IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0321**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50556757
Dated: 15 December 2014

Appellant:	**Russell Mitchell**
First Respondent:	**Information Commissioner**
Second Respondent:	**Nursing and Midwifery Council**

Heard at: Plymouth

Date of hearing: 7 May 2015

Date of decision: 7 October 2015

Before
CHRIS RYAN
(Judge)
and
SUZANNE COSGRAVE
PIETER DE WAAL

Attendances:

The Appellant appeared in person.
The First Respondent did not appear and was not represented.
For the Second Respondent: Timothy Pitt-Payne QC.

Subject matter: Duty to confirm or deny s.1(1)(a)
Absolute exemptions
- Personal data s.40

Cases: Rodriquez-Noza v Information Commissioner and Nursing and Midwifery Council and Information Commissioner v Colleen Foster and Nursing and Midwifery Council [2015] UKUT 0449 (AAC)

Farrand v the Information Commissioner and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)

Corporate Officer of the House of Commons v Information Commissioner and others [2008] EWHC 1084 (Admin)

MC v (1) The Information Commissioner, (2) The Chief Constable of Greater Manchester Police (2014) UKUT 0481 (AAC)

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2014/0321**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the Decision Notice dated 15 December 2014 is substituted by the following notice:

Substituted Decision Notice
FS50556757

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

Complainant: Mr R Mitchell

For the reasons set out in the Reasons for Decision below the Public Authority is directed to inform the Complainant, within 35 days of the date of this Decision Notice, whether or not it holds the information requested by the Complainant in a request for information dated 28 August 2014, the terms of which request appear in paragraph 4 of the original Decision Notice. If the Public Authority issues a confirmation that the information does exist it should, at the same time, either disclose the requested information to the Complainant or set out its detailed reasons for asserting that disclosure should not be made.

REASONS FOR DECISION

1. We have decided that the Nursing and Midwifery Council ("NMC") was not entitled to issue a "neither confirm nor deny" response to a request for information submitted to it by the Appellant under the Freedom of Information Act 2000 ("FOIA"). The effect of either confirming or denying would be to disclose to the world that the NMC Investigating Committee had investigated the fitness to practise of an individual, but the resulting interference with that individual's right to privacy in respect of that information would not have been unwarranted in the light of public interest factors, identified below, which give rise to a pressing social need for disclosure outweighing the individual's rights.

Background

2. In September 2012 a relative of the Appellant (who we will refer to simply as "A") was found dead in her flat. An inquest into the death was held in July 2013, at the end of which the Coroner issued a narrative verdict in which he concluded that A had neglected herself. He found that she had been malnourished at the time of her death and that, on the balance of probabilities, had not been taking her prescribed medication. A post-mortem examination had concluded that, at the time of her death, A had a potentially fatal concentration of ketoacidosis, which had most likely been the result of a combination of chronic alcohol misuse and starvation.

3. Evidence was given at the Coroner's Inquest to the effect that A had been suffering from schizophrenia for some 20 years, during which time she had been under the care of what is now known as Plymouth Community Healthcare CIC ("PCH"). In 2007 it had been decided by those responsible within PCH for A's care that her current state of health justified downgrading the level of care. From that time A ceased to have the support of a patient care coordinator and the care to be provided was limited to an outpatient appointment with a consultant psychiatrist every 3-4 months.

4. The Appellant and his wife had been concerned at this change in the level of mental health support and in order to address their concerns an individual who we will identify only as "B" (who at the time was a Community Psychiatric Nurse) volunteered to:
    a. attend A's outpatient appointments;
    b. use those opportunities to monitor A's disengagement from social contact (including her reluctance to have contact with members of her family or to consent to them being informed about her condition); and
    c. liaise with the Appellant and his wife, to the extent that patient confidentiality permitted.

5. The Appellant did not feel that the treatment provided to A from that time was adequate, particularly in the last two to three years of her life. In particular he did not think that B had carried out the role she had agreed to take on. He raised his concerns at the Coroner's Inquest into A's death. B gave evidence at the hearing in the Coroner's court in July 2013 and was asked a number of questions by the Appellant regarding what he regarded as serious failings in the care provided to A, particularly in light of the role B had agreed to undertake.

6. On 6 August 2013 the Appellant complained to the NMC, as the relevant professional regulator, about B's conduct. The complaint was investigated by NMC staff who presented a report to its Investigating Committee to enable it to consider whether there was a case for B to answer in respect of her fitness to practise. In accordance with NMC's normal practices the Investigating Committee conducted its investigation in private.

7. On 5 August 2014 a Case Investigation Officer on NMC's staff wrote to the Appellant to inform him that a panel of the Investigating Committee had considered the complaint and had concluded:
    a. that there was sufficient evidence to establish a case to answer on the facts; but that
    b. there was no real prospect that, if the case were to be referred to the Conduct and Competence Committee, it would find that B's fitness to practise was impaired.

   The NMC letter then read:

   > *"The panel considered the allegations that* [B] *failed to meet her professional responsibilities towards the patient. The panel noted that the patient in this matter was vulnerable and later died. The panel also had regard to the wider public interest in cases of this nature.*
   >
   > *"The panel noted that* [B] *remained employed by PCH and removed* [him/herself] *from a managerial post to a more junior and solely clinical role. The panel noted evidence that in some instances* [B] *had gone beyond what was expected of* [him/her] *in relation to the care provided to the patient. Furthermore,* [B] *appeared to have raised* [redacted reference to family members] *expectations of a level of service* [he/she] *could not provide. The panel noted that the patient was under the care of a consultant psychiatrist and had a Care Co-ordinator.* [B] *did not, therefore, have clinical responsibility for the patient at the material time."*

   The panel also recorded that it had taken into consideration B's remorse, the fact that the *"allegations appeared to be an isolated event in an otherwise long unblemished career,"* and the support B had received from the relevant line manager.

