

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

### **Decision notice**

**Date:** 8 July 2015

**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 information relating to a complaint about a registrant. The Nursing and Midwifery Council (NMC) refused to confirm or deny whether 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 or deny whether the requested information was held under section 40(5) FOIA.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 30 March 2015 the complainant requested information of the following description:  
  
"...the registrant's response to the NMC during the investigations..." (You provided the name of a registrant and the case reference number of the NMC's Fitness to Practise case that involved you.)
5. On 6 May 2015 the NMC responded. It refused to confirm or deny whether it held the requested information under section 40(5)(b)(i) FOIA.
6. The complainant requested an internal review on 6 May 2015. The NMC sent the outcome of its internal review on 8 May 2015. It upheld its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 11 May 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the NMC was correct to neither confirm or deny whether the requested information is held under section 40(5) FOIA.

## Reasons for decision

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9. Section 40(2) of FOIA provides an exemption for information that constitutes the personal data of third parties:

*"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)(a)(i) of the Act states 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),"*

10. 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-*

- ii. the 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 the 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)."

11. The NMC explained that it is satisfied that the information requested relates to an identifiable individual. It said that even confirming or denying whether or not the requested information is held would reveal whether or not a complaint had been made about the individual in question in a professional capacity.
12. The NMC went on to argue that it is a reasonable expectation of a data subject, such as the data subject in this case, that if a complaint is made against them, the information would not be published with respect to a fitness to practice complaint, unless it has reached a stage at which it would normally be disclosed into the public domain. That is unless and until a matter is referred for adjudication in public.
13. It therefore said that it would be unfair for the NMC to confirm or deny whether or not a complaint was made. It said such a confirmation or denial could cause damage to the data subject's professional reputation and could cause distress to the individual.
14. The Commissioner appreciates that there is a general public interest in accountability and transparency, and the public is entitled to be informed as to how the NMC operates. On the other hand the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.
15. The Commissioner's guidance on requests for personal data of public authority employees suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.
16. However the Commissioner recognises that information relating to personnel matters such as discipline will often be inherently "private" in nature. Issues may be relatively innocuous but will still be personal to

the individuals involved, whether they are under investigation or providing information as witnesses. In the Commissioner's opinion there is a much weaker public interest in confirming or denying that this kind of information is held.

17. The Commissioner must be careful not to confirm or deny that the requested information is held, but he can confirm that he is satisfied that there is no overriding public interest in this case that outweighs the fact that confirming or denying that the requested information is held would be likely to cause unwarranted distress to the individual(s) concerned.
18. In conclusion, the Commissioner finds that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the NMC was entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA.

## Right of appeal

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19. 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)

20. 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.
21. 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**