



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0022**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**  
Dr Henry Fitzhugh  
And  
Ms Melanie Howard

**Between**

**Joe Naulls**

Appellant

And

**The Information Commissioner  
The Nursing and Midwifery Council**

Respondents

Date of hearing: 25 September 2018, sitting at Fleetbank House

The Appellant represented himself

The Information Commissioner was by Ms Elizabeth Kelsey

The Nursing and Midwifery Council was represented by Mr Robin Hopkins

## DECISION AND REASONS

### INTRODUCTION

1. The appellant is appealing against the Decision Notice of the Information Commissioner (the Commissioner) dated 16 January 2018.
2. The appeal arises following the Appellant's request to the Nursing and Midwifery Council (the NMC), for disclosure of the name of the senior lawyer who he says dealt with a complaint case brought by the Appellant against a named registrant of the NMC.

### BACKGROUND AND DECISION MAKING

3. The Appellant has been pursuing a grievance about failures in the provision of special needs services for his son. In the bundle that we have there is a decision of a Special Education Needs Tribunal in which some of the shortcomings of the service providers are highlighted. The Local Government Ombudsman (LGO) also upheld the Appellant's case against the relevant local authority.
4. The Appellant also made a complaint about one of the officers who he holds responsible for the failures to the NMC, where that officer is a registrant (that is, a nurse registered with the NMC).
5. The Appellant told us that he had submitted some information in support of his complaint to the NMC, but had made it clear to the NMC that he had more information to submit. However, the NMC has decided, at the initial 'case examiner' stage of its procedures, that there is no case to answer against the registrant, and that was communicated to the Appellant in correspondence. However, as was explained to us, the NMC

does not publicise complaint cases where it has decided that there is no case to answer: for example, no details of the complaint or the outcome will be published on the NMC website.

6. The Appellant was dissatisfied by the outcome and on 15 June 2017, the Appellant made the following request to the NMC:

“please supply me the details of the senior lawyer referred to above by [redacted] and aside from you (sic) own internal investigation. I wish to forward those details to the appropriate regulatory body for him or her and that regulatory body to investigate the actions of the senior lawyer in arriving at a decision without having the full facts and material available to him or her and upon which the decision was taken not to proceed against registrant [redacted]”.

7. The names of individuals, but nothing else, have been redacted from the request for the purpose of this decision.
8. There was a delay, and on 24 August 2017 the NMC wrote to the Appellant to say that it was refusing to disclose the information, and relied upon s40(2) FOIA as the reason for doing so. The NMC upheld this decision on 21 September 2017, following an internal review. The Appellant contacted the Commissioner on 14 July 2017 to complain about the way his request for information had been handled.
9. However, the Commissioner’s decision notice concludes that the correct exemption that the NMC should have relied upon was s40(5) FOIA, which allows the NMC to neither confirm nor deny (NCND) that the information is held. This has led to the odd position that the Commissioner has produced a decision notice which relies on the NCND principle in s40(5) FOIA, even though it has been indicated to the Appellant whether or not the information is held. This is a question to which we will need to return below.

10. The Commissioner comments that under s1(1)(a) FOIA a public authority is obliged to advise an applicant whether or not it holds the information requested, but that this duty to 'confirm or deny' does not always apply if the public authority can properly rely on one of the exemptions from the duty in FOIA. Thus the exemption in s40(5) FOIA states that the duty to confirm or deny whether or not the information is held does not arise if providing the requester with confirmation or denial would itself contravene any of the data protection principles.

11. Section 40 FOIA, materially, reads as follows:-

**40. – Personal information.**

- (1) ...
- (2) 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.
- (3) 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.
- (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) ...

12. The Commissioner's approach is that if it is confirmed or denied that the information is held (details of a lawyer involved in a complaint investigation), that will be a confirmation or denial that the named individual, about whom the Appellant has complained, had been the subject of contact between the NMC and a lawyer. In itself, say the Commissioner and now the NMC, that is personal data of the individual concerned, not least because the response to a FOIA request, must be read with the request to which it relates (which in this case names the individual concerned). The NMC in its skeleton argument additionally says that public confirmation as to whether the information is held 'would equate to a public disclosure that it had received and considered an allegation against the nurse identified in [the Appellant's] request' and that 'would entail the processing of the personal data of the named nurse'.

13. If it is accepted that confirmation or denial in response to the request would mean the disclosure of personal data to the public then the issue is whether the disclosure of the personal data would contravene any of the data protection principles.

14. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly. Section 10 of the DPA 1989 (as referred to in s40(3)(a)(ii)) refers to damage or distress caused by disclosure.