The Information Request

8. In response to the outcome of his complaint, as recorded in the letter of 5 August 2014, the Appellant submitted a request for information to NMC on 28 August 2014. It was in the following terms:

   "I request the following information:
   (i) given that I have forwarded direct evidence that there WAS NO CARE COORDINATOR allocated to [A's] care between 2008 – 2012, it is recorded by the [Investigating Committee] *in its decision that the* [Investigating Committee] *'noted that the patient was under the care of a consultant psychiatrist and HAD A CARE COORDINATOR' This is false evidence/fact and I request the name of the alleged care coordinator and from what source (named) that this evidence was received by the NMC; (ii) a copy of the allegations served on the registrant* [B]; *(iii) a copy of* [his/her] *written response to those allegations or that made for* [him/her] *by* [his/her] *legal representative on* [his/her] *behalf; (Both these requests are also made in accordance with NMC legislation guidelines to IC – paras 17 & 20)' (iv) details as to the period the* [Investigating Committee] *termed in* [the NMC letter quoted above] *as 'at the material time'; (v) detail as to date of the event the* [Investigating Committee] *describe in same correspondence as 'an isolated event'; (vi) what evidence/incidents gave rise to the* [Investigating Committee] *opinion that* [B] *had 'in some instances … gone beyond what was expected of* [him/her] *in relation to the care provided to the patient' which are not explained in the letter giving reasons for the* [Investigating Committee] *decision."*

9. The Appellant made clear that his request was made under FOIA section 1. This imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

10. The NMC's response to the information request was to neither confirm nor deny whether it held any of the requested information. Its justification was that to do so would result in a disclosure of personal data to the public at large. It relied on FOIA section 40(5)(b)(i) – a confirmation or denial would contravene data protection principles in respect of an individual, in that its effect would be to disclose that the NMC had instigated a fitness to practise investigation against B.

11. In response to a further communication from the Appellant the NMC carried out an internal review of its decision but informed the Appellant, by letter dated 9 September 2014 that it maintained its "neither confirm nor deny" stance.

12. The Appellant responded to the NMC's decision in two ways. First, he notified the NMC, by letter dated 17 October 2014, that he intended to apply for Judicial Review of the Investigating Committee's decision and subsequently launched such proceedings. Secondly, he complained to

the Information Commissioner who thereafter undertook an investigation into the handling of the information request with a view to issuing a decision notice recording his conclusions.

13. On 25 November 2014, just a few weeks before the Information Commissioner completed his investigation, the NMC submitted a written concession in the Judicial Review proceedings. It was in the following terms:

    "Basis upon which the claim is conceded
    14.The [NMC] *concedes that in reaching its decision that there was no case to answer in relation to the question of whether* [B's] *fitness to practice is currently impaired, the panel took into account a material error of fact and/or irrelevant considerations, namely that:*
    (a) [A] *had a 'care co-ordinator', when the undisputed evidence before the panel was that this was not the case;*
    (b) The allegations against [B] *constituted an isolated event, when there was evidence before the panel that the matters upon which the panel decided that there was a case to answer on the facts had taken place over a period of four years.*
    Conclusion
    15. By reason of the above matters, it is conceded that the panel's decision dated 5 August 2014 is flawed. It is accordingly conceded that the claim should be allowed and the [Appellant] *should be granted the relief sought, namely:*
    (a) The decision of the panel of the Investigating Committee dated 5 August 2014 be quashed;
    (b) The issue of whether [B's] *fitness to practise is impaired by reason of the allegations arising from the* [Appellant's] *referral dated 01 August 2013 be put before a fresh IC panel for consideration as to whether there is a case to answer …"*

14. The NMC concession led to the disposal of the Judicial Review proceedings by a consent order dated 15 December 2014 which quashed the Investigating Committee's decision and directed that B's fitness to practise should be considered afresh by a newly constituted panel of the Committee.

15. By coincidence the Information Commissioner issued his decision notice on the same day. In it he concluded that the NMC had been correct in issuing a "neither confirm nor deny" response. He accepted NMC's arguments to the effect that:

    a. even confirming or denying whether the requested information was held would have revealed whether or not a complaint had been made about B's professional practice; and
    b. such a disclosure would have been unfair towards B unless or until the Investigating Committee reached a conclusion that, there being a case to answer, the complaint should proceed to the next stage of

NMC's complaints procedures, which would have been conducted in public.

The appeal to this Tribunal

16. The Appellant appealed against the Information Commissioner's decision notice on 28 December 2014. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.

17. At an early stage in the appeal process the Tribunal registrar ordered that the NMC be joined as Second Respondent to the Appeal and gave directions for the disposal of the appeal at an oral hearing, as requested by the Appellant.

18. The NMC adduced evidence at the hearing, additional to that available to the Information Commissioner, in the form of a witness statement of John Lucarotti its Head of Fitness to Practise Policy and Legislation. He is an employed barrister with extensive experience in the field of healthcare regulation in the UK. However, his role within NMC did not involve him in the day-to-day conduct of investigations. This restricted his ability to explain, in detail and in the context of this particular case, what he described as the "*robust and effective manner in which the NMC assesses registrants' fitness to practise".*

19. Mr Lucarotti explained the statutory and policy framework underlying the NMC's processes for handling fitness to practise allegations, including the review of their adequacy and efficacy which takes place at least once in every two years. He explained that if a complaint passes an initial screening assessment it is forwarded to the Investigating Committee to assess whether there is a case to answer. In making that assessment the Investigating Committee considers:

    a. Whether there is a realistic prospect of proving the factual basis of the allegation; and
    b. If so, whether, based on the established facts, there is a realistic prospect of demonstrating that the registrant's fitness to practise is currently impaired.

