

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 18 October 2010**

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

### Summary

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The complainant requested copies of information provided to the Nursing and Midwifery Council (the NMC) by the Brighton and Sussex University Hospitals Trust (the Trust) in relation to a fitness to practice complaint she made in 2007. The NMC refused disclosure on the grounds of section 40(2) of the Act. The Commissioner has investigated and finds that the public authority was excluded from its duty to respond to the request under section 1(1)(a) of the Act by virtue of the provision of section 40(5)(b)(i). The public authority also failed to issue a valid refusal notice under section 17(1) of the Act. He does not require the NMC to take any remedial steps in relation to the request.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. The complainant's information request is linked to a fitness to practice complaint she originally made to the NMC on 27 November 2007 regarding the conduct of four named nurses she alleged were involved in her mother's death in April 2002. The complainant disputes that her complaint of 2007 to the NMC ever resulted in an investigation. The

complainant believes the information provided by the Trust to the NMC in relation to the initial assessment of her complaint was inaccurate and ultimately led to the rejection of her complaint. For these reasons the complainant requested that the NMC provide her with all the information the public authority held that the Trust had sent in relation to her complaint and specifically the information on which the NMC based its analysis of her complaint.

## The Request

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3. On 26 September 2008 the complainant initially contacted the NMC to enquire about the information provided by the Trust to the NMC's investigating committee as part of her fitness to practice complaint.
4. Following the complainant's first enquiry for the information a chain of correspondence ensued which failed to answer or satisfy the complainant's queries or concerns.
5. On 19 June 2009 the complainant wrote to the NMC making four separate requests for information. Three of the four requests have since been dropped by the complainant. Amongst the correspondence was the following query:

*"Can I be sent a copy of the information requested from the Trust. I note from your letter (20.10.08) it was sent to the nurses for their comments but was not sent to me. (Why not?)..."*

6. On 3 July 2009 the NMC responded to the complainant. It outlined the procedures involved in carrying out the investigation into the complaint. The NMC advised the complainant to make a request for information under the Act.
7. On 19 July 2009 the complainant made a new request to the NMC in the same terms as that quoted in paragraph 5 above since the previous response from the public authority did not satisfy her original request. She wrote:

*"I therefore repeat the request made over a month ago that  
a) you identify the documents sent by the Trust that you requested  
b) you send me copies of those documents."*

The complainant again stated that she believed she should be allowed access to the information as the documents in question determined the

course of action of the investigating committee regarding her complaint.

8. On 29 July 2009 the NMC responded to the complainant. The response only addressed one of the earlier requests of 19 June 2009 which had in fact been dropped by the complainant and is therefore not included in this Notice. The NMC refused to disclose the information stating *"such correspondence is personal data...and is exempt from disclosure under the relevant legislation."*
9. On 9 August 2009 the complainant wrote to the NMC to clarify what information was being requested, namely the information sent by the Trust to the NMC.
10. On 10 August 2009 the NMC provided a brief response to the complainant stating *"the correspondence supplied by the Trust constitutes personal data to the nurses concerned and is therefore not subject to disclosure."*
11. On 11 September 2009 the complainant wrote to the NMC disputing whether the withheld information was the personal data of the nurses. In response to the NMC's citing of previous decisions by the ICO supporting its decision the complainant argued that they were irrelevant to her case.
12. On 22 September 2009 the NMC responded to the complainant. It reiterated its position regarding the requested information and made specific reference to the information provided by the Trust. The NMC wrote:  
  
*"...all of the materials in the possession of the NMC in respect of an allegation of impairment of fitness to practice are considered personal information to the registrant until such time, if any, that the Investigating Committee decides that there is a case to answer. Any and all such information is therefore exempt from disclosure under the Freedom of Information Act."*
13. On 27 September 2009 the complainant wrote to the NMC to enquire whether all internal complaints processes had been exhausted before her intended referral of the request and complaint to the ICO. The complainant also confirmed she remained dissatisfied with the NMC's handling of her request and the responses it had provided over the past 12 months. The complainant requested that the NMC state whether its refusal was final and if so what relevant section of the Act was involved.