15. The Commissioner's decision notice states that:-

When assessing whether confirming or denying information is held would be unfair, and so constitute a breach of the first data principle, the Commissioner takes into account factors such as whether the information relates to the an individual's private or public life, whether the individual has consented to the authority confirming or denying the information is held, and their reasonable expectations about what will happen to their personal data.

16. The decision notice then explains that:-

- (a) Releasing information under FOIA is effectively releasing it to the world at large;
- (b) The individual has a reasonable expectation that the public authority would treat information confidentially, and not, effectively, release it to the world at large (even if the requester knows whether or not the information is held);
- (c) To confirm or deny that the information is held in the present case would therefore be unfair to the individual.

17. However, in relation to interpreting the first principle, the disclosure must also not breach the material conditions in Sch 2 to the DPA 1989 'relevant for purposes of the first principle'. Processing is permitted if the data subject has consented to it (Sch 2, first condition), but if not (as in this case) then for the purposes of the sixth condition in Sch 2 (which appears to be the only condition relevant in the present case) it must be established that the disclosure is necessary in order to meet the legitimate interests of the Appellant.

18. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as for the purposes of

the Appellant's legitimate interests. Thus, that exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

19. The Commissioner's conclusions on this issue are that she recognises that the information is of interest to the Appellant given the background to the request, and that he wishes to make a complaint about a senior lawyer to the appropriate regulatory authority; but that interest is not so compelling that it overrides the third party's legitimate rights and freedoms in not having it confirmed or denied whether the information is held. On that basis, the Commissioner found that the exemption in s40(5) FOIA was applicable in this case.

#### THE APPEAL

20. The Appellant filed an appeal to the decision notice on 6 February 2018. The Appellant concentrates, understandably, on his main point that he is entitled to disclosure of the information sought, and that there is strong legitimate and public interest in its disclosure given the background to the case and need to hold public authorities and individuals to account (especially if those individuals held senior and public facing positions), and to promote openness and transparency. He sought to rely upon material posted online by the registrant he has complained about, in which the registrant has expressed personal views about the provision of health care services. He says there is common ground whether or not the material is held, and that it is too late for the Commissioner to go back on the NMC's reliance on s40(2) FOIA and to rely instead on s40(5). He told us at the hearing that, in his view, in their conduct of the complaints procedure, the NMC had failed in its duty to the Appellant's son.

21. The Appellant has not directly addressed whether the public interest in confirming or denying that the information is held in the first place, but we

think it can be safely inferred that that is the strong view of the Appellant. He states that the identity of the registrant complained about can be implied from other documentation in relation to the SEN Tribunal and the LGO, although we do not think that he disputes that the registrant has not been named in that paperwork.

22. Likewise, at the hearing, the Appellant concentrated his submissions that it was in the public interest to disclose the information sought by his request.

### DISCUSSION AND DECISION

23. In our view, whatever the circumstances in which the NMC originally relied on s40(2) FOIA in this case, given that the exemptions in the relevant parts of s40 FOIA are designed to prevent the disclosure of personal data of third parties, those parties are entitled to the most appropriate protection available in section 40 FOIA.
24. Thus, if to neither confirm or deny that information is held is the most appropriate protection for the registrant complained about by the Appellant, then the Commissioner is right to seek to apply it.
25. An issue referred to and discussed in the skeleton arguments and in the hearing was the origin of what is often described as a basic principle of the law under FOIA, namely that disclosure to the requester is in effect disclosure of the information to the world. It can be said to be relevant in a case like this where the requester may be able to glean whether or not that the public authority does in fact hold the information sought from correspondence he already has. In that situation, what difference does it make if the public authority confirms or denies that it holds the information? That is essentially the submission made by the Appellant.



26. The answer, says the Commissioner and the NMC, is that because the confirmation or denial would be made as the result of an information request under FOIA, then disclosure of the confirmation or denial would indeed amount to disclosure to the world, whatever the requester might say about not disclosing the information more widely, and whether there has been a breach of the data protection principles must be viewed in that context.

27. We note that within FOIA, itself, there are no provisions which allow a public authority to place any conditions as to whom a requester might further disseminate information once it has been disclosed under FOIA. The same is true of the Commissioner's powers: the Commissioner cannot direct that further disclosure is limited in any way. When a case comes to the Tribunal, the Tribunal's functions are restricted to those set out in s58 FOIA. If the Tribunal does not dismiss the appeal, it can otherwise only 'allow the appeal or substitute such other notice as could have been served by the Commissioner'. Thus, if the Commissioner cannot limit to whom disclosure is made once a requester has established an entitlement to disclosure, then neither can the Tribunal. There is nothing in FOIA or the Tribunal Rules which would allow the Tribunal, for example, to direct that information should be disclosed to the requester only if the requester undertakes not to disclose the information to anyone or else, or to withhold it from a particular description of person.