20. Up to this stage the process is normally conducted in private. If it is found that there is a case to answer it is referred (in the case of alleged misconduct) to the Conduct and Competence Committee and details of the complaint are disclosed on the NMC website. The website is also used to

publicise the outcome reached and any sanction imposed as a result of the Committee's deliberations. The principle of maintaining confidence until a case to answer has been established is enshrined in the NMC's Publication and Disclosure Policy: Fitness to Practise ("the Policy"), itself a public document to which Mr Lucarotti directed our attention.

21. Paragraph 47 of the Policy provides that details of any concerns about a nurse or midwife who is the subject of an investigation at this stage will not be disclosed unless it is thought necessary to issue an interim order restricting his or her practice pending the conclusion of the process or disclosure is "*justifiable on public interest grounds*". The approach is justified, under paragraph 54, which states that *"To disclose such information would breach data protection principles."* That may be seen as a cross reference to a more general statement on disclosure which appears in paragraph 7 of the Policy and forms part of an introductory summary of the legislative framework for the fitness to practise procedures. It reads as follows:

    "The NMC is also subject to a range of legislative duties in relation to information governance including the Data Protection Act 1998 (DPA), the Human Rights Act 1998 (HRA) and the Freedom of Information Act 2000 (FoIA). The DPA and FoIA impose particular duties in respect of information disclosure in specific situations. The DPA prohibits the disclosure of personal data unless certain exemptions apply. One of those exemptions is where the data subject consents to the disclosure. Another is where the disclosure is necessary for the exercise of statutory functions or the exercise of any other public functions in the public interest. In this context, the public interest includes the protection of the public, the declaring and upholding of proper standards of conduct, and the maintenance of confidence in the professions and the NMC".

22. Mr Lucarotti also drew our attention to the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004, which sets out the requirements for dealing with fitness to practise allegations. It provides that any individual who is the subject of an investigation will receive a notice to that effect, accompanied by any documents relating to the allegations made against him or her, and will be informed (Rule 6A(2)) *"…that any representations or extracts of any representations received from the* [party under investigation] *may be shown to the person making the allegation …."*

23. Mr Lucarotti defended the policy of confidentiality during the Investigating Committee's phase by reference to the sizeable number of complaints which are found to have no evidential basis and are defamatory in nature. He stated that the NMC had a duty to treat its registrants fairly by conducting the initial stages of investigations in private and maintaining this privacy when assessing requests for information by parties such as the Appellant. Any relaxation of that rule would, he said, undermine the

integrity and efficacy of the investigation procedures, which would prove damaging for all parties including registrants, complainants and the public.

The relevant law.

24. The relevant parts of FOIA section 40 read:

> ***"Personal information.***
>
> *(1)…*
>
> *(2)Any information to which a request for information relates is also exempt information if—*
>
> > *(a) it constitutes personal data* [of an individual other than the requester], *and*
> >
> > *(b) either the first or the second condition below is satisfied.*
>
> *(3)The first condition is—*
>
> > *(a) … the disclosure of the information to a member of the public otherwise than under* [the *Data Protection Act* 1998] 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) ….*
>
> *(4)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).*
>
> *(5)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, 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).*

25. It is accepted by both sides in this case that the fact that a complaint was made to the NMC about B constituted personal data, although the Appellant argues that some parts of his request sought information falling outside the definition of personal data.

26. It is also accepted:

    a. that the relevant data protection principle relevant to this case is to be found in paragraph 1 of Schedule 1 to the Data Protection Act 1998 ("DPA"), which reads:

       "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 …";

       and

    b. that the only one of the Schedule 2 conditions that is relevant is the one set out in paragraph 6(1) in the following terms:

       "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. Guidance on determining whether a public authority would contravene any of the data protection principles by giving a confirmation or denial in respect of a third party's personal data has been provided by the Upper Tribunal (Administrative Appeals Chamber) in the joined appeals of *Rodriquez-Noza v Information Commissioner and Nursing and Midwifery Council and Information Commissioner v Colleen Foster and Nursing and Midwifery Council* [2015] UKUT 0449 (AAC) ("*Foster"*). The decisions were issued after the date of the hearing of this appeal, although the fact that appeals were pending was mentioned during oral submissions and the First-tier Tribunal decision giving rise to one of them was included in the list of authorities provided for the panel's assistance.

28. By coincidence, both appeals involved a consideration of the law in relation to the NMC's fitness to practise procedures. However, the facts of the two appealed cases are different from those of this case and it is only the general guidance provided by Upper Tribunal Judge Jacobs that is relevant to the determination we are required to make.

