

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2018

Public Authority: Nursing and Midwifery Council

Address: 23 Portland Place
London
W1B 1PZ

Decision (including any steps ordered)

1. The complainant has requested copies of information exchanged in correspondence between the Nursing and Midwifery Council (NMC) and two nursing homes about which he had submitted a complaint. The NMC stated that the information, if held, would engage either section 40 or 42 of the FOIA.
2. The Commissioner's decision is that the NMC has incorrectly applied section 40(2) of the FOIA to the request. However, the Commissioner has decided that under section 40(5)(b)(i) of the FOIA, the NMC is not obliged to confirm or deny that it holds the requested information as to do so would release the personal data of third party individuals.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The complainant is unhappy with the care his late father received by ten nurses from two nursing homes. The complainant referred these ten nurses to the NMC. However, each of these cases were 'closed at the screening' stage of the NMC's fitness to practice (FtP) process.
5. The NMC has provided the Commissioner with the following information on how it deals with such complaints:

"Information about NMC screening process:

The NMC screening team deal with all initial enquiries, referrals and complaints about nurses and midwives. They will check that the person

referred is on our register and that the nature of the referral is definitely something that NMC should be involved with.

Once the screening team is satisfied that there are grounds for a case, they will pass details onto our investigations team, who prepare the case for presentation to the case examiners.

There are some cases (such as [the complainant's] cases), where the concerns raised do not on their own appear to justify investigation. In these cases we write to the nurse or midwife's employers, show them the referral and ask for details of any local investigations that they have undertaken. We also ask employers to confirm that they have no concerns about the nurse or midwife that might require our action. We make these initial enquiries to find out if there are any wider concerns we should be aware of.

The fact that a nurse or midwife is under investigation is generally treated as confidential information unless and until our Case Examiners decide there is a case to answer. We do not disclose details of any concerns involved to any enquirers (apart from current or prospective employers, or those bodies with whom we share safeguarding information) until the charges have been confirmed to the panel on the day of the hearing.

During the investigation we will frequently seek information from the nurse or midwife's past or current employers. We are required to take such steps as are reasonably practicable to obtain as much information as possible about the case. Where this would involve disclosure to a new employer who may previously have been unaware of the allegations, we would consider the nurse or midwife's interest in the confidentiality of the referral against the public interest in contacting the employer and disclosing the fact that a referral has been made".

Request and response

6. On 4 November 2016, the complainant wrote to the NMC and requested information in the following terms:

*"1. All information exchanged, between the nursing and midwifery council, and both care, and nursing homes?
2. Responses from both care, nursing homes, to your questions?
3. A copy of the questions that you sent to the care, nursing homes?
4. All information that was processed by the legal department"*

7. The NMC responded on 5 December 2016 refusing to provide the requested information citing sections 40(2) with regards to questions 1,

3 and 4, section 41 with regards all 4 parts of the request, and section 42 with regards to question 2 of the request as its basis for doing so.

8. The complainant requested an internal review on 28 December 2016. The NMC sent the outcome of its internal review on 13 January 2017 maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 19 January 2017 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation, the NMC clarified that section 40(2) and section 42 of the FOIA remained engaged.
11. The Commissioner considers the scope of this case is to determine whether it is a request for third party personal data and whether section 40(2) or section 40(5) applies to the request. If any of the withheld information is not considered to be third party personal data, the Commissioner will also consider whether any of the requested information can be withheld under section 42 of the FOIA.

Reasons for decision

Section 40 – personal data

12. Section 1 of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities:
 - a) the duty to inform the applicant whether or not requested information is held and, if so
 - b) the duty to communicate the information to the applicant.
13. Section 40(2) of the FOIA, which the NMC applied to the request, says that information is exempt from release if it is the personal data of a third party (i.e. someone other than the applicant) and if one of the conditions under section 40(3) or section 40(4) are met.
14. In the Commissioner's view, the NMC should have applied section 40(5)(b)(i) to the request. Section 40(5)(b)(i) says that a public authority is not obliged to confirm or deny that it holds information if, by confirming or denying it is held, the authority would breach one of the data protection principles.