28. In terms of case law on this issue we were referred to two cases where the courts have confirmed this view. The first is *Office of Government Commerce v Information Commissioner* [2010] QB 98 (OGC) (a case which explored the relationship between parliamentary privilege and the Commissioner's powers) where Stanley Burton J said at paragraph 72 that:-

72 Disclosure under FOIA is always to the person making the request under section 1 . However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It

ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure.

29. This was a general comment by the judge in describing the statutory scheme under FOIA and was not an issue of dispute in the case. It was made, as the judge indicates, in the context of the need for exemptions from disclosure, the nature of which the judge goes on to describe in the following paragraphs of the judgment.
30. The other case we were referred to was *Webber v IC and Nottinghamshire Healthcare NHS Trust* (GIA/4090/2012), where the appellant had made a FOIA request for information (including hospital records) about the death of her son in 1999 when he was compulsorily resident at Rampton hospital, which was refused under the s41 FOIA exemption that the information had been obtained from another person (the deceased son). The Upper Tribunal dismissed the mother's appeal noting that the s41 exemption still applied even though the patient was deceased. Judge Williams commented that if this was not the case then there would be nothing to stop journalists and investigators from obtaining information about deceased patients, and then he said at paragraph 37:-

I put that example because it is always to be remembered that FOIA is about putting information into the public domain. I do not forget of course the very specific reason why the appellant makes her request about C, her son, in this case, but it is nonetheless an application to put the information into the public domain.

31. Although the judge did not go on to explain why 'FOIA is about putting information into the public domain', his approach fits in with our short analysis of FOIA above, and with the approach of Stanley Burnton J set out in the *OGC* case.

32. However, we were referred to one Upper Tribunal decision which appears to cast some doubt on approach set out in the previously mentioned cases. *GR-N v Information Commissioner* [2015] UKUT 0449 (AAC) is a decision of Judge Jacobs. This was also a case involving the NMC, and a requester attempting to obtain information that was before the NMC when it decided there was no case to answer against a nurse about whom the requester had made a complaint. This was also an NCND case under s40(5) FOIA where the case turned on the application of paragraph 6(1) of Schedule 2 of the DPA. After completing an analysis of those provisions, Judge Jacob included the following paragraph in the judgment, headed 'Argument from generalised statements':-

30. Before leaving the analysis, I want to comment on two aspects of the arguments from Mr Hopkins and Mr Pitt-Payne. They both deployed general statements that are often made in FOIA cases. First, I was told that FOIA is applicant and motive blind. Second, I was told that disclosure under FOIA was disclosure to the whole world. There is much truth in both propositions, but they are not universally true. That makes it dangerous to rely on them as universally applicable principles that provide a sound basis on which to interpret FOIA. I merely wish to draw attention to this danger for future cases. I will not dwell on it beyond pointing out, by way of illustration, that it is impossible to apply paragraph 6(1) without having regard to the identity of the applicant, the interest pursued by the request, and the extent to which information is already potentially available to the public.

33. Thus, in this paragraph Judge Jacob states that the general statement that disclosure under FOIA was disclosure to the whole world 'is not universally true' and that it is 'dangerous to rely' on it as a 'universally applicable' principle 'that provide[s] a sound basis on which to interpret FOIA'. The judge states that he is drawing attention to this danger for future cases.

34. We note that in paragraph 30, Judge Jacob applies his comments equally to the general statement that 'FOIA is applicant and motive blind'. In relation to this general statement Judge Jacob is able to point to an illustration of his concerns when he states that it is impossible to apply paragraph 6(1), without having

regard to 'the identity of the applicant, the interest pursued by the request, and the extent to which information is already potentially available to the public'. That must be true because in paragraph 6(1) the legitimate interests pursued by 'the third party or parties to whom the data are disclosed' (which would include a FOIA requester) have to be considered.

35. However, we note that Judge Jacob does not provide any illustration which indicates an exception to the general statement that disclosure under FOIA is disclosure to the whole world. It does not, in fact, appear that the judge's concerns in any way impacted on the decision he made in the case he was considering, and indeed at paragraph 23 he also stated that:-

23...It is important to take into account that disclosure of data under FOIA would be free of any duty of confidence, as Mr Pitt-Payne put it.