29. In his decision in *Foster* Judge Jacobs noted that the relevant statutory provisions required to be interpreted in light of Directive 95/46/EC. He then identified paragraph 6(1) of Schedule 2 to the DPA as the relevant principle to apply. In doing so he acknowledged the requirement of "fairness" under paragraph 1 of Schedule 1 to the DPA but did not

consider that it added anything to the analysis in the case before him. Judge Jacobs then said that applying paragraph 6 to the facts of a case might involve up to three stages. First, it should be determined whether or not the issuing of a confirmation or denial is necessary for the purposes of legitimate interests pursued by the party seeking the information. If it is not then the public authority is entitled to maintain a "neither confirm nor deny" response without the need for further enquiry. If it is, then consideration must be given, under a second stage, to the identification of the rights and freedoms or legitimate interest of the individual about whom the information has been sought, the data subject. If there are none then it is not necessary to proceed further but if the first and second stages are passed:

> *"It is then necessary to consider whether the processing is unwarranted, or overridden, in any particular case by reason of prejudice to the data subject's rights, freedoms or legitimate interests." [Para 29]*

The interests of the data subject may therefore "trump" the interests of those requesting the information, but only if the data subject's interests are sufficient to override those other interests or to render disclosure unwarranted.

30. The decision of Judge Jacobs also included the warning that the three stage process should not be compressed into a simple balancing exercise between "legitimate interest" and "unwarranted interference". He adopted the analysis set out in his own earlier decision in *Farrand v the Information Commissioner and the London Fire and Emergency Planning Authority* [2014] UKUT 0310 (AAC) ("*Farrand")* to the effect that paragraph 6(1) *"…contains a condition that must be satisfied – that processing is necessary – to which there is an exception – prejudice to the data subject …".* Judge Jacobs had also made it clear in *Farrand* that any public interest factors in favour of disclosure should not be considered at stage one – if the person seeking information is found to have a legitimate personal interest in having information disclosed to him or her that may be sufficient at that stage of the process. The fact that any resulting disclosure under FOIA will be made without imposing any obligation of confidentiality, so that the requester will be free to publicise it, is a factor that should be *"taken into account in identifying the rights, freedoms and interests of the data subject and in deciding whether they override the interests of the person to whom the data would be disclosed. In other words, the language of FOIA is relevant at the second and third stages involved in applying paragraph 6(1) rather than at the first stage." [Foster* paragraph 23]

31. The judgment in *Foster* does not make express reference to the decision of the High Court in *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin) *("Corporate Officer").* That decision arose at a time when appeals from this Tribunal went to the High Court rather than the Upper Tribunal

although then, as now, the right of appeal was limited to errors of law. The Court did not advocate, or apply, a three stage process but simply approved the approach which the First Tier Tribunal had adopted, which had been to decide that the public interest in information about the operation of the process for paying expenses to Members of Parliament amply justified the possible prejudice to the privacy of individual MPs likely to result from its disclosure.

32. The High Court in *Corporate Officer* also provided guidance on the nature of the public interest test to be applied. With specific reference to the disclosure of the private addresses of MPs who had claimed relevant expenses the Court said:

> *"42. None of this is intended to suggest that the disclosure of an individual's private address under FOIA does not require justification. In the present case, however, there was a legitimate public interest well capable of providing such justification."*

The judgment then set out examples of the evidence supporting the public interest argument before continuing:

> *"43. In essence* [Corporate Officer's counsel's] argument *was that the justification relied on was not sufficiently weighty to make the disclosure of those addresses necessary in all circumstances. It was common ground that "necessary" within schedule 2 para 5 of the DPA should reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends. We note the explanation given by the court in The Sunday Times v United Kingdom (1979) 2 EHRR 245 paragraph 59:*
>
> > *'The court has already had the occasion …to state its understanding of the phrase "necessary in a democratic society" the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions.*
> > *The court has noted that, while the adjective 'necessary' within the meaning of article 10(2) is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' and that it implies the existence of a 'pressing social need'."*

33. It seems clear to us that the High Court in *Corporate Officer* proceeded on the basis that public interest should be taken into account as a relevant factor when considering whether, in the language of paragraph 6, a

legitimate interest in disclosure existed at the relevant time. That creates difficulty for us in applying the three stage test stipulated in *Foster,* bearing in mind the clear instruction from Judge Jacobs that we should not consider public interest factors at stage 1.

34. The Upper Tribunal has also considered the difficulty that may arise in a “neither confirm nor deny” case where the person seeking the information already knows that it exists. That is the case in this Appeal where, as explained above, the Appellant instigated the process which led to the NMC carrying out an investigation and he was, of course, subsequently informed of the outcome of the Investigating Committee’s deliberations (see paragraph [7] above). In *MC v (1) The Information Commissioner, (2) The Chief Constable of Greater Manchester Police* [2014] UKUT 0481 (AAC) *(“GMP”)* the fact that the requested information existed was not only known to the individual who submitted the information request under consideration but had also been referred to in the open court hearing of an application for Judicial Review related to the same subject matter. The Upper Tribunal decided that the First-tier Tribunal had been wrong to conclude that the public interest in the public authority being able to preserve secrecy about any pattern of behaviour on the instruction of medical experts in criminal investigations (by giving a “neither confirm nor deny” response to all requests on the subject) outweighed the public interest in disclosure of the existence of such a report in the case in question. Upper Tribunal Judge Turnbull said:

> *“22. In my judgment it is a nonsense to say that the public interest demands that a public authority give a “neither confirm nor deny” response when the fact that the information exists is already in the public domain.*
>
> *“23. The* [Information Commissioner] *submits as follows in relation to this point:*
>
>> *“FOIA is ‘applicant blind’ (thus, what matters is not what the requester knows, but what the public knows); the public interest must be assessed at the relevant time, i.e. the date of the request (or* [the public authority’s] *response to the request); information such as that in dispute here is only properly in the public domain if the relevant public authority has confirmed this expressly or by clear implication.*
>>
>> *Putting those propositions together, the question is whether, at the relevant time, there was in the public domain confirmation (i.e. from* [the public authority] *itself, as opposed to statements from [Mr C] as to what he had learnt otherwise through public statements by the* [public authority]*) of the answer to [Mr C’s] question.*

