

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

### **Decision notice**

**Date:** 27 August 2014

**Public Authority:** Nursing and Midwifery Council  
**Address:** 23 Portland Place  
Marylebone  
London  
W1B 1PZ

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

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1. The complainant has requested evidence and witness statements relating to the fitness to practise hearing involving two named nurses. The Nursing and Midwifery Council (NMC) refused to confirm or deny whether it held the requested information, relying on section 40(5) – personal data, as its basis for doing so.
2. The Commissioner's decision is that section 40(5) applies and therefore the NMC is not obliged to confirm or deny whether the information is held.
3. The Commissioner does not require the public authority to take any further action to ensure compliance with the legislation.

#### **Request and response**

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4. The complainant had raised concerns over the fitness to practise of two named nurses. After considering the issues raised, the NMC wrote to the complainant on 8 January 2014 informing him what action it intended to take over the matter. The NMC advised the complainant that it considered the nurses had no case to answer.
5. On 12 January 2014, the complainant responded to the NMC's letter. He referred to the NMC's findings and stated that,

"... I need to see all the information which made up the process. Specifically you make reference to evidence which I am not clear I have seen including that of other witnesses."

6. The NMC responded on 20 February 2014. It refused to confirm or deny whether it held the requested information under section 40(5)(b)(i) on the basis that to confirm the information was held would itself disclose personal data in breach of the Data Protection Act 2014.
7. Following an internal review the NMC wrote to the complainant on 7 March 2014. It maintained its application of section 40(5)(b)(i)

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular he was concerned that there was a strong public interest in disclosing the information because the concerns he had raised related to the implementation of child protection measures.
9. This decision notice will only address the complainant's rights of access under the FOIA. The issue to be decided is whether the NMC was correct to refuse to confirm or whether it holds the information under section 40(5).

### **Reasons for decision**

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#### **Section 40(5)(b)(i)**

10. Under section 1 of FOIA a public authority is obliged to tell someone who has made a request for information whether that information is held. However section 40(5)(b)(i) of FOIA removes that obligation if either confirming or denying the information is held would disclose personal data relating to a third party in breach of the data protection principles contained in the Data Protection Act 1998 (DPA).
11. The NMC has argued that if it had to confirm the information was held there would be a breach of the first data protection principle.
12. The complainant has personal knowledge of whether the information is held because he made the complaint to the NMC about the nurses and was involved in the matters to which that complaint relates. However when considering the NMC's response under FOIA the Commissioner must ignore this fact. As a disclosure under FOIA is considered to be a disclosure to the world at large the Commissioner must treat the request

as if it had been made by a member of the general public, who lacked any personal knowledge of the events in question. Therefore the Commissioner must consider whether either confirming or denying that the information is held would itself breach the first data protection principle.

13. The first issue to determine is whether the requested information constitutes personal data. Personal data is information which both relates to an individual and identifies them. As the request itself identified two individuals the question is whether confirming the information is held would tell the recipient, something about those individuals.
14. For the NMC to confirm that it holds information relating to a complaint about someone would in effect confirm the existence of a complaint against that person. This would be a disclosure of personal data.
15. The next question is whether disclosing that personal data would breach the first data protection principle. The first principle states that the processing of personal data shall be fair and lawful and shall only take place if one of the conditions set out in schedule 2 of 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. This is not always straightforward. The Commissioner will look at what the consequences to the two named nurses would be if the NMC had to reveal they were the subject of a complaint which had been investigated by them. He will also look at the expectations of the individuals concerned and the legitimate interest in the public having access to the information, balanced against the rights of the two nurses.
17. It would be inappropriate to discuss in detail the circumstances that gave rise to the complaint to which the request relates in the public version of this decision notice. The explanation of the Commissioner's decision is contained in the main body of this notice will therefore be brief. A confidential annex has been produced which will only be made available to the complainant and the public authority.
18. Before providing any further explanation either in the main notice or its confidential annex, it will be helpful to set out the Commissioner's understanding of the NMC's complaint procedures. The NMC's role is to protect the health and wellbeing of the public by regulating nursing professionals and midwives in England, Wales, Scotland and Northern Ireland. As well as producing codes of practice it investigates complaints about nursing staff. When a complaint is received there is an initial screening to determine whether the matter should be referred for

further investigation. Any further investigation is carried out by NMC staff who produce a report, complete with recommendations, which then goes to its Investigating Committee. It is for the Investigating Committee to decide whether the nurse in question has a case to answer. Whether there is a case to answer depends on two things; whether the alleged events did occur and, if so, whether based on those facts and all the other circumstances of the case there is a reasonable prospect that the NMC would find that the nurse's fitness to practise was impaired. The Commissioner understands that this is a rigorous process which can involve obtaining further witness statements.

