

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 November 2015

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

Decision (including any steps ordered)

1. The complainant has requested two reports. Under section 40(5)(b)(i) of the FOIA the Nursing and Midwifery Council (NMC) neither confirms nor denies that it holds this information, which it says would be the personal data of third persons.
2. The Commissioner's decision is that the NMC is correct to neither confirm nor deny that it holds the requested information, and that the exemption under section 40(5)(b)(i) is engaged.
3. The Commissioner does not require the NMC to take any steps.

Request and response

4. The complainant submitted a complaint to the Nursing and Midwifery Council about the treatment her mother had received from two nurses whilst in the Mater Hospital, Belfast. An Investigating Committee considered both nurses' referral and directed that, in both cases, there was no case to answer.
5. On 27 March, the complainant wrote to the NMC and requested information in the following terms:

"I would therefore be obliged if you could forward me the full report, as how the decision was reached and any documentation submitted by [Nurse 1] and [Nurse 2] regarding this under the Freedom of Information Act."

6. The NMC responded on 29 April. It refused to confirm or deny that it held the requested information under section 40(5)(b)(i) of the FOIA.
7. Following an internal review the NMC wrote to the complainant on 6 July. It maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 3 August to complain about the way her request for information had been handled.
9. The Commissioner has focussed his investigation on whether the NMC is correct not to confirm or deny it holds the information that has been requested, under section 40(5)(b)(i) of the FOIA.

Reasons for decision

10. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the Act to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
11. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
12. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
13. There may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. If to do so would contravene data protection principles, for

example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

14. The NMC says that 40(5)(b)(i) applies in this case, namely that confirming or denying information is held would contravene one of the data protection principles. Specifically it would contravene the first principle which says that personal data should be processed fairly and lawfully.

If held, would the information be personal data?

15. The Commissioner has first considered whether the requested information would be the personal data of third persons.
16. The Data Protection Act categorises personal data as data that relates to a living individual from which that individual can be identified. The NMC has told him that, if held, the information would relate to two, living and identifiable individuals. The Commissioner has considered this and the wording of the request and is satisfied that the requested information would be personal data. If held, it would tell the public something about those individuals, namely whether in their professional roles, they have been involved in any investigation or complaint.

Would confirming or denying the information is held breach any of the data protection principles?

17. The NMC has said that the condition under subsection 40(5)(b)(i) applies, namely that confirming or denying it holds the information would contravene the first data protection principle – that personal data should be processed fairly and lawfully.
18. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
19. The NMC says that confirming or denying whether the information is held would communicate whether or not a complaint has been made about the competency or conduct of an individual registrant (nurse or midwife). It says that registrants would have a reasonable expectation that if a fitness to practice complaint is made about them, information concerning such a complaint would not be published, unless it had reached a stage at which it would normally be expected to be disclosed to the wider public.
20. The NMC has told the Commissioner that when an Investigating Committee in private concludes that there is no case to answer then the named registrants may reasonably expect that the matter will continue to remain confidential. It says that if it confirmed or denied the identity

of named registrants in such cases, or whether a complaint had been made against them, it would be in breach of the Data Protection Act.

21. The NMC argues that, in the above circumstances, to disclose whether or not a complaint has been made against a named registrant would cause damage to their professional reputation and personal distress.
22. Releasing information under the FOIA is effectively releasing it to the world at large. In previous, similar decisions – such as FS50565027 - the Commissioner has said that he considers that individuals who are subject to internal investigation are generally entitled to expect that their personal information would not be disclosed into the public domain. Otherwise, public authorities as employers would find it more difficult to encourage staff to engage with disciplinary procedures.
23. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard. As discussed above, the NMC has confirmed that, if an investigation did take place, any relevant information would have been treated confidentially.
24. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
25. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
26. The Commissioner accepts the NMC's argument that registrants would expect their personal data to be treated fairly. It would be reasonable for them to have an expectation of confidentiality that would extend to the NMC refusing to confirm or deny whether any reports relating to an Investigation Committee are held. The Commissioner is also prepared to accept that a registrant would be likely to feel a degree of distress if the NMC confirmed whether or not it held information of the type that has been requested in this case. He is therefore satisfied that the NMC is correct to apply to the request the absolute exemption at section 40(5)(b)(i). Confirming or denying whether the NMC held the requested information would not be fair and would contravene one of the data protection principles.

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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Pamela Clements
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Wycliffe House
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SK9 5AF