ISO27001. Using this standard helps the HCPC to manage and keep information assets secure. Each year the HCPC is audited on this standard and all employees and contractors are required to undergo information security training each year.
42. These four named documents are required as part of the HCPC certification and for internal continuity of cyber protection. They expose known and potential weaknesses, protection arrangements and specific system information that would enable a cyber-attack to succeed.
43. In applying the exemption to these documents, the HCPC initially consulted the Chief Information Security Officer (CISO) (as defined by ISO27001). Then a further verbal discussion was held with the Director of IT and the Chief Executive who is the designated qualified person.
44. The HCPC explained that it was important to convey the views of the CISO and IT director to the Chief Executive as the documents are highly technical and a full appreciation of detriment may not be apparent to a non-specialist. This consultation took place at the time of the original response.
45. The HCPC provided to the Commissioner more detailed reasons from the CISO for considering why each of the four documents falls within the scope of the exemption. In summary, the CISO considered that disclosure of the withheld information would prejudice the effectiveness of the HCPC security controls or expose weaknesses or vulnerabilities in the HCPC security controls.
46. The Commissioner is therefore satisfied that the qualified person did provide his opinion that the information in question was exempt under section 36(2)(c).
47. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that



the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

48. Having considered the above arguments the Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information. She is satisfied that the qualified person's opinion that disclosure would be likely to prejudice the effective conduct of public affairs is a reasonable opinion to hold.
49. For these reasons, the Commissioner is satisfied that section 36(2)(c) of the FOIA applies in this case. She will therefore now go on to consider the public interest test.

### **Public interest test**

50. The public interest test considerations under section 36 of the FOIA require the Commissioner to consider the extent, severity and frequency of the inhibitions claimed.
51. The HCPC has stated that there is a public interest in gaining assurance that the HCPC has appropriate information security arrangements in place.
52. The complainants have argued that '*there is a clear public interest in data subjects being able to assure themselves that their personal data are being properly managed and safeguarded.*'
53. The HCPC provided public interest arguments against disclosure:
  - It is accredited to ISO27001 which should provide assurance to the public that appropriate measures are in place in terms of information security. Additionally the HCPC provided many other documents on information security arrangements to the requestors.
  - There is no public interest in a disclosure which results in the sensitive data of thousands of service users, witnesses and registrants being inappropriately accessed.
  - Release of the documents would require the HCPC to completely review urgently its network security arrangements.
  - The information within the documents is highly technical and specific to IT network security. It is unlikely that individuals without malicious motivation would be interested in the contents of the documents.

54. The Commissioner finds that although there is a significant and important public interest in the public's general understanding of information security, there is a greater public interest in withholding this particular security information.
55. In this case, the Commissioner considers the public interest arguments in favour of maintaining this exemption to the security documents, are much stronger and she believes the effects of disclosure would be severe and far reaching. Disclosing the information would place the HCPC in a precarious position and potentially allow members of the public to see weaknesses or vulnerabilities of their data security arrangements. This in turn could impact on the HCPC's ability to operate effectively and efficiently and in the interests of the public.
56. In conclusion, the Commissioner finds that the HCPC is entitled to withhold the information to which it applied section 36(2)(c).

### **Other matters**

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57. The Commissioner is concerned at the unreasonable delays at every stage of this request.
58. After the intervention of the Information Commissioner and her decision notice (reference FS50631370 dated 23 August 2016) the HCPC responded to the initial request dated 21 February 2016 on 19 September 2016.
59. The Commissioner's guidance explains that when a public authority receives an internal review request, it should ensure the review takes no longer than 20 working days in most cases, or 40 in exceptional circumstances. An internal review was requested on 20 October 2016 and acknowledged on 27 October 2016.
60. After the intervention of the Commissioner, the outcome of the internal review was sent on 12 January 2017. The complainants did not receive the outcome until 6 March but as stated in paragraph 8 above, the Commissioner does not consider that there was any deliberate intention to delay responding on behalf of the HCPC.
61. The Commissioner is also concerned and disappointed in the time taken for the HCPC to respond to the Commissioner's request for submissions. The Commissioner wrote to the HCPC on 4 April 2017. On 4 May 2017 the HCPC requested an extension from 5 to 18 May 2017 'due to resource issues due to absence and annual leave.' On 18 May 2017 the HCPC provided submissions without the required details. This was

requested by telephone on 25 May and in writing on 19 June 2017. The required detail was provided to the Commissioner on 20 June 2017.

62. The Commissioner expects the HCPC to ensure that an appropriate process is in place to respond promptly to FOIA requests, internal reviews and correspondence from the Commissioner.

## Right of appeal

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63. 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)

64. 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.
65. 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**  
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