> *On the facts of this case, the* [Information Commissioner] *was satisfied that the answer to that question is "no". The refusal of permission to apply for judicial review did not, in the* [Information Commissioner's] *submission, constitute such a public confirmation of the answer."*

> *"24. The significance of the question whether the existence of the requested information is already in the public domain is that, if it is, then ordinarily there can be no public interest in the public authority being able to give a "NCND" answer. Unless there is a real question as to the accuracy of the statement, in the public domain, that the information exists, it does not seem to me to matter how it got into the public domain. It does not in my judgment therefore generally matter whether it was put there by the public authority or by some other person. … I do not think that the degree of accessibility to the public of information in the public domain can be material for present purposes."*

35. The same issue arose in *Foster.* In that case, unlike *GMP,* but similar to this case, the existence of the requested information was known to the individual who had made the original information request but had not been publicised in any other way. The relevant part of Judge Jacobs' decision reads:

> *"26. Mr Hopkins* [Counsel for the Information Commissioner] *presented a detailed argument to the effect that existing knowledge of a complaint was only relevant when it had a necessary authoritative quality. He distinguished this quality by reference to the source of the information. Recognition of the existence of a complaint in a High Court judgment was authoritative, whereas mention in the course of argument to the Court or in a blog was not. I asked Mr Hopkins about information that had already been disclosed by the authority and about the right to be forgotten. He argued that there would be no new processing if the information was already disclosed, although new processing might occur if there had been a long gap; he gave the example of 10 years.*

> *"27. I do not accept Mr Hopkins' approach, because it is too restrictive. When the Upper Tribunal first acquired jurisdiction over information rights cases, I was struck by the extent to which the decisions of the Information Tribunal (now the First-tier Tribunal) had generated detailed rules and sub-rules for what were merely issues of fact. I do not doubt that that was for the best of motives, principally to do with consistency in decision-making. But it runs the danger that it will become cumbersome and restrictive. Mr Hopkins' approach would have the same effects of generating rules (a necessary authoritative quality) and sub-rules to cope with different circumstances (High Court judgment, counsel's argument, blogs). More*

> *importantly, the legislation is capable of coping with those considerations without the need for a series of principles. The application of paragraph 6(1) involves a comparison of the interests of the parties concerned. The factors that Mr Hopkins mentioned can easily be taken into account as part of the assessment of the interests of the parties and the legitimacy of those interests. That analysis allows those and other factors to be taken into account, while avoiding the analysis becoming encumbered by any general principles, leaving the focus where it should be: on the nature of the interests in the individual case."*

36. On the basis of that conclusion Judge Jacobs concluded that he did not need to consider the relevance of *GMP* beyond recording that counsel for both the NMC and the Information Commissioner had argued that it could be distinguished. The facts, as we have said, are different but we are nevertheless faced with the broad terms of Judge Turnbull's conclusions, particularly in paragraphs 22 and 24 of his decision.

<u>The arguments presented by the parties to the Appeal</u>

37. The Appellant's Grounds of Appeal sought to have the Information Commissioner's decision reversed on the basis that FOIA section 40(5) did not apply and, if it did, then, on the particular facts of this case, the public interest in disclosure outweighed any obligation of confidentiality owed to B. In this respect he relied on what he saw as a reluctance on the part of NMC to address his criticisms of the Investigating Committee's decision and the contention that the relevant facts were already in the public domain having been considered at a Coroner's Inquest (at which B gave evidence) and in the course of the Judicial Review proceedings referred to above. The Appellant also argued that, by virtue of the regulations governing the NMC's fitness to practise procedures, B had, in effect, given an implied consent that relevant information could be shared with the Appellant, as the person who had instigated the complaint. Finally, it was said that refusing to confirm or deny whether the requested information was held created an unfairness against the Appellant in that it created an "inequality of arms" in his attempts to demonstrate that the Investigating Committee's decision had been flawed.

38. The Information Commissioner's Response to the Appeal sought to categorise the Appellant's grounds (in a manner to which the Appellant did not subsequently object) under the following headings:

    a. Was it already publicly known whether or not the requested information was held? The Information Commissioner accepted that, if at the time of the information request it was already a matter of public record whether or not the requested information was held by the NMC then a "neither confirm nor deny" response would not have been sustainable. However, he argued that the relevant time was the date when the NMC responded to the information request (i.e. early September 2014 at the latest) and there was no evidence

at that date of information in the public domain to the effect that a fitness to practise complaint had been made and considered by the Investigating Committee. The earlier Coroner's Inquest , it was argued, had not disclosed those facts and the Judicial Review proceedings had been commenced later.

b. Would confirmation or denial disclose personal data? The Information Commissioner challenged the Appellant's argument that some of the information covered by particular elements of the information request fell outside the meaning of personal data. It was not appropriate, he said, to consider each of the questions posed by the Appellant in isolation because, in context, the disclosure to the public of whether or not the requested items of information were held would, by necessary implication, amount to a disclosure of whether or not a fitness to practise complaint about an identifiable individual had been considered by the NMC.
c. Would disclosure of that personal data contravene the first data protection principle? The Information Commissioner invited us to approve the analysis contained in the decision notice. Any implied consent by B was limited to the disclosure of the outcome of the complaint to the complainant, whereas disclosure under FOIA was, in effect, disclosure to the world at large. Far from consenting, it was said, B would have had a reasonable expectation that, as matters stood at or around the time of the information request, NMC would not disclose to the world at large whether or not it had considered a fitness to practise complaint unless or until it decided that there was a case to answer. Any disclosure contrary to that expectation would have caused B distress and reputational damage. The Information Commissioner went on to concede that disclosure could still be justified by sufficiently weighty public interest factors in favour of disclosure but argued that the flaws in the Investigating Committee's decision (as conceded during the course of the Judicial Review proceedings) did not qualify. They might justify closer scrutiny of the NMC and its procedures but that did not justify the undermining of the privacy rights of B, who was not responsible for any flaws in the investigatory processes.