14. The NMC did not respond to the complainant's letter of 27 September 2009.

## **The Investigation**

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### **Scope of the case**

15. On 23 October 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the fact that the requested information was refused as personal data of a third party, i.e. under section 40 of the Act.

### **Chronology**

16. On 26 November 2009 the Commissioner wrote to the NMC to obtain copies of the withheld information and the NMC's further arguments for refusing disclosure of the requested information.
17. On 23 December 2009 the NMC responded to the Commissioner providing copies of the withheld information and outlining its position regarding the handling of the request. The NMC explained that the request had not been dealt with in the usual way, i.e. passed to a freedom of information officer. The NMC outlined how the request would have been handled if the correct process had been applied including citing previous Decision Notices issued by the Commissioner and issuing a valid refusal notice. The NMC stated that it may also have considered dealing with part of the information requested under the Data Protection Act 1998 (the 'DPA').
18. On 20 January 2010 the Commissioner contacted the NMC seeking clarification on the applied exemption and requesting that the remainder of the withheld information be sent to him. The Commissioner also wrote to the complainant with an update on her case.
19. After further communication, on 28 May 2010 the complainant wrote to the Commissioner asking him to delay drafting this Notice until she had written to him with further arguments regarding her position.
20. On 13 June 2010 the complainant wrote to the Commissioner again asking him to further delay the Decision Notice. The complainant also requested that certain correspondence be sent to her and sought clarification on a few points.

21. On 27 June 2010 the complainant wrote to the Commissioner seeking further clarification and copies of information involved in the investigation.
22. On 1 July 2010 the Commissioner wrote to the complainant providing the requested clarification.
23. On 4 July 2010 the complainant wrote to the Commissioner stating her reasons for not accepting the findings of the investigation and again clarifying exactly what information she was requesting and why.
24. On 12 July 2010 the Commissioner wrote to the complainant providing the further clarification sought and stating that the Notice would now be drafted in order to bring the complaint to a close.

## Analysis

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### Exemptions

25. The full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex.
26. In considering whether the exemption is valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public.
27. The Commissioner notes that had the public authority handled the request within its freedom of information department from the outset – as it acknowledged that it had failed to do (paragraph 17 above) – it would have been likely to have applied the exemption in section 40(5)(b)(i), which excludes it from the obligation to confirm or deny whether information pertaining to the request is held. This exemption has been applied by the public authority in a number of previous cases involving information of a similar nature, for example:

[http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs\\_50180310.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50180310.pdf)

[http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs\\_50169734.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50169734.pdf)

More recently than those detailed above the Commissioner has issued Decision Notices along similar lines concerning section 40(5)(b)(i), for instance:

[http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs\\_50277585.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50277585.pdf)

28. The public authority did not apply section 40(5)(b)(i) in this case nor did it explicitly cite section 40(2) as grounds upon which to withhold the information requested. However the public authority did rely on the fact that it considered the information to be the personal data of third parties as reasons not to disclose it. Even if it was not specific about exactly what information it held, it therefore indicated that it held information pertaining to the request. The Commissioner has decided that citing section 40(5) was in fact the correct course for the public authority to have taken, for the following reasons.

#### **Exemption: Section 40(5)**

29. Section 40(5) provides an exemption from the duty to confirm or deny for information which is the personal data of an individual other than the applicant. Although the public authority failed to consider this subsection, the subject matter of the case prompted the Commissioner to consider whether the public authority would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
30. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights set out in the DPA, legislation which the Commissioner also regulates, are closely linked to Article 8 of the Human Rights Act. The Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights, even where it has not been cited.
31. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under the Act if to do so would breach the data protection principles. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemptions in section 33A(1) of that Act were disregarded.

32. The DPA defines personal information as:

*'...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

The Commissioner is of the view that whether or not information had been received by the public authority as a result of a complaint against named individuals would be information which constituted the personal data of those individuals.

33. He would therefore like to clarify that even confirming or denying whether information is held would reveal whether or not a complaint had been made about them and this has resulted in him considering the case in a different manner to the public authority.

34. In light of the above, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request the public authority would have been excluded from the duty imposed by section 1(1)(a), i.e. the duty to inform a requester whether it holds information of the description specified in the request, and, if that is the case, to have that information communicated to him.

35. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying a complaint had been made would contravene any of the data protection principles.

### **Would complying with section 1(1)(a) contravene the first data protection principle?**

36. The first data protection principle states that:

*"Personal data shall be processed fairly and lawfully..."*

In considering whether or not confirming or denying a complaint had been made would contravene the first data protection principle, the Commissioner has taken into account the reasonable expectations of



- any potential named individual, the legitimate interests of the public, and the rights and freedoms of any named individual.
37. Without disclosing any more detail than is necessary in order not to defeat the intention of section 40(5), the Commissioner is satisfied that in the context and background of fitness to practice complaints third parties (i.e. medical practitioners about whom complaints have been made) would have a reasonable expectation of privacy and would not expect the public to have access to information which discloses whether or not a complaint had been made about them.
  38. The Commissioner understands that the public has a legitimate interest in knowing that medical professionals are fit to practice. However, he also has to consider the individuals involved and their right to privacy. Whilst it may be true that the release of information could be useful for the public for example when complaints are upheld, the Commissioner considers it important to have a distinction between the outcome of a complaint where wrongdoing has been found and complaints which are unfounded or are still under investigation. The existence of a complaint should not be disclosed whilst it is under investigation or if it has been determined to be unfounded, especially as malicious or baseless complaints may be made. The Commissioner does not believe that the public interest in disclosure in this case outweighs the unfairness to the data subjects involved. It is probable that their working lives will have already come under scrutiny and he does not believe they should have to suffer any further intrusion.
  39. The Commissioner is satisfied that disclosing whether or not named parties were subject to complaints and subsequently investigated is not necessary for the purposes of the legitimate interests pursued by the public. He believes that that such a disclosure would be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the parties in question.
  40. The Commissioner is satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the Act would contravene the fairness element of the first data protection principle. Given this he has not gone on to consider the other data protection principles.
  41. The Commissioner therefore finds that the NMC was not obliged to have responded the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).



## Procedural Requirements

42. Section 17(1) (full wording in Legal Annex) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1), i.e. within 20 working days.
43. In this instance the relevant request was made on 19 June 2009. The public authority did not respond to the request refusing to disclose the information until 10 August 2009.
44. The Commissioner therefore has concluded that the refusal notice did not meet the requirements of section 17(1) of the Act.

## The Decision

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45. The Commissioner's decision is that the NMC did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained within section 40(5)(b)(i).

The Commissioner finds that the public authority breached section 17(1) in failing to issue a refusal notice within the statutory time limit.

## Steps Required

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46. The Commissioner requires no steps to be taken.

## Other matters

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47. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint.

48. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews

should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is twenty working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, an internal review was not completed, despite the complainant's correspondence informing the public authority that she was dissatisfied with its response and moreover the publication of his guidance on the matter.

49. The Commissioner notes that the NMC admitted the request was not handled correctly and was not referred to the relevant department for consideration under the Act. This included the fact that it neglected to instigate an internal review at the appropriate stage. The Commissioner considers the actions carried out by the NMC in handling this request not to be those which are part of its usual practice however he would like to take this opportunity to recommend that the NMC follow his published guidance in the future when handling requests of this nature.
50. The public authority's approach as described at paragraph six of this Notice implies that it does not realise that any request in writing is a freedom of information request. The Commissioner would like to draw the public authority's attention to an Information Tribunal decision published in 2007 *Richard Day and the Department for Work and Pensions (EA/2006/0069)* which states this fact and remind the public authority that the Commissioner has also adopted this view. The Tribunal decision can be found at the link below.

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i68/Day.pdf>

## Right of Appeal

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51. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 18<sup>th</sup> day of October 2010**

**Signed .....**

**Pamela Clements  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Refusal of Request

**Section 17(1)** provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

**Section 17(2)** states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3)** provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a

separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

**Section 17(4)** provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6)** provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7)** provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

### **Personal information.**

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“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.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), 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."

**Section 40(4)** provides that –

"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)."

**Section 40(5)** provides that –

"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, 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)."

**Section 40(6)** provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;  
"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.