

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2013

Public Authority: Nursing and Midwifery Council

Address: 23 Portland Place
London
W1B 1PZ

Decision (including any steps ordered)

1. The complainant has requested information from the Nursing and Midwifery Council ("the NMC") which, if held, would have included details of information relating to a complaint about a particular nurse. The NMC refused to confirm or deny whether or not the requested information was held under section 40(5) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the NMC was correct to neither confirm nor deny whether the requested information was held under section 40(5) of the FOIA. He therefore requires no steps to be taken.

Background

3. When the NMC receives a complaint about a nurse or midwife an initial assessment is made as to whether the matter should be progressed and an investigation conducted.¹ If an investigation takes place, on completion of this investigation the complaint will be considered by the Investigating Committee Panel of the NMC. This will be dealt with in private. There are a number of potential outcomes including, concluding the matter, or referring the case to the Conduct and Competence

¹ http://www.nmc-uk.org/Documents/FtP_Information/NMC_FtP_Factsheet-RTE-one.pdf

Committee² or to the Health Committee³. Any hearing or decision in relation to the Conduct and Competence Committee is usually in the public domain.⁴

4. The complainant's information request is linked to a fitness to practice complaint originally made in June 2012 and assessed by the NMC in October 2012 regarding the conduct of a named nurse.

Request and Response

5. On 16 October 2012 the complainant's son requested information of the following description:

"Given the response by you I would now like to make an application for Freedom of Information so I am able to have copies of any Letters or Correspondence from (name redacted) and Atos Healthcare".

6. On 8 November 2012 the NMC provided a response to the request. It stated that it would be relying upon section 40(5)(b)(i) of the FOIA and would be neither confirming or denying it held the requested information as to do so would breach the data protection principles of the Data Protection Act 1998 (DPA). In support of its position it referred to previous Decision Notices issued by the Commissioner in which he upheld its reliance on section 40(5)(b)(i) in similar circumstances.⁵
7. On 9 November 2012 the complainant requested an internal review as she was not satisfied with the response received.
8. On 5 December 2012 the NMC upheld its original decision to apply section 40(5)(b)(i) of the FOIA to refuse to confirm or deny whether the requested information was held.

² <http://www.nmc-uk.org/Hearings/How-the-process-works/Adjudication/Fitness-to-Practise-committees/Conduct-and-Competence-Committee/>

³ <http://www.nmc-uk.org/Hearings/How-the-process-works/Adjudication/Fitness-to-Practise-committees/Health-Committee/>

⁴ <http://www.nmc-uk.org/Hearings/Hearings-and-outcomes/>

⁵ See the Commissioner's Decision Notices; FS50180310, FS50169734 and FS50276047

Scope of the case

9. The complainant contacted the Commissioner on 11 December 2012 to complain about the way the request for information had been handled. Therefore the scope of this case is to consider whether the NMC was correct in relying upon section 40(5)(b)(i) of the FOIA to refuse to confirm or deny whether the requested information was held.

Reasons for decision

10. Sections 40(5) of the FOIA provides, amongst other things, that a public authority is not obliged to confirm or deny whether information is held if to do so would constitute a disclosure of personal data and this disclosure would breach any of the principles of the DPA.
11. In this case the request is for information which, if held, would have included details of information relating to a complaint about a particular nurse.
12. Personal data is defined under section 1(1) of the DPA as data which relate to a living individual who can be identified;
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
13. In this matter the Commissioner is satisfied that the requested information, being information in relation to a fitness to practice complaint about a particular nurse, would be the personal data of that nurse, if it were held.
14. Further, the Commissioner considers that even confirming or denying whether information is held or not would reveal whether or not a complaint had been made about an individual. The Commissioner considers that whether or not a complaint has been made against a named individual acting in their professional capacity is information which constitutes the personal data of that individual. Having considered the nature of this request, and the circumstances of the case, the Commissioner has concluded that if the requested information were held, it would be the personal data of the nurse in question.
15. Having identified that the requested information is personal data consideration has to be given as to whether confirming or denying whether the requested information is held would breach a data protection principle. In reaching this view the Commissioner has to consider the consequences of confirming or denying whether the

information is held and not the consequences of disclosing the content of the information itself.

16. In cases such as this the most likely data protection principle is the first principle which requires that personal data is processed fairly and lawfully.
17. The Commissioner has first considered whether it would be fair to confirm or deny whether the requested information is held.
18. In considering whether confirming or denying would be fair the Commissioner has taken the following factors into account:
 - the consequences to the data subject;
 - the data subject's reasonable expectations of what would happen to their personal data and;
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
19. In this instance confirming or denying whether the information was held would communicate whether or not a complaint had been made about the competency or conduct of an individual nurse. The NMC has argued that this would be unfair to the data subject as the reasonable expectation of an individual, if a complaint had been made, would be that information would not be published in respect of any complaint unless and until it reached the stage at which it would normally be expected to be disclosed.
20. Given the NMC's procedures as described above the Commissioner is satisfied that the reasonable expectation of an individual would be that if a complaint had been logged, assessed and not formally investigated, that information, if held, would remain confidential. He recognises that to confirm or to deny the existence of a complaint could cause damage to the professional reputation of an individual and personal distress.
21. The Commissioner is aware that there is a legitimate public interest in knowing that health professionals are fit to practice and that issues of competency and practice are investigated if concerns are raised. However, in circumstances where there is a concern, internal disciplinary procedures exist and information concerning issues of competency come into the public domain if a case to answer is satisfactorily established as described above.
22. Having considered the issue of legitimate public interest the Commissioner is satisfied that, in these circumstances, the rights of the

data subject would not be outweighed by the legitimate public interest in this case.

23. From the information submitted the Commissioner concludes that, in these circumstances, the reasonable expectations of the individual would be for this information, if held, to remain confidential. He considers that to confirm or deny that information is held would be unfair and a breach of the first data protection principle.
24. In reaching a view on this the Commissioner has had to bear in mind that the FOIA is applicant blind, except in a few limited scenarios none of which are applicable in this case. In other words, the potential disclosure of information under the FOIA has to be considered as a potential disclosure to the world at large. Consideration cannot be given to the identity of the applicant or their personal reasons for asking for information.
25. In this instance the Commissioner accepts that, in line with previous decisions, it would be unfair in the circumstances for the NMC to confirm or deny whether it holds the information within the scope of the request.⁶
26. The Commissioner therefore considers that the NMC has acted appropriately in refusing to confirm or deny that information is held and is entitled to rely upon section 40(5)(b)(i) of the FOIA.

⁶ See the Commissioner's Decision Notices; FS50180310 (October 2008), FS50276047 (October 2010), FS50169734 (November 2008), FS50474386 (April 2013), FS50486283 (July 2013) and FS50492136 (August 2013)

Right of appeal

27. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

28. 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.
29. 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

Rachael Cragg
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