39. The Appellant took issue, in his written Reply, on each of the arguments relied on by the Information Commissioner, laying particular stress on the public interest in the need for transparency in respect of the NMC's flawed investigation. The Appellant also challenged the suggestion that B would suffer reputational damage, given that PCH sanctioned B, who also accepted voluntary demotion from the management position held at the time when the Appellant submitted his complaint to the NMC. It was unlikely, he suggested, that B's professional reputation would have remained intact in the circumstances so that its further protection by maintaining confidentiality about the NMC investigation was unnecessary.

40. The Appellant's Reply also drew attention to the fact that the information request arose out of the terms of the NMC's letter of 5 August 2014, in which it disclosed details of the investigation to him. But he placed

particular emphasis on the evidence given by B, in public, during the course of the public hearing in the Coroner's Inquest, referred to above, and to the later Judicial Review proceedings, information about which was also in the public domain.

41. The NMC filed its own written Response. It largely supported the arguments presented by the Information Commissioner but laid particular stress on the fact that it was not the disclosure to the Appellant that would have led to a breach of the data protection principle but the fact that, having released the information to him it would be required to do the same for any other requester, effectively putting the information into the public domain.

42. The NMC relied on the detail of its investigatory process. It explained that it is only if and when the Investigating Committee, having found that there was a case to answer, refers the complaint to the Conduct and Competence Committee that the existence of the complaint becomes known, with both the notice of the hearing before that committee and the decision ultimately reached being made public. It argued that it would have been unfair, in those circumstances, to disclose the existence of the Appellant's complaint against B and that the public interest in the way in which the NMC carried out its functions in relation to fitness to practise could be met by way of the judicial review process, which allows a person with sufficient interest to challenge a NMC decision. Disclosure, it was said, would also constitute an unwarranted interference in B's rights, freedoms and legitimate interests.

43. The NMC acknowledged the approach adopted by the Upper Tribunal when deciding, in *GMP*, that a prior public disclosure may undermine the right of a public authority to issue a "neither confirm nor deny" response to an information request. However, it argued that the circumstances of that case were fundamentally different from, and distinguishable from, the present case. *GMP* concerned the qualified exemption in FOIA section 30(3) and not section 40(5) and the fact that the document under consideration existed had been placed in the public domain by a decision by the High Court made in open court before the information request had been submitted. By contrast, it was said, at the time the Appellant's information request was refused:
    a. The NMC had not itself disclosed to the public, as opposed to the Appellant, whether the requested information existed.
    b. The Coroner's Inquest involved a public hearing, but this took place before the Appellant submitted his complaint about B to the NMC; nothing that was said at that hearing could therefore have disclosed whether or not a complaint had been made or whether the NMC held any of the requested information. Although the effect of the questions put to B by the Appellant at the Coroner's Inquest may have put into the public domain information about the standard of care A received from B and the Appellant's criticism of it, the prejudice likely to be suffered by B would be significantly increased

were the public to be informed, in effect, that the Investigating Committee had found those criticisms to have been justified.

c. The Judicial Review proceedings were commenced by the Appellant after the date when his information request had been refused and did not, in any event, disclose to the public whether or not the NMC held the requested information. Nor was it certain that any member of the public seeking access to the content of the court file under Part 5.4C(1) of the Civil Procedure Rules would have succeeded in persuading the court to release copies of the papers filed in those proceedings.

44. The NMC also acknowledged that the First-tier Tribunal decision that ultimately led to the Upper Tribunal's decision in *Foster* had ordered disclosure in not dissimilar circumstances but pointed out that it was not binding authority and was, at the time, subject to an appeal. In the event, as we explained above, the appeal was successful although the report of the Upper Tribunal's decision did not become available until some time after the hearing of this appeal.

45. At the hearing of the Appeal the Information Commissioner relied upon his written submissions but both the Appellant and counsel for the NMC supplemented their written submissions by oral argument and responded to questions posed by the panel. This led to a number of issues being explored, either in addition to those raised in written submissions or by way of further elaboration of them. They included the following:

a. The Appellant considered that the public interest in disclosing the requested information was increased by a lack of rigour in NMC's investigation of complaints and its reluctance to reconsider the decision of the Investigating Committee when the Appellant drew its attention to the errors that were ultimately acknowledged in the concession NMC made in the Judicial Review proceedings. The Appellant posed a number of questions to Mr Lucarotti on the quality of the investigatory processes, the resources available to carry them out and the willingness of the NMC to reconsider a decision of its Investigating Committee. The outcome on the first two issues was inconclusive, partly because Mr Lucarotti was not familiar with the detail, but the Appellant urged us to take them into account when considering the desirability of openness in this part of the NMC's functions. As to reconsideration Mr Lucarotti confirmed that, at the relevant time (but not today, following amendment to the procedures) the NMC had no power to re-visit a decision and would not do so. This led to a debate as to whether the NMC could have itself issued judicial review proceedings once the Appellant had drawn its attention to the mistakes in the original decision. The debate was ultimately sterile, but left for consideration the weight which we should attach to the transparency of NMC's procedures in the context of the particular facts of the case.
b. The Appellant also sought to persuade us that there was evidence of dishonesty in the way in which those involved had approached

the investigation and that this increased the public interest in disclosure. However, no evidence was submitted to us to lend realistic support to the argument.

