General Medical Council

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17 February 2009

Mr Peter Walsh
Chief Executive
AvMA
44 High Street
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18 FEB 2009

Dear Peter

Thank you for your letter of 6 February 2009, addressed to Finlay Scott, about the case of Dr Jane Barton. Finlay has asked me to reply on his behalf as the Assistant Director with responsibility for our Investigation function. You may recall that we met several times recently at the CHRE's offices, as part of their working group establishing the audit of cases closed before a hearing?

As you may know, GMC Interim Orders Panel (IOP) hearings are held in private, as set down in our statutory rules, unless the doctor requests that their particular hearing is held in public. Dr Barton made no such request and so the hearing was held in private and, accordingly, the transcript and minutes are not publicly available.

Nonetheless, I have looked at your request for a copy of the IOP transcript and minutes relating to this case in accordance with the provisions of the Freedom of Information Act 2000 (FOIA). I consider, however, that an exemption set out in the FOIA applies to the information that you have requested. In accordance with the FOIA this letter acts as a refusal notice in respect of the information you have requested.

The exemption that applies, in my view, is set out at Section 40(2) of the FOIA. This relates to information requested which is about a third party, and the disclosure of which would be in breach of the Principles of the Data Protection Act 1998 (DPA). In this instance we believe that the disclosure of this type of information would breach the First Principle, which requires that the processing of data is fair and lawful.

This exemption is absolute which means that it is not subject to a public interest test (in order to assess if the public interest is greater served by disclosing the information than maintaining the exemption).

You have the right of appeal against this decision. If you wish to appeal please set out in writing your grounds of appeal, and send it to Julian Graves, Information Access Manager, GMC, 5th Floor, St James's Building, 79 Oxford Street, Manchester M1 6FQ. You also have a further right of appeal to the Information Commissioner. If applicable, Mr Graves will provide you with the contact details of the Information Commissioner.

I am sorry to write back in such formal terms, but you will understand that we wished to treat this as an FOIA request and ensure that we provided you with an answer which complies with the requirements of that legislation.

In broader terms, I can understand the questions that the families and AvMA may have about the GMC's decision to restrict Dr Barton's registration only relatively recently (from July 2008), when we have known about the case since July 2000. As you are likely aware, this case has been put to the Interim Orders Committee (IOC), as it was, on a number of occasions before July 2008. In fact, the case went to IOC in July 2000, June 2001, March 2002, September 2002 and October 2004, before being heard by IOP last July. On each of those previous occasions, as you know, no Order was made against the doctor.

Of course, the IOC's decisions were matters for the IOC and I could not go behind those decisions. Discussion of the case will have taken place in camera, amongst the Committee members, with the support of the Legal Assessor. Those discussions will, quite properly, remain confidential. The determinations of the Committee, although open to scrutiny by both the GMC representatives and the doctor's side, remain confidential (as explained above). It is therefore impossible for me to attempt to give detailed reasons for those decisions.

This, I think, does raise a number of issues. What I can tell you is that, on five separate occasions, the GMC's lawyers attempted to persuade the IOC that an Order against Dr Barton was necessary. On none of those occasions was the IOC convinced of the case for an Order to be made. The GMC's investigation function has no right of appeal in such cases. This may change with the advent of the Office of the Healthcare Professions Adjudicator (OHPA) which will take the adjudication function away from the GMC and place it with an independent body (the current Department of Health timetable suggests OHPA will be operational by April 2011, at the earliest).

Whether the IOP (either in current or future form) should be more accountable – for example, by making its determinations public – is an interesting question. As the legislation stands, the reasons for IOP decisions (as expressed in their determinations) are not made public, though any actions taken against a doctor's registration are publicly available. This reflects the fact that the IOP make, exactly, interim decisions. They do not make findings of fact and yet they can take fairly radical action against a doctor (preventing them from practising or from practising unrestricted) assuming that there is cogent reason to *suspect* that a doctor's fitness to practise may be impaired. Clearly, in these circumstances, the IOP's powers – although necessary to ensure public safety - are not to be exercised lightly. Where they do consider a case, there has to be some protection for the doctor (who may, after all, turn out to be entirely innocent of the charges being made against him or her). I believe that this explains why the legislation is as it is and why, for example, the IOP meets in private. There is clearly a very delicate balancing act here between the rights of the doctor and the interests of accountability and openness.

The final point that I would make is that this case appears to have been characterised by additional information becoming available as investigations have proceeded and by a changing picture in terms of the other investigations being carried out outside the GMC. You will be aware of the Police involvement. One of the circumstances which did change

just before we took the case to IOP in July 2008 was that it became apparent that there was to be an Inquest into the deaths of several of the patients. Of course, the formal reasons for the decision to hold an Inquest also became apparent at that time. In addition, I believe it also became clear to us before July 2008 that there were further patients whose deaths were to be investigated. All of which gave us good cause to take the case back to the IOP in order that they could consider making an Order.

I hope that this at least begins to clarify the picture from the GMC's point of view Peter. I would be more than happy to discuss these issues with you in more detail. If you think a meeting might be useful, please let me know. Alternatively, I am available on the direct line number given below if you would prefer to call me to discuss.

Yours sincerely

Code A

Neil Marshall
Assistant Director – Fitness to Practise
Fitness to Practise Directorate

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