36. In our view, it is somewhat difficult to reconcile the acceptance of this statement in relation to FOIA, with the concerns that were raised in paragraph 30. If there is no duty of confidence attached to disclosure under FOIA, then effectively the assumption must be that disclosure under FOIA is, at least potentially, to the whole world.

37. In some cases of course the requester will have no desire to disclose the information further, and it may be in his or her personal or business interests not to do so, but as we have stated, there is nothing in FOIA which prevents onwards disclosure if the requester decides to further disseminate the information received as the result of a FOIA request.

38. Judge Jacob does not refer to the earlier cases we have mentioned, and it may be that they were not cited to him. Applying those previous cases and considering the structure of FOIA, we find that as Stanley Burnton J held in the *OGS* case that, under FOIA once 'a request has been complied with by disclosure to the applicant, the information is in the public domain'. It may be the Judge Jacob considered that there was a difference between the statement

that 'disclosure under FOIA was disclosure to the whole world' and the statement that once disclosed, the information is in the public domain, but in our view, they amount effectively to the same thing.

39. In any event, in the present case, an exception to the general statement has not been identified, and we find that if the NMC confirms or denies to the Appellant, pursuant to FOIA, that it holds the requested information, then that fact will indeed be in the public domain in the sense that there is nothing that can be done, if the Appellant chooses, to disseminate the fact more widely.
40. On that basis we concur with the approach taken by the Commissioner and the NMC in considering that s40(5) FOIA is the correct exemption to consider, even though the NMC's earlier communication to the Appellant may have indicated whether or not the information was held.
41. The Appellant has not disputed that the information he seeks is the personal data of the registrant he has complained about. He has not directly addressed the question as to whether to confirm or deny that the information exists, would itself amount the disclosure of personal data. In our view, the Commissioner and the NMC are correct to say that to disclose whether or not a lawyer has been involved as requested by the Appellant (in the context that the registrant is named in the request) would equate to a public disclosure as to whether or not the NMC had received and considered an allegation against the identified registrant, and whether or not the case had been referred to a lawyer. That information, in our view, amounts to personal data as defined in section 1 DPA, as it data which relate to a living individual who can be identified from that data.
42. That being the case the main question in this case is whether the disclosure of that personal data can be justified in any event. First of all, we must, as did the Commissioner, consider whether disclosure of the information would be fair. We agree with the Commissioner that the individual registrant would

have a reasonable expectation that personal data relating to allegations made to the NMC, and relating to the possible involvement of a lawyer, would not be put in the public domain by means of a positive response to a FOIA request. This is underlined by the confirmation that the NMC does not publicise any information relating to complaints and allegations which are not investigated once a case examiner has determined that there is no case to answer. As the NMC add there is a significant risk of reputational damage and distress for the registrant. Therefore, we agree with the Commissioner that disclosure of this information would not be fair.

43. Second, even if not fair, we need to go on and consider, for the purposes of paragraph 6 of Schedule 2, the nature of the legitimate interests of the Appellant. The Appellant has a strong personal and legitimate interest in pursuing the issue of the lack of service provision for his son, but he has already been able to do that through the SEN Tribunal and the LGO. He is entitled to make complaints about those involved in this issue who are registered with the NMC, and he has a legitimate interest if he believes that the NMC has not complied with its own procedures, and that the role of any professionals involved in those procedures should be considered by the appropriate regulatory bodies. There is also a legitimate interest in disclosure for the general purposes of transparency and accountability of public authorities and senior officials.

44. However, in our view the legitimate interests do not override the rights of the data subject in this case, in our view. The information sought is now somewhat removed from the issue pursued by the Appellant. It relates to the actions of a further professional he says is involved in the complaints process. There may be other routes to source the information he wants, and a complaint to a regulatory body about a professional does not necessarily need the name of that professional, or even confirmation of involvement, if the regulatory body can obtain it, for example by requesting it from the NMC.

45. We conclude that the legitimate interests of the Appellant do not justify the disclosure of the personal data in this case, and to effectively placing it in the public domain.

### CONCLUSION

46. For the reasons set out above we are satisfied that that NMC was entitled to rely on s40(5) FOIA to decline to confirm or deny that the information is held, and the Commissioner was right to make that finding in the decision notice.

47. As clarified in the hearing, this appeal can only be about the s40(5) FOIA exemption and we have not considered the applicability of s40(2) FOIA.

48. Therefore, this appeal is dismissed.

Signed

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 08 October 2018.