19. It is only if the Investigating Committee finds that there is a case to answer that the details of the complaint are made public by being published on the NMC's website. Up to that point the process is confidential between the parties involved. If the Investigating Committee decides there is a case to answer, the matter is referred to either the Conduct and Competence Committee or the Health Committee. These committees hear cases in public and decide what sanctions are appropriate.
20. In this case the complainant's complaint did not result in a referral to either of the Conduct and Competence Committee or the Health Committee. Therefore neither the details of the complaint, or the identity of the nurses involved, have ever been made public. The logical conclusion is that, supposing the complaint was considered by the Investigating Committee, it decided that, in respect of both nurses, there was no case to answer.
21. At the time of the request there was nothing in the public domain which questioned the nurses' fitness to practise. Certainly, and very importantly, there was no official recognition of any question over their fitness to practise. The Commissioner is therefore satisfied that if the NMC had to confirm it had received a complaint against the two nurses this would amount to official confirmation that a complaint had been made. Regardless of the outcome of any complaint the Commissioner finds that such a confirmation would be detrimental to the professional reputation of the nurses. Even though they could point to the fact that they had never been the subject of a hearing before a panel of the Conduct and Competence, or Health Committee, it is still possible that members of the public would infer they had been responsible for some form of misconduct.
22. The potential reputational damage of confirming a complaint had been made against them would help shape the nurses' expectations that the complaint would be treated confidentially. This is strengthened by the general expectation that disciplinary issues will remain private.

23. Nevertheless the nurses would have understood that as they were subject to regulation by the NMC there were circumstances in which information about their performance and fitness to practise could be made public. However the procedures for dealing with any complaints are set out on the NMC's website. The NMC has argued that that if a complaint had been received and it was either rejected in the initial screening stage, or it had been decided, in private, by the Investigating Committee that there was no case to answer, the nurses would reasonably expect the existence of the complaint to remain confidential.
24. Finally it is necessary to consider the legitimate interests of those to whom the information would be released, which the Commissioner regards to be the public at large. Those interests then have to be balanced against the rights and freedoms of each nurse. There is very little that the Commissioner is prepared to discuss in the open version of this notice in respect of this test. It does however involve consideration of the nature of the complaint, the potential consequences of the alleged failings and right of the individual nurses to continue with their professional careers. This is in light of the fact that the complaints never progressed to a formal public hearing in front of a panel of the Competence and Conduct or Health Committee.
25. The Commissioner has considered very carefully the nature of the allegations. The Commissioner has also had regard for the fact that the complaints against the two nurses have been considered by the appropriate regulator, the NMC, which found no cause to refer the matter to a public hearing. The Commissioner has no grounds for finding that the NMC's decisions in respect of the complaints are unsound. He therefore finds that despite the serious nature of the allegations the nurses have a right to remain dis-associated from them, in public at least. The reasons for this finding are explained in more detail in the confidential annex.
26. The Commissioner is satisfied that there would be some detrimental impact on the nurses if the NMC had to confirm, in effect to the public, that they had been the subject of a complaint to their regulatory body. Furthermore the Commissioner finds that the nurses would not reasonably expect the NMC to acknowledge that they had been the subject of such complaints given that any such complaints never progressed to a public hearing. Finally the Commissioner is satisfied that the rights of the nurses not to be tarnished by association with the allegations overrides the legitimate interest in the public knowing whether complaints against them had been considered by the NMC.
27. The Commissioner finds that for the NMC to reveal to the world that it had received a complaint about the two named nurses would constitute an unfair disclosure of personal data. The Commissioner is satisfied that

the NMC were therefore entitled to refuse to confirm whether it had received such a complaint, relying on section 40(5)(b)(i) to do so.

## **Other Matters**

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28. The Commissioner has included a section on 'Other matters' in the confidential annex.

## Right of appeal

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29. 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)

30. 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.
31. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**