

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 July 2013

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

Decision (including any steps ordered)

1. The complainants have requested information from the Nursing and Midwifery Council ("the NMC") which, if held, would have included details as to the identity of witnesses who provided information to the NMC during its investigation of a fitness to practice complaint and a copy of all case material. 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 decision is made as to whether an investigation should be conducted. 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, issuing a warning or referring the case to a Fitness to Practice ("FTP") Panel. Any hearing or decisions in relation to the FTP panel are usually in the public domain.
4. The complainants' information request is linked to a fitness to practice complaint they originally made in October 2010 regarding the conduct of a named nurse. They allege she failed in her duty of care towards their son resulting in his death in 2007.

5. The complainants believe that the information provided to the Investigating Committee Panel was inaccurate and led to the decision of no case to answer in relation to their complaint. This led to the FOIA request to check the accuracy of the information that had been provided and upon which the NMC Investigating Committee Panel had based its analysis of the complaint.

Request and Response

6. On 8 December 2012 the complainants requested information of the following description:

"Please can you forward to us the names of the [Number redacted] witnesses interviewed at the Investigating Committee hearing which took place on [Date redacted]".

"Also we would appreciate a copy of all the case material which we have not received as yet."

7. On 14 December 2012 the NMC responded and stated it would provide a response to the request by 15 January 2013.
8. On 11 January 2013 the NMC provided a response to the matters raised. It stated that it would be relying upon section 40 (5)(b)(i) of the FOIA and would neither be 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).
9. On 18 January 2013 the complainants requested an internal review as they were not satisfied with the response received.
10. On 24 January 2013 the NMC acknowledged receipt of the request for an internal review.
11. On 13 February 2013 the NMC provided its response and stated it was relying upon section 40(5)(b)(i) of the FOIA to refuse to confirm or deny whether the requested information is held.

Scope of the case

12. The complainants contacted the Commissioner on 25 March 2013 to complain about the way the request for information had been handled. Therefore the scope of this case has been 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 is held.

Reasons for decision

13. 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.
14. In this case the request is for information which, if held, would have included details as to the identity of named nurses who provided information to the NMC during its investigation of a fitness to practice complaint about a specific nurse and a copy of all case material produced to an Investigating Committee Panel (in relation to the same complaint).
15. 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.
16. In this matter the Commissioner is satisfied that the requested information, being the identity of identifiable living individuals and information in relation to an investigation into a fitness to practice complaint, would be personal data if it were held.
17. 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.
18. 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.
19. 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. The Commissioner has first considered whether it would be fair to confirm or deny whether the requested information is held.

20. 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.
21. 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.
22. Given the NMC's procedures the Commissioner is satisfied that the reasonable expectation of an individual would be that if a complaint had been considered and not proceeded with 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.
23. 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.
24. 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.
25. 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 principle.

26. 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.
27. 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.¹
28. 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.

¹ ICO decision notices FS50276047, FS50169734, FS50474386

Right of appeal

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

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

Rachael Cragg
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