c. Counsel for the NMC stressed that a decision in the Appellant's favour would have the effect of entitling any member of the public, including journalists, to the same information, exposing to public criticism individuals against whom no case to answer had been established. This, he said, constituted a much greater intrusion than the factual issues that came to light during the inquest, which had, in any event, pre-dated the request for information. It was not outweighed by any public interest in disclosure of the existence of a determination with turned out to be flawed, because the law provided Judicial Review as a remedy in those circumstances. The Appellant countered that the remedy involved both cost and risk for any individual who chose to pursue it.

d. There was a short debate during the hearing over the significance of the transition from the private to the public phases of the NMC investigatory processes being determined, not by a finding that the person complained of had a case to answer on the facts of the complaint, but only at the stage where the Investigating Committee decides, in addition, that the individual's fitness to practise is currently impaired. Counsel for the NMC argued that fairness to the individual required that he or she should be entitled to rely on the established rules as to the circumstances when any complaint would become public knowledge, unless the policy relied on was self-evidently unreasonable, which was not the case here as the NMC had selected a reasonable point at which to draw the line. He resisted the suggestion that, although the individual's expectations carried weight, they may be overturned in circumstances where the investigatory process has been found to be flawed. He argued that Judicial Review provided a mechanism for addressing that sort of error and pointed out that the problem had been further addressed by the NMC changing its procedures in March 2015 to give it the power to re-consider an Investigating Committee's determination.

<u>The questions for the Tribunal to determine</u>

46. Doing the best we can with binding precedents that seem to us to provide us with something less than total clarity or consistency, we approach our determination of the appeal before us by asking the following questions:

i) Would a confirmation or denial response to the information request disclose B's personal data (in particular the fact that there had been an investigation into B's fitness to practise), given that some of the individual questions incorporated into the request related to findings and statements made during the investigation which did not constitute personal data?

ii) If a confirmation or denial were to reveal personal data about B, did the Appellant have a legitimate interest in knowing whether or not

the NMC held the information which the Appellant was seeking about the outcome of the investigation into B's fitness to practise?

iii) If he did have such an interest would a confirmation or denial as to whether the requested information was held (and public disclosure of the existence of the investigation) prejudice the rights and freedoms or legitimate interests of B?

iv) If the answer to iii) is in the affirmative would such prejudice be unwarranted?

Our decision

47. We can answer question i) quite quickly. At the stage of assessing the correctness of a "neither confirm nor deny" response, it is not relevant to consider whether parts of the information requested might not constitute personal data. The NMC was correct to say that responding in any other way would lead to the discovery that a complaint against B had been lodged and investigated.

48. As regards questions ii) and iii), our uncertainty as to the stage at which we are required to take into account factors referred to in the cited authorities and the appropriate test we are required to apply, is allayed, to some degree, by the fact that we are clear that the answers to both questions is "yes". In our view the Appellant had a legitimate interest in receiving either a confirmation or denial in respect of the information request because of both his relationship with the deceased, the nature of his concerns about the care A had received and the legitimate concerns and questions he raised about the accuracy of factual findings in the investigation report. Against that the release of information that discloses that a fitness to practise complaint had been investigated by the NMC would certainly prejudice the privacy rights of B.

49. In light of those two findings we move to question iv). We remind ourselves that we should include among the factors to be taken into consideration:

   a. the extent to which it could be said that B had impliedly consented to disclosure by participating in the investigatory process;
   b. the degree to which it may be said that the circumstances suggest a pressing need for the public to be given a confirmation or denial that the requested information was held;
   c. the extent to which the relevant information was already known, either by the public as a whole or by an individual (such as the Appellant), who had received it without any obligation imposed to preserve its confidentiality;
   d. the possible dilution of the degree of interference in privacy rights likely to be experienced by B in light of other information in the public domain concerning B's contribution to A's care in the period before A died;
   e. B's entitlement to rely on the publication policy in existence at the time when the Appellant's complaint was first submitted to the NMC.

We deal with each issue in turn before considering the balancing exercise in the round

Consent

50. We reject the Appellant's argument that B had in some way given consent to the disclosure sought. It is clear from NMC's written procedures that information will be passed to the complainant but we have found nothing that indicates either that confidentiality would be imposed on the complainant, or that it would not. In those circumstances, B might well have reason to suspect that further disclosure into the public domain was possible. That is a material consideration for us to take into account when assessing, later, B's reasonable expectations of privacy, but we think it is taking the point too far to say that B's involvement in the investigation (which is not voluntary, in any event) could be said to amount to consent.

Pressing social need for public disclosure

51. Counsel for NMC argued that a confirm or deny response would not provide the public with any material that might be said to inform public debate on the adequacy of its disciplinary processes – the only information that would be disclosed would be about B. Our approach to this issue, however, is to treat the confirm or deny stage as just the first part of what may then become a two stage process. If a confirmation is given that information does exist then a public authority giving such confirmation must either disclose the requested information or demonstrate that it is entitled to refuse because of either the circumstances of the request or the exempt nature of the information. If an exemption is relied on then the public interest in the transparency of NMC's processes may well become a key factor. It is therefore legitimate to consider it in the context of this appeal, because the second stage will not be considered at all if the public authority is found to be entitled to give a "neither confirm nor deny" response at the first stage.