15. This subsection is about the consequences of confirming or denying whether information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles, but whether the simple action of confirming or denying that it is held would do so.
16. The Commissioner's guidance on section 40(5) explains that there may be circumstances, for example for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information about an individual can itself reveal something about that individual. To either confirm or deny that information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. In this case, appearing to confirm that the requested information is held indicates whether in their professional roles, the nurses have been involved in any investigation or complaint.
17. For section 40(5)(b)(i) to apply to a request the following conditions must be met:
 - confirming or denying whether information is held would reveal the personal data of a third person; and
 - confirming or denying whether information is held would contravene one of the data protection principles.
18. The Commissioner has first considered whether confirming or denying relevant information is held would reveal the personal data of a third person as defined by the Data Protection Act (DPA).

Is the information personal data?

19. The DPA says that for data to constitute personal data, it must relate to a living individual and that individual must be identifiable from it.
20. The requested information in this case, if held, would appear to relate to living individuals and, if held, is likely to refer to the individuals concerned by name. The individuals concerned could therefore be identified from it. The Commissioner is satisfied that, if held, the requested information would be the third party individuals' personal data. She has gone on to consider section 40(3) in the first instance, which concerns release of personal data and the DPA.

Would confirming or denying the information is held contravene one of the data protection principles?

21. Section 40(3)(a) says that personal data is exempt from release if disclosing it would contravene any of the data protection principles, or would cause damage or distress and so breach section 10 of the DPA.
22. The Commissioner has considered whether confirming or denying the requested information is held would breach the first data protection principle, which states –
 - Personal data must be processed fairly and lawfully; and
 - Personal data shall not be processed unless at least one of the conditions in the DPA schedule 2 is met.
23. When assessing whether confirming or denying information is held would be unfair, and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to their personal or professional life, whether the individual has consented to the authority confirming or denying the information is held, and their reasonable expectations about what will happen to their personal data.
24. 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 explained in paragraph 5 of this decision notice, the NMC has confirmed that, if an investigation did take place, any relevant information would have been treated confidentially.
25. 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.
26. The FOIA is applicant and motive '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.
27. If held, the information concerns living individuals' professional role and as explained in paragraph 5 of this decision notice, the NMC has confirmed that, if an investigation did take place, any relevant information would have been treated confidentially. Consequently, the Commissioner considers that the individuals in this case would have a reasonable expectation that their personal data would not be released to

the world at large under the FOIA, through the NMC confirming or denying that the requested information is held.

28. The Commissioner therefore considers that confirming or denying the requested information is held would be unfair to the individuals concerned; that is the nurses. The nurses would reasonably expect that their personal data – whether his or her employers has been in touch with the NMC about their professional roles – would not be released to the world at large and the potential reputational damage of confirmation or denial were given.
29. In this case, the NMC has not applied section 40 to question 3 of the request. However, the Commissioner considers that, if held, the questions that the NMC sent to the nursing homes would be personal data as it is likely that they would refer to the individuals concerned.
30. Despite the factors above, an authority may confirm or deny information is held if there is compelling public interest in doing so that would outweigh the legitimate interests of the data subject (the nurses in this case).

Balancing the individual's rights and freedoms against the legitimate interest in confirming or denying information is held

31. Given his background to the request, and his concerns, the Commissioner recognises that the information in question is of interest to the complainant. However, the complainant has not provided evidence for confirmation or denial that the information is held that is so compelling that it overrides the data subjects' legitimate rights and freedoms.
32. The Commissioner has noted that, by applying section 40(2) to the request, the NMC appeared to confirm that it holds related information. The Commissioner is satisfied that, under section 40(5)(b)(i) of the FOIA, the NMC was not obliged to confirm or deny that it holds the information the complainant has requested. Doing so would release the personal data of third party individuals, which would be unfair and a breach of the first data protection principle.
33. The Commissioner has not considered the applicability of section 42 of the FOIA in view of her decision that the public authority was entitled to rely on section 40(5).

Right of appeal

34. 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

35. 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.
36. 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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