

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2015

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

Decision (including any steps ordered)

1. The complainant has requested information relating to an individual witness statement.
2. The Commissioner's decision is that the Nursing & Midwifery Council (NMC) was correct to neither confirm nor deny that the information was held under section 40(5)(b)(i).
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 29 August 2014, the complainant wrote to the NMC and requested information in the following terms:
"a copy of the witness statement of [redacted] (case ref: redacted)"
5. The NMC responded on 13 September 2014 and refused to confirm or deny the requested information was held citing section 40(5)(b)(i) of the FOIA as its basis for doing so.
6. Following an internal review the NMC wrote to the complainant on 30 September 2014 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 15 December 2014 to complain about the way her request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the NMC has correctly cited section 40(5)(b)(i) of the FOIA in response to the request.

Reasons for decision

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."

10. 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),"

11. Section 40(5) states 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) 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 that Act were disregarded.

12. The NMC explained that the information requested would, if held, be considered third party personal data.
13. The NMC further stated that even confirming or denying whether the information is held or not, would reveal whether a complaint had been made about a specific individual in a professional capacity and therefore the information would constitute personal data of the individual.
14. It is necessary to first consider whether confirming or denying that the requested information is held would involve the disclosure of personal data. If this test is met then the Commissioner will go on to consider whether this would breach any of the data protection principles.

Would confirming or denying that information is held involve the disclosure of personal data?

15. Section 1(1) of the Data Protection Act 1998 (DPA) defines personal data 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."*

16. The Commissioner understands that the complainant has a personal interest in the request. However the FOIA does not allow the Commissioner to take this into account as a substantive factor when considering whether information should be disclosed.
17. The Commissioner has published guidance on section 40(5) which acknowledges that there may be situations in which it could be argued that giving the confirmation or denial to the requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
18. The FOIA is motive and applicant "blind", and the test is whether the information can be disclosed to the public at large, not just to an individual. Therefore information can only be disclosed under the FOIA if it could be disclosed to any member of the public who requested it.

19. The Commissioner considers it reasonable to assume that, if the NMC did hold information relating to the request it would be likely to be personal data of third parties.
20. The Commissioner must also consider whether any individual could be identified by virtue of the NMC confirming or denying that it holds the requested information. Having taken into account the specific wording of the request, the complainant, clearly knows the identity of specific individuals. Therefore the Commissioner accepts that confirmation as to whether the requested information is held or not would be likely to tell the public something about those individual(s), namely whether they were involved in any investigation or complaint.

Would confirming or denying this personal data is held, breach any of the data protection principles?

21. The NMC argued that confirming or denying whether the information requested is held would breach the data protection principles, in particular, the first data protection principle.

22. Principle 1 of the DPA states:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
(a) at least one of the conditions in Schedule 2 is met "*

23. The NMC went on to explain that it had considered whether it would be fair to confirm or deny that the information requested is held. It took into account the following factors:

- Consequences to the data subject
- The data subjects reasonable expectation of what would happen to their personal data
- The balance between the rights and freedoms of the data subject and the legitimate interests of the public

24. The NMC stated that, in this instance, confirming or denying whether the information is held would communicate whether or not a complaint had been made about the competency or conduct of an individual nurse. It considered that the individual nurse would have a reasonable expectation that details of any complaint made about them would not be made public, unless it had reached a stage at which it would normally be expected to be disclosed.

25. The NMC explained that when an Investigating Committee in private concludes that there is no case to answer, then the named nurse may

reasonably expect that the matter will continue to be confidential. In such cases it would be unfair for the NMC to confirm or deny the identity of the named nurse or whether a complaint had been made against them, and if it did so, the NMC would be in breach of the DPA.

26. The NMC also stated that it recognises that to disclose whether a complaint has been made against a nurse could cause damage to their professional reputation and personal distress.
27. The NMC further explained that a nurse who is the subject of an investigation has a reasonable expectation that the matter would remain confidential, unless and until a case is referred for adjudication in public.
28. The Commissioner considers that individuals who are subject to internal investigation, or who provide information as witnesses, are generally entitled to expect that their personal information would not be disclosed into the public domain. Otherwise, public authorities as employers would find it more difficult to encourage staff to engage with disciplinary procedures, whether as the subject of an investigation or as a witness.
29. 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. The NMC has confirmed that, if an investigation did take place, any relevant information would have been treated confidentially.
30. In light of the above the Commissioner accepts the NMC's argument that any individual named in the request, would have an expectation of confidentiality which would extend to refusing to confirm or deny that any statements were held.
31. The Commissioner also accepts that an individual would be likely to feel distressed if the NMC confirmed whether or not information of the type requested was held.
32. 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.
33. 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.

34. 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.
35. 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.
36. 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

37. 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

38. 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.
39. 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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