

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to nurses proven of misconduct due to misuse of social media from the Nursing and Midwifery Council (the Council).
2. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of FOIA to withhold some of the requested information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 24 May 2021, the complainant made the following request for information to the Council:

"In the 2020 calendar year how many nurses were found proven of misconduct due to the misuse of social media?"

For each case please state (i) the social media that was used, (ii) the punishment that was issued as a result of the case, (iii) a brief summary of the nature of the comments/words context that was posted, who saw it and how a complaint was lodged, (iv) state any discriminatory or insulting words that were used to describe patients.

Please note that I do not want any details about where the incident happened, or any identifying features such as age, sex, qualification of the nurses in question. I have NOT asked for this so as not to breach S.40 of the Act, and in doing so I expect a reasonable amount of detail in part (iii) of your response which can be provided without breaching S.40."

5. The Council confirmed that between 1 January 2020 and 31 December 2020, they had four cases where nurses were found to be proven of misconduct due to the misuse of social media. As the number of cases was very small, they refused to provide the remainder of the requested information citing section 40(2) (personal information) of FOIA as its basis for doing so.
6. Following a request for an internal review, the Council maintained their position and upheld the use of section 40(2) of FOIA on 19 July 2022.

Reasons for decision

Section 40 - personal information

7. This reasoning covers whether the public authority was correct to apply section 40(2) of FOIA to the request.¹
8. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
9. In this case, the Commissioner is satisfied that the withheld information is personal data because there are only four cases where nurses have been proven of misconduct and it would be possible, using other pieces of information, to identify individuals.
10. The Commissioner recognises that small numbers carry a greater risk of identification than larger ones – but that does not mean that every small number identifies any individual. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information already in the public domain that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route

¹ <https://www.legislation.gov.uk/ukpga/2000/36/section/40>

to identification, the information is not personal data, regardless of its sensitivity.

11. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
12. Within their submissions to the Commissioner, the Council asserted that the level of detail being requested for each of the four cases would mean that a motivated intruder could use this information, combined with other information available publicly, to identify the individuals in question.
13. The Council has explained how the individuals could be identified from the withheld information. As the individuals can be identified, the information is personal data.
14. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
15. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary and whether these interests override the rights and freedoms of the individuals whose personal information it is.
16. The Commissioner considers that the complainant is pursuing a legitimate interest but that disclosure of the information through FOIA is not necessary to satisfy it. This is because the legitimate interest of nurse accountability has been met by the existing oversight of professional governing/regulatory bodies and the publication of sanction details.
17. The Commissioner considers that disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation. The Council was therefore correct to apply section 40(2) of FOIA to this request.

Right of appeal

18. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

19. 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.
20. 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

Michael Lea
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