

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2012

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

Decision (including any steps ordered)

1. The complainant requested information from the Nursing and Midwifery Council (the NMC) in relation to an investigation into the fitness to practice of a named midwife.
2. The Commissioner's decision is that the NMC breached section 17 of the FOIA by not informing the complainant within the statutory time for compliance of its reliance on section 40(5) of the FOIA, to neither confirm nor deny whether information was held. However, he does not require the NMC to take any further action.

Request and response

3. On 26 July 2011, the complainant wrote to the NMC and requested information in the following terms:
'Please could you provide us with the following documents:-
 1. *The external lawyers report*
 2. *The report of the regulatory legal team*
 3. *Independent expert evidence that was obtained by the external lawyers or by the regulatory legal team.'*
4. The NMC responded on 18 August 2011.
5. Following an internal review the NMC wrote to the complainant on 21 September 2011 in which it upheld its initial decision.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way the request for information had been handled.
7. The scope of the case will be to consider the NMC's application of the FOIA to the request.

Reasons for decision

8. Following the Commissioner's involvement in the case, the NMC informed him that it wished to rely on section 40(5) of the FOIA.
9. Section 40(5) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
 - constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act (DPA).
10. The Information Commissioner's analysis of whether the above criteria would be satisfied follows.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

11. The DPA defines personal information 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, 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."

12. The Commissioner's guidance on the exemption for personal data¹ expands on what constitutes personal data:

¹ The guidance is available online at the following link:
http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx

“The two main elements of personal data are that information must ‘relate to’ a living person, and that person must be identifiable. Information will ‘relate to’ a person if it is:

- about them;
- is linked to them;
- has some biographical significance for them;
- is used to inform decisions affecting them;
- has them as its main focus; or
- impacts on them in any way.”

13. The Commissioner considers that the request is clearly linked to a named individual and the information requested is that person’s personal data as it ‘relates’ to them in that it is within the context of a fitness to practice complaint. The information cannot be disclosed without reference to that individual.

Would disclosure of this personal data breach a data protection principle?

14. In determining whether section 40(5) applies, the Commissioner has considered whether it would breach the first data protection principle to confirm or deny that the information was held.

15. The first data protection principle requires personal data to be processed fairly and lawfully and that:

- at least one of the conditions in Schedule 2 is met; and
- in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

16. Therefore the Commissioner has focused on whether the NMC confirming or denying to the world at large that it held the information in this case would be fair to the named midwife.

17. In establishing whether disclosure is fair, the Commissioner has considered the reasonable expectation of the data subject, the legitimate interests of the public and the rights and freedoms of the named individual.

18. The Commissioner is of the view that in the context of and background of fitness to practice complaints, third parties (ie healthcare practitioners about whom complaints have been made) have a reasonable

expectation of privacy and would not expect the public to have access to information which discloses whether or not a complaint has been made about them.

19. The Commissioner understands that the public has a legitimate interest in knowing that medical professionals are fit to practice. However, he also has to consider the individuals involved and their right to privacy.
20. Whilst it may be true that the release of information could be useful for the public, for example when complaints are upheld, the Commissioner considers it important to make a distinction between the outcome of a complaint where wrongdoing has been found and complaints which are either unfounded, where there has been a finding of no case to answer or where complaints are still under investigation. The existence of a complaint should not be disclosed to the general public whilst it is under investigation or if it has been determined to be unfounded.
21. The Commissioner does not consider that the public's legitimate interest in disclosure in this case outweighs the unfairness to the data subject involved. It is probable that the data subject's working life will already have come under scrutiny and he is not of the view that they should have to suffer this further intrusion.
22. The Commissioner is satisfied that disclosing whether or not a named party was subject to complaints and subsequently investigated, which would be the effect of either confirming or denying, is not necessary for the purposes of the legitimate interests pursued by the public. He believes that such a disclosure would be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the party in question.
23. The Commissioner considers that any response provided in this regard in line with the provisions of section 1(1)(a) of the FOIA would contravene the fairness element of the first data protection principle. Given this he has not gone on to consider the other data protection principles.
24. The Commissioner therefore is of the view that in all the circumstances the NMC was not obliged to have responded to 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).

Procedural requirements

25. Section 17 of the FOIA requires a public authority, which is relying upon any exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1), ie within 20 working days.

26. In this instance the NMC only relied upon the exemption contained within section 40(5) after the Commissioner's involvement and outside of the statutory time for compliance. The NMC therefore breached section 17 of the FOIA.

Other matters

27. The Commissioner is concerned that the NMC did not apply the exemption contained within section 40(5) until the Commissioner began his investigation. He would expect any public authority, regardless of how many requests it deals with, to pay particular attention to requests of this nature and the consequences of either confirming or denying whether information is held where personal data is involved. Specifically, he would highlight that requests under the FOIA are generally considered to be applicant and motive blind and disclosure is to the world at large, not only to the party who made the request.

Right of appeal

28. 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

29. 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.
30. 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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