

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 July 2021

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

#### Decision (including any steps ordered)

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1. The complainant has requested from the Nursing and Midwifery Council ("the NMC") information that had previously been redacted which was contained within an investigation report about the conduct of a nurse. The redacted information specifically relates to linked cases and/or previous referrals relating to the same nurse.
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 40(2) of the FOIA.
3. The Commissioner does not require the NMC to take any steps as a result of this decision notice.

#### Request and response

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4. On 2 June 2020, the complainant wrote to the NMC and requested information in the following terms:

*"...I note that the information against the heading "Linked cases/previous referrals within last 3 years" has been redacted. Please tell me what is being hidden under the redaction. As the husband of the deceased, I suggest this is in my interest and in my continuing pursuit of this matter cannot be kept from me under the guise of the Freedom of Information Act."*

5. On 5 October 2020, the complainant contacted the NMC as they had not received a response to their request.
6. The NMC responded on 4 November 2020. It advised the complainant that it had handled the request as a Subject Access Request ("SAR") for the complainant's own personal data. However, the NMC explained that the requested information was third party personal data and that disclosure would be a breach of the General Data Protection Regulation 2018 ("GDPR").
7. Following an internal review the NMC wrote to the complainant on 18 December 2020. It upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 6 January 2021 to complain about the way their request for information had been handled. The complainant explained that they have received a report regarding the nurse on duty at the time their wife died, and that this report relates to an investigation into their wife's death. In the investigation report, some information has been redacted. The information that has been redacted falls under the heading "linked cases/previous referrals within the last 3 years". The complainant wants to view the information that has been redacted within that report.
9. In the circumstances of this case, the Commissioner has used her discretion to consider that the NMC should have applied section 40(2) of the FOIA (personal data) to the withheld information. This applies when a request for information relates to any information that constitutes personal data.
10. The scope of this notice is to determine whether the NMC is entitled to withhold the requested information under section 40(2) of the FOIA.

### **Reasons for decision**

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#### **Section 40 - personal information**

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then section 40 of the FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

15. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. In the circumstances of this case, having considered the context of the withheld information, the Commissioner is satisfied that the information will relate to the data subjects. The complainant has been provided with a redacted copy of a report which relates to a named nurse regarding a specific work incident. An identified work incident relating to a named individual is undoubtedly information that both relates to and identifies that individual and other individuals concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

***Would disclosure contravene principle (a)?***

22. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*.

23. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

***Lawful processing: Article 6(1)(f) of the GDPR***

25. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.
26. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*<sup>2</sup>.

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks"*.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of*

27. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
28. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

29. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
30. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
31. As stated above, the Commissioner has used her discretion to apply section 40(2) of the FOIA to the requested information. The NMC has not identified any legitimate interests in disclosure. However, the Commissioner considers that there is a general legitimate interest in medical professionals and their conduct.
32. In this case, it is clear that the complainant is seeking access to the withheld information for a specific reason: to assist with their personal investigation into the surrounding circumstances of their wife's death.
33. The Commissioner considers that there is a limited legitimate interest in disclosure of this information to the world at large.

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*the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

*Is disclosure necessary?*

34. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

36. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
37. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
38. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information would be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as a private individual, and the purpose for which they provided their personal data.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world at large and not just to the requester. It is the equivalent of the NMC publishing the information on its website.

41. The complainant has explained that the information that has been withheld by the NMC is crucial for consideration for the Attorney General's Office, for referral to the High Court. On 18 December 2020, the NMC explained to the complainant that should the Attorney General and the High Court deem it necessary to see the redacted information, the Attorney General and the High Court would submit a disclosure request, and quote their legal basis for disclosure. The NMC would then consider if the information could be disclosed.
42. From the information that has been provided by the complainant, the Commissioner is satisfied that the withheld information is about work-related incident(s), concerning the nurse who is named within the investigation report. In its response to the complainant, the NMC stated that it would not be a reasonable expectation of the individual named that their personal data would be disclosed to the complainant. The NMC stated:

*"it may also be helpful to explain that some of the information (and documentation) held concerning our investigations does not contain any information about you at all. In some instances, the information held entirely makes reference to the care provided to other individuals, or assessments of the midwives' professional conduct. Such information is not your personal data. Given the private and confidential nature of such information, it would not be appropriate to disclose this to you."*
43. Whilst the Commissioner understands the complainant's reasoning for wanting to receive this information, she must consider the impact of disclosure to the world at large, rather than to an interested party. She therefore finds that disclosure could cause unwarranted damage or distress to the named nurse.
44. The Commissioner has not seen any evidence to suggest that the individual involved would have a reasonable expectation that their personal data would be disclosed in response to an information request. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subject as it would reveal information about these third parties which is not otherwise in the public domain.
45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
47. The Commissioner has therefore decided that the NMC was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

### **Other matters**

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48. The Commissioner reminds the NMC to ensure it is using the correct legislation when a request for information is made. In this case, the complainant has made a request for information regarding a report, not for their own personal data, and therefore FOIA was the appropriate access regime.



## Right of appeal

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49. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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 .....**

**Sarah Clouston**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**