

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 October 2008

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

Summary

The complainant requested a statement that had been provided by a named nurse to the public authority. The public authority responded in accordance with the provisions of section 1(1)(a) (it confirmed or denied it held the information requested). After considering the case, the Commissioner finds 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) (exclusion from the duty to confirm or deny a public authority holds third party personal data) because in responding to the request, it had to disclose information which constitutes the personal data of the named nurse. The Commissioner does not require the public authority to take any steps in relation to the complainant's request.

The Commissioner's Role

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 this case, the Commissioner also took into account his dual role as the regulator for the Data Protection Act 1998 (DPA). Therefore, the approach he has adopted as well as his findings reflects his remit under both pieces of legislation.

The Request

3. On 25 May 2007, the complainant wrote to the public authority requesting;

a statement submitted by [named nurse] to the public authority (in its role as the body corporate responsible for nurses and midwives in the United Kingdom).

4. On 04 July 2007, the public authority responded in accordance with the provisions of section 1(1)(a) of the Act. In other words, it either confirmed or denied 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.
5. A full text of section 1 is available in the Legal Annex at the end of this Notice.

The Investigation

Scope of the case

6. Dissatisfied with the public authority's final response on 08 October 2007, the complainant wrote to the Commissioner on 15 October 2007 to complain about the way her request for information had been handled.

Chronology

7. On 07 August 2008, the Commissioner invited the complainant to make submissions in relation to the complaint he had received from the complainant.
8. The public authority responded on 01 September 2008. The Commissioner wrote two additional letters to the public authority in response to its submissions of 07 August 2008.

Analysis

Procedural matters

9. A public authority is required under section 10(1) of the Act to comply with the provisions of section 1(1)(a) promptly or within 20 working days. As noted above, the public authority's response was later than 20 working days. However, due to his findings below, the Commissioner does not find the public authority in breach of section 10(1) in this case.
10. A full text of section 10 is available in the Legal Annex at the end of this Notice.

Exemption

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

11. The information was requested in the belief by the complainant (and it is irrelevant whether this was right or wrong) that [named nurse] had been the subject of a complaint. This therefore prompted the Commissioner to initially consider 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).
12. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
13. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data' from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), 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.
14. A full text of section 40 is available in the Legal Annex at the end of this Notice.
15. 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 a complaint had been made against the named nurse.
16. The Commissioner is of the general view that whether or not a complaint was made against a named individual acting in their professional capacity is information which constitutes the personal data of that individual.
17. 'Personal data' as defined under section 1(1) of the DPA is data which relate to a living individual who can be identified from those data or from those 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.
18. A full text of section 1(1) of the DPA is available in the Legal Annex at the end of this Notice.
19. At the time the request was made, the Commissioner is satisfied that [named nurse] was 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 a complaint was made against [named nurse] is clearly the personal data of the nurse as it relates to an identifiable living individual.

21. The Commissioner would like to clarify however that strictly speaking, the complainant's request was not to know whether or not a complaint had been made against [named nurse]. Rather, it is the fact that responding to such a request would reveal this information which prompted him to consider the case in the manner that he has.
22. 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).
23. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether a complaint had been made against [named nurse] in the context of the request for the statement the nurse had 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?

24. The first data protection principle states in part; '*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...*'
25. A full text of the first data protection principle is available in the Legal Annex at the end of this Notice.
26. 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.'
27. In considering whether or not confirming or denying a complaint had been made against [named nurse] would contravene the first data protection principle, the Commissioner took into account the reasonable expectations of [named nurse], the legitimate interests of public, as well as the rights and freedoms of the named nurse.
28. Without disclosing any 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 the statement was submitted, [named nurse] 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 was made against him/her.
29. The Commissioner considers the public has a legitimate interest in knowing that an individual providing a medical service(s) is fit and proper to do so. For instance

where an allegation against a medical professional's fitness to practice 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 actions taken as a result by the relevant public bodies. Therefore, there could be in effect 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.

30. The Commissioner is however aware that it is inherent in the nature of their role for medical professionals to be the subject of complaints (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 their complaints history, rather, it is the existing mechanisms in place to ensure standards are maintained that satisfy the public's legitimate interest.
31. It is the role of the public authority as well as NHS Trusts and other relevant medical establishments to ensure that nurses and midwives always maintain the required fitness to practise standards. Generally speaking therefore, the public interest in ensuring these standards are maintained is satisfied by the role carried out by these bodies rather than by knowing an individual's complaints history. 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 nurse] had been the subject of a complaint. The disclosure is therefore not necessary for the purposes of legitimate interests pursued by the public.
32. From the facts available to him, the Commissioner is satisfied that disclosing whether or not [named nurse] was the subject of a complaint is not necessary for the purposes of legitimate interests pursued by the public and this disclosure would be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the nurse in question.
33. The Commissioner is therefore satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the Act would contravene the fairness element of the first data protection principle.
34. 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.
35. He therefore finds that the public authority was not obliged to have responded 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 duty to consider the rights of data subjects. These rights, set out in the Data Protection Act are closely linked to article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act

if he ordered disclosure of information or confirmation/denial without having considered these rights, even if the public authority has not cited the exemption.

The Decision

36. 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 at section 40(5)(b)(i).

Steps Required

37. The Commissioner requires no steps to be taken.

Other matters

38. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

39. The Commissioner acknowledges that this is a complex case and can comprehend the public authority's failure to correctly apply section 40(5)(b)(i) on this occasion. However in light of the broad interpretation of the definition of personal data, he would encourage the public authority to always initially consider the possibility of the application of section 40(5)(b)(i) when considering its response to a request of this nature in future. This will ensure that it also remains focussed on its responsibilities under the DPA as well as under the Act when responding to the request.

Right of Appeal

19. 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.
Website: 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 15 day of October 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.

Section 1 Data Protection Act 1998

Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

- “data subject” means an individual who is the subject of personal data;
- “personal data” means 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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d) alignment, combination, blocking, erasure or destruction of the information or data;
- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.