52. This is not to say that any view we form at this stage will prejudge the approach that may subsequently be adopted if the result of this appeal is that the Appellant's information request does go to the second stage. However, in addition to the public interest in individual failures of care being placed in the public domain to make repetition less likely, we do have some concerns about the NMC disciplinary processes and their operation in this case. First, we think that it is at least open for debate as to whether the NMC's point of delineation between the confidential and open phases of its processes has been set correctly. There is a case for saying that, once the Investigating Committee has found a case to answer on the facts, the public is entitled to know what those facts are and the conclusion reached in respect of them, even if it is ultimately decided that, for other reasons, there is thought to be no real prospect of the Conduct and Competence Committee finding that the fitness to practise of the person complained of is currently impaired. Secondly, as the NMC acknowledged to the Appellant at the time, the Investigating Committee

had proceeded on the mistaken basis that at the time of death A had been under the care of a Care Coordinator. Yet the Appellant's complaints at the time were dismissed on the basis that there was simply no mechanism for reviewing or overturning the decision. We were told that a rule change was made in March 2015 under which the Investigating Committee does now have power to review its own decisions. Counsel for the NMC argued that the effect of the change was that the problem had been addressed and accordingly any public interest in disclosure (and hence, as a preliminary, the issuing of a confirm or deny response) had been reduced or eradicated. However, we prefer to say that the change may reflect an acknowledgement by the NMC that, at the relevant time, the procedures in place were capable of leading to injustice, and that this increases the legitimate public interest in the transparency of the NMC processes prior to the rule change. Thirdly, we have some concerns that the manner in which the NMC communicated with the Appellant at the time in relation to his complaints about the Investigating Committee's work was less helpful and forthcoming than it might have been. We raised with Mr Lucarotti during the hearing our concerns on this issue, particularly with regard to a letter written to the Appellant on 16 October 2014 which rejected his complaint, refused to provide materials relevant to him and directed him towards the FOIA if he wished to pursue the matter further. Mr Lucarotti was unable to throw any significant light on whether the member of NMC's staff who wrote the letter would have known that its response to any FOIA request which was subsequently presented would have been to issue a neither confirm nor deny response. However, even adopting the most innocent explanation for the approach adopted, it is fair to say that the operation of at least this part of the disciplinary processes appears confusing and lacking in transparency.

53. In light of the conclusions we have reached on each of the points elaborated we find that there is a pressing social need, on the facts of this case, for the NMC to either confirm or deny the existence of the information requested so that the concerns we have expressed may be more thoroughly examined at the second stage of the FOIA process, should disclosure be refused.

Information already in the public domain

54. We accept the NMC case that, while the public hearing conducted by the coroner may have put into the public domain the Appellant's criticism of B's conduct, it obviously could not have informed the public that those criticisms were subsequently going to be considered by the NMC Investigating Committee. We accept too that the outcome of the Judicial Review proceedings, which did have the effect of placing the existence of an investigation into the public domain, occurred after the date when the NMC rejected the information request and must therefore be disregarded. The case before us does not therefore reflect the facts in *GMP* but *Foster* requires us to take into account, (as part of the balance required by paragraph 6(1) of Schedule 2 to the DPA) the fact that information about

the existence and outcome of the investigation was disclosed to the Appellant without any restrictions placed on his subsequent use of it.

Impact on professional reputation

55. The Appellant argued that, as B's reputation had been severely harmed by the evidence she gave at the inquest and her decision to transfer to a more junior post, the impact of a confirm or deny response by the NMC would be minimal and did not therefore constitute a significant prejudice to her right to privacy. We were not attracted by the argument. We consider that the fact that an individual's professional regulator decides to conduct an investigation into his or her fitness to continue in practice represents a significantly more serious career development than the other events referred to. Accordingly we do not place any significant weight on this factor in our overall determination.

Reasonable expectation in light of established procedures

56. As we have indicated, when considering whether B had consented to disclosure, the NMC procedures would give anyone subjected to them some expectation that the Investigating Committee's activities would remain private unless and until it referred the case to the Conduct and Competence Committee. However, there is no question of an absolute assurance on the point. The person complained of will be told, at the outset, that information is likely to be disclosed to the complainant and is given no assurance as to the confidentiality of the information in that individual's hands. He or she will also become aware from the Policy that any expectation of confidentiality is qualified by the NMC's public duty to disclose information in some circumstances. His or her expectation of privacy must therefore be qualified by an awareness that, as has happened in this case, the maintenance of confidentiality may be challenged under FOIA.

Conclusion on the stage iv) balancing exercise

57. We have concluded that, in all the circumstances of this case, it would not be an unwarranted interference in B's privacy rights for the fact of the NMC investigation to be made public. We reach that decision on the basis that the expectation of privacy in respect of an admittedly significant career development is limited by the qualifications mentioned above and the very fact that B was found wanting in the performance of a duty owed to a member of the public who died. In that weakened state the prejudice to the individual is outweighed by the public interest in knowing how the conduct complained of came about, the effectiveness of the steps taken by B's professional regulator to investigate it and the regulator's conduct in dealing with the Appellant's involvement in, and criticisms of, the investigatory process. The issuing of a confirm or deny response to the information request will not lead, directly, to the public disclosure of information directly addressing those public interest issues but it is the first step in the process which may lead to either disclosure or a more detailed

considerations of those factors in the context of debate on the application of any FOIA exemptions on which the NMC may rely.

Conclusion

58. We conclude that the NMC was not entitled to issue a neither confirm nor deny response to the Appellant's information request and that it should, within 35 days, either confirm or deny whether it holds the requested information.

59. Our decision is unanimous

Chris Ryan
Judge

7 October 2015