

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

### **Decision notice**

**Date:** 15 December 2014

**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 nurse. 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 nor 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. In August 2014 the complainant made the following request for information under the FOIA for:

"I request the name of the alleged care co-ordinator and from what source (named) this evidence was received by the NMC.

A copy of the allegation served on the registrant.

A copy of the written response to those allegations.

Details as to the period the IC termed 'at the material time'.

Detail as to the date of the event the IC described as 'an isolated event'."

5. On 4 September 2014 the NMC responded. It refused to confirm or deny whether it held the requested information under section 40(5) FOIA.
6. The complainant requested an internal review on 4 September 2014. The NMC sent the outcome of its internal review on 9 September 2014. It upheld its original position.

## Reasons for decision

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7. 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),"*

8. 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)."
9. 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.
10. 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.
11. It said that in the event that an Investigating Committee, held in private, concludes that there is no case to answer, then any individual subject to such a complaint may reasonably expect that the matter will remain confidential. It said that in such cases it would be unfair for the NMC to confirm or deny whether or not a complaint was made about a particular individual. It said such a confirmation or denial could cause damage to the data subject's professional reputation and could cause distress to the individual.
12. The Commissioner is aware that in the Tribunal case EA/2013/0176, the Tribunal found that despite the fact that the complaint in question had not gone to a public hearing as there was found to be no case to answer, because of the strong criticisms of the care team in that case, it would be fair to confirm or deny whether or not the information was held, and therefore whether a complaint had been made to the NMC in that case.
13. The Commissioner accepts that it is not always going to be unfair to disclose the existence of a complaint of misconduct where there has

been no finding of wrongdoing, but given the strong and reasonable expectation where there is no case to answer, there is a need to carefully consider the particular circumstances of the case.

14. Upon considering the withheld information, as well as the Tribunal's comments in EA/2013/0176, the Commissioner is satisfied that in this case section 40(5) FOIA was correctly applied by the NMC.

## Right of appeal

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15. 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: [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)

16. 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.
17. 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**