

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 24 November 2008

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

### Summary

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The complainant requested information which, if held, would have included statements that had been provided by named nurses to the Nursing and Midwifery Council (the "NMC") during its investigation of fitness to practise complaints. The public authority responded in accordance with the provision of section 1(1)(a) (it confirmed or denied it held the information requested). After considering the case, the Commissioner's decision is that the public authority was excluded from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i) because, in responding to the request, it had to disclose information which constitutes personal data of the named nurses. The Commissioner does not require the public authority to take any steps in relation to the complainant's request.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.
2. In considering the case, the Commissioner also took into account his dual role as the regulator of the Data Protection Act 1998 (the "DPA"). Therefore, the approach he had adopted, as well as his findings in this case, reflects his remit under both pieces of legislation.

### The Request

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3. On 18 March 2007, the complainant wrote to the NMC and made a request for information which, the Commissioner considers, included within its scope,

statements submitted by [named nurses] to the public authority, in its role as the body corporate responsible for nurses and midwives in the United Kingdom.

By 30 April 2007 the complainant had not received a response and so made her request again, this time to the NMC's Chief Executive.

4. The NMC responded on 29 May 2007 in accordance with the provisions of section 1(1)(a) of the Act; namely it confirmed or denied whether it held the information requested. This Notice does not detail the public authority's exact position under section 1(1)(a) due to the Commissioner's decision in this case. This will be explained further below.
5. On 20 June 2007 the complainant wrote back to the NMC and requested an internal review into its handling of the request for information.
6. The NMC responded on 3 July 2007. It confirmed the position as set out in its letter of 29 May 2007.

## **The Investigation**

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### **Scope of the case**

7. On 9 July 2007 the complainant contacted the Commissioner to complain about the way her request for information had been handled.

The complainant also raised other issues, over the course of her correspondence with the Commissioner, that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

8. On 23 July 2008 the Commissioner wrote to the public authority and asked it to make submissions in relation to the complaint he had received.
9. The NMC responded on 26 August 2008. The Commissioner wrote two additional letters to the NMC in response to its submissions of 23 July 2008.

## **Analysis**

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### **Procedural matters**

#### **Time for compliance**

10. The Commissioner has considered whether the public authority has complied with section 10(1) of the Act.

11. Section 10(1) provides that –  
“... a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”
12. The complainant made her request for information on 18 March 2007. She received a response on 29 May 2007. This is outside the twenty working day period for compliance. The NMC has therefore breached section 10(1) of the Act by failing to respond in time.

## **Exemption**

### **Section 40(5)(b)(i) (Exclusion from the duty to confirm or deny)**

13. Taking into account the nature of the request and the effect disclosure would have in this case the Commissioner has considered whether the public authority would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
14. From the outset, it is important to point out that the Act is applicant blind, except in very limited circumstances, none of which are applicable in this case. This means that a disclosure made under the Act is in effect a disclosure to the world at large, as any other applicant would be entitled to that same information upon request.
15. Generally, the provisions of sections 40(1) to 40(4) exempt ‘personal data’ from disclosure under the Act. In relation to a request which constitutes the personal data of an individual other than the applicant, section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemptions in section 33A(1) of that Act were disregarded.
16. The nature of the request meant that the public authority’s response in accordance with the duty under section 1(1)(a) inevitably disclosed whether or not complaints had been made against the named nurses.
17. The Commissioner is of the general view 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.
18. ‘Personal data’ is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
19. At the time the request was made the Commissioner is satisfied that [named nurses] were alive and at the time of drafting this Notice, there is nothing to suggest that this is no longer the case.

20. Whether or not complaints were made against [named nurses] is clearly the personal data of the nurses as it relates to identifiable living individuals. The Commissioner would like to clarify that the complainant's request was not to know whether or not complaints had been made against [named nurses]. Rather, it is the fact that responding to such a request would reveal this information which has prompted the Commissioner to consider this case in the manner that he has.
21. In light of the above findings, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
22. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether complaints had been made against [named nurses] in the context of the request for the statements the nurses may have provided to the public authority would contravene any of the data protection principles.

**Would complying with section 1(1)(a) contravene the first data protection principle?**

23. The first data protection principle states:

“personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met...”
24. The Commissioner considers the most applicable condition for processing in this case is likely to be Schedule 2(6)(1), which states:

“the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”
25. In considering whether or not confirming or denying complaints had been made against [named nurses] would contravene the first data protection principle, the Commissioner took into account the reasonable expectations of [named nurses], the legitimate interests of the public and the rights and freedoms of the named nurses.
26. Without disclosing more detail than is necessary, in order not to defeat the intention of section 40, the Commissioner is satisfied that in the context and background in which any statements would have been submitted, [named nurses] would have had a reasonable expectation of privacy and would not have expected the public to have access to information which discloses whether or not a complaint had been made about them.
27. The Commissioner considers that the public has a legitimate interest in knowing that individuals providing healthcare services are fit and proper to do so. For instance where an allegation about a healthcare professional's fitness to practise

- has been proven to be founded via a complaints investigation process, and all available appeal rights have been exhausted, then the public has a legitimate interest in knowing that such an allegation was made, as well as the details of the allegation and the actions taken as a result by the relevant public bodies. Therefore, there could be a legitimate interest in knowing whether or not an individual was the subject of a complaint to the extent that it confirms that there have been legitimate and proven concerns about their fitness to practise.
28. The Commissioner is however aware that it is inherent in the nature of their roles for healthcare professionals to be the subject of complaints, whether these complaints are founded or unfounded. The public interest however is in knowing they are competent enough in their roles and meet all the expected standards. In the Commissioner's view therefore this interest is not satisfied by merely knowing individuals' complaints histories, rather it is the existing mechanisms in place to ensure standards are maintained that satisfy the public's legitimate interest.
  29. It is the NMC's role, as well as that of NHS Trusts and other relevant establishments, to ensure that nurses and midwives always maintain the required fitness to practise standards. Generally, the public interest in ensuring these standards are maintained is satisfied by the roles carried out by these bodies rather than by knowing individuals' complaints histories. Specifically in this case, the legitimate interest of the public would not be satisfied by responding to a request for information in a manner which would reveal whether or not [named nurses] had been the subject of a complaint. The disclosure is therefore not necessary for the purposes of legitimate interests pursued by the public.
  30. Further, the Commissioner is satisfied that disclosing whether or not [named nurses] were the subject of complaints would be unwarranted by reason of prejudice to the rights, freedoms and legitimate interests of the nurses in question.
  31. The Commissioner is therefore satisfied that any response provided in this regard, in line with the provision of section 1(1)(a) would contravene the fairness element of the first data protection principle.
  32. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he has not gone on to consider the other data protection principles.
  33. He therefore finds that the public authority was not obliged to respond to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i). The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved, the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to Article 8 of the Human Rights Act. The Commissioner may be in breach of his obligations under the Human Rights Act if he ordered public authorities to confirm or deny whether information was held under section 1(1)(a), or to disclose information under section 1(1)(b), without having considered these rights, even if the public authority has not cited the exemption.

## The Decision

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34. The Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained within section 40(5)(b)(i).

## Steps Required

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35. The Commissioner requires no steps to be taken.

## Right of Appeal

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36. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 24th day of November 2008**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### General Right of Access

#### Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

#### Section 1(2) provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

#### Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

#### Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

#### Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”



**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

**Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and

- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

## **Personal information**

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

“In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act."

## **The Data Protection Act 1998**

### **Schedule 1 – the Data Protection Principles**

1. "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
  - (a) at least one of the conditions in Schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met."